STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL FARRELL, Plaintiff-Appellant,	UNPUBLISHED November 28, 2017
v	No. 335979 Wayne Circuit Court
FARM BUREAU INSURANCE, Defendant-Appellee.	LC No. 15-000811-NF

Before: METER, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

In this action to recover no-fault benefits under the Michigan Assigned Claims Plan (MACP), plaintiff appeals by right a November 23, 2016, trial court order granting summary disposition in favor of defendant Farm Bureau Insurance, the assigned claims insurer. For the reasons set forth in this opinion, we affirm.

I. FACTS

Plaintiff commenced this suit following an accident that occurred on May 5, 2014, when plaintiff was struck by a motor vehicle when he was walking on the side of a road. Plaintiff suffered injuries to his leg and a broken ankle. According to a police report of the incident, plaintiff indicated that he was assaulted by the occupants of the vehicle. Plaintiff could not identify an auto no-fault insurer so he filed a claim with the Michigan Assigned Claims Plan (MACP) and the MACP assigned the claim to defendant. On May 6, 2014, plaintiff filed an application for PIP benefits for injuries that he claimed to have sustained in the accident. On the application, plaintiff indicated that he was not employed at the time of the accident, checking the box "no" under the question whether he was employed.

Thereafter, on January 20, 2015, plaintiff commenced this suit seeking PIP benefits from defendant. Plaintiff alleged that defendant refused to pay PIP benefits, including lost wages. During discovery, plaintiff testified at a deposition that he was employed as of May 5, 2014—the day of the accident. Plaintiff testified that he was employed full-time at Right Choice Staffing Group or "Vascor" where he earned $7.50 per hour transporting Dodge Ram pickup trucks. Plaintiff testified that he had not worked for Vascor since the day of his injury and he denied that he was ever written-up or disciplined during his employment. Plaintiff testified that, on the day of the accident, he was injured on his way to work. When plaintiff was advised that his

application for PIP benefits indicated that he was unemployed, plaintiff denied that he was unemployed, and stated that he was employed at the time of the accident.

In addition to the deposition testimony, in his responses to defendant's interrogatories, plaintiff indicated that he was employed full-time as of May 5, 2014, at Right Choice Staffing Group (hereinafter "Vascor") where he earned $7.50 per hour. In response to an interrogatory asking, "If you claim that you have lost wages or income contemplated by MCL 500.3107(1)(b) as the consequence of the accident you describe in your Complaint . . . please [provide the following information]," plaintiff indicated that he was employed at Vascor from February 2014 to May 5, 2014 and suffered $12,000 in lost wages since the accident on May 5, 2014.

On October 26, 2016, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's claim for PIP benefits was barred by MCL 500.1373a(2) because he made false statements in support of his claim for wage-loss benefits. Defendant attached two letters from Vascor in support of its contention that plaintiff made fraudulent statements about his claim for wage-loss benefits. The first letter was addressed to plaintiff, dated April 25, 2014, and read as follows:

> This letter is to inform you that this is your one and only warning about erratic driving of any kind, squealing tires, throwing gravel, speeding and or passing, is included in this. We are in a zero tolerance policy for any disruptive behavior. Thank you for your service to this point.

The second letter was dated May 6, 2014, addressed to plaintiff, and read as follows:

> This letter is to inform you that your services with Right Choice Staffing (adept Services) will no longer be needed. You showed up to the job site and appeared to be intoxicated. The area manager sent you home for this on 5/4/14. Due to this we are terminating your contract with Right Choice Staffing. Thank you for your services to this point. As of now any monies owed to you from this date forward will be mailed to you at the address you provided us on your application. After today you are no longer welcomed at our offices or work sites.

Defendant argued that these two letters showed that plaintiff was terminated from his job for being intoxicated on the job on May 4, 2016 and the letters showed that plaintiff made fraudulent statements in support of his wage-loss claim. Specifically, defendant argued that plaintiff falsely stated at his deposition that he was employed and on his way to work at the time of the accident on May 5, 2014. In addition, at his deposition, plaintiff testified that he had not received any disciplinary actions while employed at Vascor. With respect to the termination letter being dated May 6, 2014, one day after the accident, defendant argued that even if plaintiff was unaware that he had been terminated on the date of the accident, he was aware of both the termination and the warning at the time of his deposition and at the time he responded to the interrogatories. Despite being aware of the warning and termination letters, plaintiff indicated in the interrogatories that he suffered wage-loss because of the accident and he testified at his deposition that he had no disciplinary actions during his employment. Defendant argued reasonable minds could not differ as to whether plaintiff made material misrepresentations in support of his wage-loss claim and plaintiff was barred from recovering any PIP benefits under

MCL 500.3173a(2) as applied in *Bahri v IDS Property Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014).

Plaintiff responded, arguing that his application for PIP benefits contained "only true facts," and stated that he "had no way of knowing that his former employer put disciplinary letters in his employment file or what they said." Plaintiff argued that he attached pay stubs to the responses to the interrogatories that supported that he was employed. Plaintiff asserted that while he was in the hospital on May 6, 2014, Vascor placed a discharge letter in his employment file, but maintained that "[t]here is no evidence that this discharge letter was given to [plaintiff.]." Plaintiff asserted that on May 7, 2014, when he was discharged from the hospital, he "changed his address and did not attempt to return to his employment location."

Plaintiff argued that MCL 500.3173a(2) applied only to claims made to the "Michigan automobile insurance placement facility," (MAIPF) and his written claim indicated that he was not employed at the time of the accident. Plaintiff argued that his deposition testimony was not a claim made to the facility and therefore did not show that he made misrepresentations. In addition, plaintiff argued that his representations did not meet all of the elements of fraud necessary to void an insurance contract. Plaintiff argued that there was no evidence to show defendant relied on the misrepresentations and there was no damages. Furthermore, plaintiff argued that there was no evidence to show that he ever received the termination letter where he did not return to his former address after he was discharged from the hospital. Plaintiff concluded that he "did not make any false statement in his application to the MAIPF for no-fault benefits. Nothing he said at his deposition rose to the level of fraud."

The trial court held a hearing on November 23, 2016. At the hearing, plaintiff argued that he did not make misrepresentations because, regardless of the reason why he could not return to Vascor, he was unable to return anywhere for work because he fractured his ankle in the accident. Plaintiff argued that, therefore, any misrepresentation was not material because "he is entitled to wage loss benefits if he couldn't seek other employment because of the injury." Plaintiff also argued that he was not officially terminated until "the day of the accident," and was not provided notice of the termination until after the accident.

Defendant responded that there was no reliance requirement and maintained that plaintiff lied in both the response to the interrogatories and during his deposition testimony. Defendant argued that plaintiff was not working at the time of the accident because he was terminated the day before on May 4, 2014, for being intoxicated. Defendant maintained that plaintiff received his one warning 10 days earlier and then when he was sent home on May 4, 2014, he was effectively terminated.

The trial court agreed with defendant, indicating that *Bahri*, 308 Mich App at 420 was controlling and that "I believe there was material misrepresentation by the plaintiff." On November 23, 2016, the trial court entered a written order granting summary disposition in favor of defendant. This appeal ensued.

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). "In reviewing a motion brought under MCR 2.116(C)(10), we review the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact." *Id*. "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). To the extent that we must interpret and apply the applicable provisions of the no-fault act, issues involving statutory interpretation involve questions of law that are reviewed de novo. *Silich v Rongers*, 302 Mich App 137, 143; 840 NW2d 1 (2013).

III. ANALYSIS

At the outset, we note that the trial court erred in holding that his case was governed by *Bahri*, 308 Mich App at 420. In *Bahri*, the plaintiff was injured in automobile accidents on both March 4, 2011, and on October 20, 2011. *Id*. at 421. The plaintiff obtained a no-fault policy from the defendant insurer on October 12, 2011. *Id*. The plaintiff sought PIP benefits for the October 20, 2011, accident, including replacement services. *Id*. at 422. In support of her claim for replacement benefits, the plaintiff submitted "Household Services Statements" indicating that she received daily household services for all of October 2011 through February 2012. *Id*. However, the defendant's surveillance video captured the plaintiff doing physical activities during this time period that were "inconsistent with her claimed limitations." *Id*. at 425. The defendant moved for summary disposition, arguing that, pursuant to the no-fault policy's fraud exclusion, the plaintiff was barred from recovering any PIP benefits because she made a fraudulent representation with respect to her claim for replacement services. *Id*. at 422. The trial court agreed and granted summary disposition. *Id*.

On appeal, this Court affirmed the trial court, holding that the plaintiff was barred from recovering PIP benefits pursuant to the no-fault policy's fraud exclusion, which provided as follows:

> We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy. [*Id*. at 423-424.]

This Court explained that, given the evidence that the plaintiff misrepresented her physical limitations and claimed replacement services for a time period before she was injured in the automobile accident, there was no question of fact regarding whether the plaintiff's PIP claim was barred by the fraud exclusion. *Id*. at 426.

Defendant argues that *Bahri* is controlling; however, *Bahri* is distinguishable and is not dispositive. *Bahri* involved the application of a fraud exclusion provision in a no-fault insurance policy. In contrast, at issue in this case is whether plaintiff is entitled to recover PIP benefits through the MACP and plaintiff's recovery is governed by the relevant provisions of the no-fault act. Indeed, this case is more akin to *Shelton v Auto-Owners Ins Co*, 318 Mich App 648; ___NW2d___ (2017).

In *Shelton*, the plaintiff was a passenger in a vehicle owned and operated by Timothy Williams and was injured in a single-car collision. *Id*. at 651. The plaintiff did not own a vehicle or reside with a relative who owned a vehicle so, pursuant to MCL 500.3114(4)(a), she sought PIP benefits from Williams' insurer—i.e. the defendant Auto-Owners. *Id*. The defendant moved for summary disposition, alleging that the plaintiff made misrepresentations with respect to replacement services and she was therefore barred from recovering PIP benefits under the fraud exclusion clause of Williams' no-fault policy. *Id*. at 650. The trial court granted summary disposition in favor of the defendant as to replacement services, but denied the motion as to payment for medical services. *Id*. at 650-651.

On appeal, the defendant argued that, like in *Bahri*, the plaintiff's misrepresentation as to replacement services barred her from recovering all PIP benefits including payment for medical services pursuant to the fraud exclusion in Williams' policy. *Id*. at 652. This Court rejected the defendant's argument and distinguished *Bahri* in relevant part as follows:

> The law governing application of the policy exclusion in *Bahri* is not applicable in this case. In *Bahri*, the provision applied to the plaintiff because "defendant issued [the subject] no-fault automobile policy to [the] plaintiff." [*Bahri*, 308 Mich App at 421]. In this case, however, Shelton was not a party to, nor an insured under, the policy; she was injured while a passenger, and because neither she nor her spouse or resident relative had a no-fault policy, *defendant was required to pay her benefits pursuant to statute, not pursuant to a contractual agreement*.
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> Therefore, the exclusionary provision in defendant's no-fault policy does not apply to Shelton and cannot operate to bar Shelton's claim. [*Shelton*, 314 Mich App at 652-653 (emphasis added).]

Although Shelton did not involve a claim arising under the MACP, this case is akin to *Shelton* in that, like in *Shelton*, in this case, plaintiff's right to recover PIP benefits is governed by statute, not by an insurance policy. This case is therefore unlike *Bahri* and the trial court erred in concluding otherwise.

The statutory provision at issue in this case provides as follows:

> 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 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. [MCL 500.3173a(2).]

In interpreting and applying this provision, we note that "[t]he primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). "[U]nless explicitly defined in a statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (quotation marks and citation omitted).

Under MCL 500.3173a(2), a "fraudulent insurance act" occurs when

> a person . . . 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*.[1] [Emphasis added.]

Here, reasonable minds could not differ as to whether plaintiff presented oral and written statements that contained false information in support of his claim for wage-loss benefits and the statements concerned a fact or thing that was material to the claim for wage-loss benefits. Although plaintiff initially submitted a claim form that indicated he was not employed at the time of the accident and that he did not suffer lost wages, after the MACP assigned the claim to defendant, plaintiff's subsequent statements in support of that claim were false and clearly aimed at concealing the fact he was terminated. In his complaint, plaintiff indicated that he suffered wage-loss benefits. Then, during discovery, plaintiff made false statemens in support of his claim for wage-loss benefits. Specifically, at a deposition, plaintiff testified that he was employed at the time of the accident and was on his way to work when he was involved in the accident. Plaintiff also testified that he had never been written-up or disciplined at his job. However, employment records from Vascor showed that plaintiff received a warning from his employer concerning his "erratic driving," and the letter informed plaintiff that his employer had a "zero tolerance policy for any disruptive behavior," and that the letter was his "one and only warning about erratic driving of any kind. . . ." Ten days later, plaintiff appeared for work in an intoxicated state and was sent home and this incident led to his official termination on May 6, 2014. Based on this evidence, it is clear that plaintiff made a material misrepresentation in support of his wage-loss claim when he testified that he had never been subject to a disciplinary action at Vascor.

Plaintiff noted that the letter was written on May 6, 2014, one day after the accident, presumably is to show that, because the letter was dated May 6, 2014, he was officially employed on May 5, 2014—the day of the accident. However, plaintiff was clearly aware that he was terminated at the time he gave his deposition testimony and at the time he responded to defendant's interrogatories and in both those instances, plaintiff made misrepresentations to

[1] This definition aligns with the definition of "fraudulent insurance act" set forth in MCL 500.4503(c) and (d), however, MCL 500.4503 narrows the definition by referring to "acts or omissions committed by any person who knowingly and with an intent to injure, defraud or deceive. . . ."

conceal the fact he was terminated. At his deposition, plaintiff was aware that he was terminated, yet he testified that he had never been subject to a disciplinary action, which was patently false. That testimony was an oral statement made in support of the wage-loss claim and it was material to the claim. MCL 500.3173a(2). While defendant contends that there was no evidence to show that he received his termination letter, the evidence shows that defendant was aware he was terminated. Defendant does not dispute that he received a warning on April 25, 2014, and that this warning was his "one and only" warning concerning disruptive driving, or that he was sent home 10 days later for being intoxicated at the workplace. Then, after his release from the hospital, defendant never attempted to return to work, which shows that he was aware of his termination.

Furthermore, defendant submitted the following interrogatory to plaintiff regarding his employment status at the time he was injured:

> If you claim that you have lost wages or income contemplated by MCL 500.3107(1)(b) *as the consequence of the accident* you describe in your complaint for which you are entitled to reimbursement, please [provide the following information about the employer] [Emphasis added.]

Plaintiff responded by providing information about Vascor/Right Choice Staffing and indicated that he had lost $12,000 in wages since May 5, 2014. In doing so, plaintiff represented that he was employed at Vascor on May 5, 2014, and that, as a consequence of the accident, he lost $12,000 in wages from Vascor. This was clearly a material misrepresentation intended to convey that the accident was the cause of plaintiff's inability to work at Vascor. Considering this response in conjunction with plaintiff's deposition testimony and plaintiff's complaint, there was no question of fact regarding whether plaintiff made material misrepresentations in support of his claim for wage-loss benefits and that such representation amounted to a "fraudulent insurance act," as defined under MCL 500.3173a(2).

Having concluded that plaintiff made a material misrepresentation with relation to his claim for wage-loss benefits, we now must determine the effect that the misrepresentation had on plaintiff's claim as a whole. We return to the language of the statute, which provides:

> 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 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*. [MCL 500.3173a(2) (emphasis added).]

Thus, in the event that a claimant commits a fraudulent insurance act as part of or in support of a claim is: (1) subject to penalties imposed under MCL 500.4511 and (2) the claim that "contains or is supported" by the fraudulent insurance act is "ineligible for payment or benefits under the assigned claims plan." Here, MCL 500.4511 concerns criminal penalties for

fraudulent insurance acts and that statute is inapplicable.[2] However, because plaintiff submitted a claim to the MACP, and then supported that claim with a fraudulent insurance act as that is defined in the civil statute MCL 500.3173a(2), that claim "is ineligible for payment or benefits under the assigned claims plan." Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff argues that the trial court erred in granting summary disposition because defendant failed to prove the elements of fraud as set forth in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). However, *Titan* did not involve a fraudulent insurance act under MCL 500.3173a(2) and instead involved fraud arising in the context of an insurance policy. As discussed above, this case does not involve an insurance policy and instead involves whether plaintiff was entitled to PIP benefits under at statutory provision of the no-fault act—i.e. MCL 500.3173(a). Accordingly, plaintiff's arguments with respect to *Titan* are misplaced and unpersuasive.

Affirmed. No costs awarded. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Michael J. Riordan

[2] Criminal penalties under MCL 500.4511 would require proof of a crime which requires proof beyond a reasonable doubt; our holding today should not be construed as a finding that there would be sufficient evidence to sustain a conviction in a criminal proceeding. Rather, our holding concerns whether, for purposes of summary disposition, there was proof of a material misrepresentation under MCL 500.3173a(2).