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STATE OF MICHIGAN

COURT OF APPEALS

ADASENY HUMPHREY, Plaintiff-Appellant,	UNPUBLISHED August 19, 2021
v HOME-OWNERS INSURANCE COMPANY, Defendant-Appellee.	No. 354214 Oakland Circuit Court LC No. 2019-172730-NF

Before: LETICA, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

In this first-party no-fault action, plaintiff, Adaseny Humphrey, appeals by delayed leave granted[1] the trial's court order granting summary disposition to defendant, Home-Owners Insurance Company, based upon what it found to be fraudulent statements Humphrey made during her deposition. For the reasons stated in this opinion, we reverse.

I. BASIC FACTS

On February 27, 2018, Humphrey was driving her mother's vehicle when she was involved in a motor vehicle crash. She filed a claim for personal protection insurance (PIP) benefits through her mother's no-fault policy, which was issued by Home-Owners Insurance Company. Home-Owners paid some benefits, but then requested that she submit to a so-called "independent medical examination" (IME) to assess her need for ongoing treatment. On March 22, 2019, Humphrey filed a claim against Home-Owners to recover PIP benefits. On April 17, 2019, she submitted to the IME, and on July 10, 2019, Home-Owners sent a letter stating that it had concluded that her claimed injuries were considered to be pre-existing conditions, so no additional benefits would be paid for her injuries.

[1] *Humphrey v Home-Owners Ins Co*, unpublished order of the Court of Appeals, entered October 9, 2020 (Docket No. 354214).

Relevant to the issues raised on appeal, in March 2020, Home-Owners moved for summary disposition under MCR 2.116(C)(10), asserting that Humphrey had made multiple false statements during her August 2019 deposition. First, Humphrey testified that as a result of the February 27, 2018 motor vehicle crash, she suffered from depression, anxiety, headaches, and pain in her back, neck, left shoulder, and left wrist. She unequivocally denied that she had any of these issues before the accident. Her medical records, however, directly contradicted her denial. For example, Humphrey was treated for anxiety in 2011 and 2013. She also complained to her chiropractor of back pain in 2012 and 2015, and headaches and neck pain in 2015. Second, Humphrey testified at her deposition that she had been in a prior motor vehicle crash, but she denied filing an insurance claim in relation to that crash. Records from Allstate Property and Casualty Insurance Company, however, show that Allstate made payments to medical providers on Humphrey's behalf in 2007 for treatment of shoulder pain and a head injury arising out of a motor vehicle crash. Finally, Humphrey testified that she could not drive for long periods of time due to anxiety and back pain, but records from Saganing Eagles Landing Casino indicate Humphrey went to the casino, which is a 50-minute drive from her home, 76 times in 2018, 110 times in 2019, and 31 times as of March 14, 2020.

Following oral argument, the trial court granted summary disposition after determining that there was no genuine question of material fact as to whether Humphrey's claim was barred by common-law fraud. Specifically, the court determined that Humphrey's statements during her deposition were material misrepresentations, that the statements were false, and that she made the statements knowingly or reckless and with the intent that Home-Owner's would rely upon them.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Humphrey argues that the trial court erred by granting summary disposition on the basis of common-law fraud because under *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 728; 957 NW2d 858 (2020) false statements made by the insured during litigation are incapable of satisfying the elements for voiding a policy on the basis of post-loss fraud. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering*, *Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

Whether an insured has committed fraud is generally a question of fact for a jury to determine. See *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 658-660; 899 NW2d 744 (2017). In its motion for summary disposition, Home-Owners argues that Humphrey's claim was barred because she engaged in "common-law fraud" when she made material misrepresentations during her deposition.[2] In *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012), our

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[2] In its motion for summary disposition, Home-Owners primarily argued that Humphrey had made material misrepresentations during her deposition testimony. However, it also included a footnote indicating that, during an IME, Humphrey had denied ever being injured in a prior motor vehicle

Supreme Court recognized that "actionable fraud, also known as fraudulent misrepresentation," requires proof that: (1) the insured "made a material representation," (2) "that it was false," (3) that when the insured made the statement she "knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion," (4) that he or she "made it with the intention that it should be acted upon by" the insurer, (5) that the insurer "acted in reliance upon it," and (6) that by acting in reliance on the material misrepresentation, the insurer "suffered injury." See also *MEEMIC Ins Co v Fortson*, 506 Mich 287, 304; 954 NW2d 115 (2020) (restating the elements for fraudulent misrepresentation set forth in *Titan*).[3]

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accident. Although the IME report is attached, Home-Owners did not direct the trial court to the specific page where Humphrey allegedly made the denial. Based on our review, in the history section of the IME, the doctor wrote that Humphrey "denies a previous history of motor vehicle accident with injury." There is no record of the exact question that Humphrey was asked, nor of her exact answer. Instead, the report only includes a denial attributed to her by the IME doctor. The records attached to the motion for summary disposition indicate that Humphrey's prior motor vehicle crash occurred in 2007, which was over ten years before she submitted to the IME. In light of the significant delay between the crash and when she was apparently asked about it during the 2019 IME, we conclude that the single statement attributed to her by the IME doctor is not sufficient to establish the elements of fraud beyond a question of fact.

Furthermore, although Home-Owners Insurance Company argues that Humphrey made additional false statements during the IME evaluation, it did not present that argument in the proceedings before the trial court. A party moving for summary disposition under MCR 2.116(C)(10) must support the motion with enough detail that the opposing party is on notice of the need to respond. *Barnard Mfg Co, Inc*, 285 Mich App at 369; see also MCR 2.116(G)(4) (stating that the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact"). A properly supported motion for summary disposition shifts the burden to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Here, the summary-disposition motion focused almost exclusively on the false statements Humphrey made during her deposition. And, beyond Humphrey's alleged denial of a prior motor vehicle crash, the IME was not even mentioned as a basis for a finding of fraud. Given that the issue was not properly presented, Humphrey was not put on notice that she needed to respond to the allegedly false statements she made during the IME. Thus, because Home-Owners Insurance Company did not properly support its motion for summary disposition with regard to the statements made during the IME, the burden never shifted to Humphrey to establish that a genuine issue of material fact exists with regard to those statements. Summary disposition, therefore, is not warranted on the basis of fraudulent statements made during the IME.

[3] On appeal, Home-Owners argues that to succeed on its common-law fraud claim it need only show four requirements. Specifically, it must show (1) that the insured made a material misrepresentation, i.e., one that is reasonably relevant to the insurer's investigation of a claim, (2) the representation was false, (3) the insured knew the representation was false or made it recklessly without any knowledge of its truth, and (4) the insured made the representation with the intention that the insurer would rely upon it. *Fashho v Liberty Mut Ins Co*, ___ Mich App ___, ___; ___

In *Haydaw*, this Court held:

> statements made during litigation are by their nature incapable of satisfying the elements for voiding a policy on the basis of postloss fraud. In order to obtain that relief, the material misrepresentation must have been made with the intention that the insurer would act upon it. Yet an insured's statements during discovery are made with the intention that the trier of fact, not the insurer, will act on them. To the extent that the insurer acts on those statements, it is through counsel for purposes of litigation strategy rather than processing the claim under the policy's terms. [*Haydaw*, 332 Mich App at 728 (quotation marks and citation omitted).]

"We read *Haydaw* as standing for the unremarkable proposition that an insurer cannot assert that it denied a claim because of fraud that occurred after litigation began; the fraud must have occurred before the legal proceedings." *Fashho v Liberty Mut Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 349519), slip op at 4.

Although *Haydaw* involved a fraud-exclusion clause as opposed to a common-law fraud defense, the basic principle—that statements made during litigation are not made with the intent that the insurer will rely upon them—applies equally to both fraud-based defenses. There is no meaningful distinction between a fraud defense based upon the language of the insurance policy and a fraud defense based upon the common law. In both instances, the insured must have made a material misrepresentation with the intent that the insurer acts upon the misrepresentation. See *Haydaw*, 332 Mich App at 728; *Tian*, 491 Mich at 555.[4] As a result, although Humphrey made numerous false statements during her deposition testimony, those false statements do not warrant a grant of summary disposition. Rather, the validity of her claim must be tested by the trier of fact.[5]

NW2d ___ (2020) (Docket No. 349519); slip op at 3. However, we are compelled to use the test set forth by our Supreme Court in *Titan*, 491 Mich at 555, and restated by our Supreme Court in *MEEMIC*, 506 Mich at 305 n 12.

[4] Home-Owners contends that *Haydaw* was wrongly decided. However, we are not persuaded that it was.

[5] As explained in *Williams v Farm Bureau Mut Ins Co of Mich*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 349903); slip op at 5,

> An insurer maintains the power to deny claims or parts of claims it believes fraudulent. The plaintiff then bears the burden of filing suit and ultimately proving that she was injured in an auto accident and that the injury resulted in reasonable and necessary medical care and other covered expenses.
>
> Furthermore, the Legislature provided a specific remedy for postprocurement fraud in the no-fault act itself. MCL 500.3148(2) permits an

Reversed and remanded for further proceedings. Humphrey may tax costs as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

/s/ Anica Letica
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

> insurer to recoup attorney fees "in defending against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation."

Thus, the fact that Humphrey made multiple statements in her deposition that were directly contradicted by her medical records and other documentary evidence can be presented to the jury as proof that Humphrey is not credible and that her claim for PIP benefits is fraudulent. Further, it would be relevant to a finding that attorney fees are warranted under MCL 500.3148(2).