STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY JOHNSON,

Plaintiff-Appellee,

v

GEICO INDEMNITY COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 18, 2021

No. 351838
Wayne Circuit Court
LC No. 18-006423-NF

Before: TUKEL, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

Defendant, Geico Indemnity Company, appeals by leave granted[1] the trial court's order denying its motion for summary disposition on the basis of fraud. We reverse and remand for entry of an order granting summary disposition in favor of defendant.

I. FACTUAL BACKGROUND

This case arises from a March 14, 2017 automobile accident in which plaintiff sustained a torn rotator cuff, severe whiplash, severe migraines, fibromyalgia, short-term memory loss, and back and neck issues. After the accident, plaintiff claimed that as a result of her accident-related injuries, she was unable to perform household tasks and personal care activities. William Stadler, plaintiff's former boyfriend, and Jacob Heminger, plaintiff's son, performed household services as a result. Stadler and Heminger shared duties which included: laundry, cooking, cleaning, and helping plaintiff move throughout her home, among other services. Plaintiff also required assistance bathing and dressing. Plaintiff's minor daughter, KJ, assisted with these activities.

Defendant was plaintiff's automobile insurer at the time of the accident. After the accident, plaintiff submitted a claim for personal injury protection (PIP) to defendant seeking benefits for replacement services and attendant care. Defendant refused payment for replacement services and

[1] *Johnson v Geico Indemnity Co*, unpublished order of the Court of Appeals, entered March 25, 2020 (Docket No. 351838).

attendant care and plaintiff filed the instant action. Defendant moved for summary disposition, arguing that plaintiff's insurance policy was void under the fraud provision of the insurance contract. Defendant submitted that during the time in which plaintiff claimed to have received replacement services and attendant care by Stadler and Heminger, she had traveled to Ohio and Florida without Stadler and Heminger. According to defendant, the fact that Stadler and Heminger stayed in Michigan during plaintiff's trips was evidence that plaintiff fraudulently sought benefits under the insurance policy.

In response, plaintiff argued that while she was away, both Stadler and Heminger performed the household tasks noted on her claim for replacement services while personal care services were provided by plaintiff's friend, Jessica Bullock, and KJ. Plaintiff asserted that her accident-related short-term memory loss caused her to forget who performed certain services, that she did not put Bullock's or KJ's names on the claim form because she believed she could only have a certain number of service providers, and that she did not put KJ as a service provider because she believed all providers had to be over age 18. The trial court ultimately denied defendant's motion for summary disposition. This appeal followed.

II. STANDARD OF REVIEW

On appeal, defendant argues that the trial court erred in denying its motion for summary disposition because no genuine dispute of fact existed as to whether plaintiff made material misrepresentations with respect to her claim for replacement services and attendant care.

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

This case requires consideration of provisions of the no-fault act, MCL 500.3101 *et seq*. Consequently, "this Court reviews de novo issues of statutory construction." *Nason v State Employees' Retirement Sys*, 290 Mich App 416, 424; 801 NW2d 889 (2010). "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature . . . ." *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). "If the language is clear and unambiguous, this Court must enforce the statute as written. . . . Unless defined by statute, words and phrases are to be given their plain and ordinary meaning, and this Court may consult a dictionary to determine that meaning." *Tree City Props LLC v Perkey*, 327 Mich App 244, 247; 933 NW2d 704 (2019).

Further, "[t]he rules of contract interpretation apply to the interpretation of insurance contracts." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group*

Agency, Inc, 468 Mich 459, 468; 663 NW2d 447 (2003). Yet, if the contract contains clear language, this Court must enforce the contract as written. *McGrath*, 290 Mich App at 439. "However, if an ambiguity exists, it should be construed against the insurer. An insurance contract is ambiguous if its provisions are subject to more than one meaning." *Id*. (citations omitted). And, "[a]ny terms not defined in the contract should be given their plain and ordinary meaning, which may be determined by consulting dictionaries." *Id*. (citation omitted).

III. ANALYSIS

The no-fault act requires insurers "to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as motor vehicle . . . ." MCL 500.3105(1). This includes, "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). However, an insurer may void an insurance policy when an insured makes fraudulent misrepresentations in support of a claim for benefits. *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424; 864 NW2d 609 (2014).

> To void a policy because the insured has wilfully misrepresented 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. A statement is material if it is reasonably relevant to the insurer's investigation of a claim. [*Id*. at 424-425 (citation omitted).]

Indeed, the insurance agreement between plaintiff and defendant included a fraud provision, which provided:

> 13. FRAUD AND MISREPRESENTATION
>
> We may void this policy or deny coverage if you or an *insured* person:
>
> (a) Knowingly made incorrect statements or representations to us with regard to any material fact or circumstance;
>
> (b) Concealed or misrepresented any material fact or circumstance; or
>
> (c) Engaged in fraudulent conduct;
>
> at the time of application or at any time during the policy period or in connection with the presentation or settlement of a claim.

"Generally, whether an insured has committed fraud is a question of fact for a jury to determine." *Meemic Ins Co v. Fortson*, 324 Mich App 467, 473; 922 NW2d 154 (2018), aff'd but criticized ___ Mich ___; ___ NW2d ___ (2020) (Docket No. 158302). "However, under some circumstances, a trial court may decide as a matter of law that an individual committed fraud." *Meemic Ins Co*, 324 Mich App at 473, citing *Bahri*, 308 Mich App at 425-426. In these cases, the insurer has the burden of proving the existence of fraud because "[r]eliance on an exclusionary

clause in an insurance policy is an affirmative defense." *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (2017). "Thus, to obtain summary disposition the insurer must show that there is no question of material fact as to any of the elements of its affirmative defense." *Id*., citing MCR 2.116(C)(10).

It is undisputed that plaintiff sought PIP benefits in the form of attendant care and replacement services. Replacement services are those "[s]ervices that were required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself because of the injury." *Johnson v Recca*, 492 Mich 169, 180; 821 NW2d 520 (2012) (emphasis omitted). Under the no-fault act, replacement services include:

> [e]xpenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [MCL 500.3107(1)(c).][2]

Plaintiff claimed she was entitled to replacement services where Stadler and Heminger assisted with dishwashing, taking the garbage out, cooking, dusting, vacuuming, changing linens, grocery shopping, driving, and laundry. Plaintiff testified that the reason she claimed replacement services was because she "still can't do any of those things at this time, so [Stadler and Heminger] are doing it all." Under MCL 500.3107(1)(c), plaintiff is entitled to recover for replacement services for activities that if "she had not been injured, [she] would have performed . . . ."

However, in this case, plaintiff clearly submitted affidavits for attendant care and replacement services that were, in plaintiff's own words, inaccurate. She submitted affidavits claiming that she received 12 hours of attendant care, as well as household replacement services, from Stadler and Heminger while she was in Cincinnati, Ohio on a business trip. During her deposition, plaintiff acknowledged that neither man was with her during that trip. With respect to household services, plaintiff argues that it is possible that those services were being provided in her absence while she was in Cincinnati. She also suggests that both men were providing services for her, at her home, in her absence. However, this argument is merely speculative. Plaintiff fails to identify any evidence that anyone actually did anything for her at her home during the four day trip. Moreover, it is a logical stretch for plaintiff to claim she required 12 hours of attendant care at her home while she was not there. Additionally, Herminger's affidavits claiming that he performed household services like cooking and dishwashing do not makes sense if plaintiff was not at home to receive those services: it is unnecessary to perform household services like cooking and washing dishes for someone who is in a different state. The same may be said of the services

[2] The no-fault act, MCL 500.3101 *et seq*., underwent substantial revisions when it was amended by 2019 PA 21 effective June 11, 2019. Even though the order relevant to this appeal was recorded on November 11, 2019, the complaint was filed on June 18, 2018—thus, the prior version of the no-fault act controls in this case. See *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, ___ Mich App ___, ___ n 3; ___ NW2d ___ (2020) (Docket Nos. 347553 and 348440); slip op at 3. Even so, the changes to the no-fault act did not change the cited language.

claimed to have been provided by Stadler and Heminger when plaintiff took a second trip to Florida, admittedly without them.

Not only was plaintiff's claim for replacement services while she was out of town false, the misrepresentations were material. *Bahri*, 308 Mich App at 424. "A statement is material if it is reasonably relevant to the insurer's investigation of a claim." *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd on other grounds 455 Mich 866 (1997). The record evidence in this case is clear that plaintiff knew the statements were false at the time they were made, or that the statements were made recklessly because plaintiff could not have received replacement services from Stadler or Heminger while she was traveling without them. The evidence is also clear that plaintiff made the misrepresentations "with the intention that the insurer would act on it" because plaintiff sought compensation for replacement services from defendant with the expectation of receiving a benefit under the insurance agreement. *Bahri*, 308 Mich App at 424-425. Thus, we conclude that there is no genuine issue of material fact regarding whether plaintiff materially misrepresented her need for replacement services during the time she was out of town. Plaintiff submitted fraudulent claims for replacement services under the terms of the insurance contract, which entitled defendant to void the contract. Defendant was entitled to summary disposition on this basis alone.

However, we note that plaintiff also fraudulently misrepresented her claim for attendant care when she traveled to Ohio and Florida without Stadler and Heminger. In the trial court, defendant submitted a series of plaintiff's Facebook posts which purport to show plaintiff engaging in activities for which she claimed to have required attendant care. The burden then shifted to plaintiff to "establish that a genuine issue of disputed fact exists" as supported by "documentary evidence." *Quinto*, 451 Mich at 362-363 (citations omitted). Indeed, plaintiff agreed that she was mistaken when she indicated that Stadler and Heminger provided attendant care during that time—however, she defended her actions by stating that her memory loss caused her to forget that Stadler and Heminger did not provide the attendant care. Plaintiff further argued that while she was in Ohio and Florida, did receive attendant care from those who traveled with her and from her daughter, KJ. Plaintiff submitted a notarized affidavit which claims that other consultants who traveled with plaintiff to Ohio assisted her with dressing and grooming. However, these affidavits do not explain how plaintiff required 12 hours of attendant care daily while on this trip. Moreover, with respect to the Florida trip, plaintiff relies on a letter written by her daughter. That letter is not notarized, and thus, is not a proper affidavit that could be considered in deciding the motion. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 120; 839 NW2d 223 (2013). Finally, with respect to plaintiff's argument that she believed she was limited to a certain number of service providers, and that those providers had to be over the age of 18, plaintiff presents no evidence to support her claim that a claims adjuster told her anything about who could be named as a care provider.

On the basis of the foregoing, we conclude that no genuine issue of material fact remains regarding whether plaintiff committed fraud when seeking reimbursement for replacement services and attendant care in accordance with her insurance policy with defendant. Thus, the trial

court erred by denying defendant's motion for summary disposition. We reverse, and remand to the trial court for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ Kathleen Jansen
/s/ Thomas C. Cameron