STATE OF MICHIGAN

COURT OF APPEALS

JAMES M. BAUM,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY, also known as AUTO-OWNERS INSURANCE GROUP, and HOME-OWNERS INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
May 20, 2021

No. 352763
Ingham Circuit Court
LC No. 19-000126-NO

Before: MURRAY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Plaintiff, James M. Baum, appeals as of right the circuit court order granting defendant, Home-Owners Insurance Company,[1] motion for summary disposition under MCR 2.116(C)(10) after finding that plaintiff committed fraud in claiming work-loss benefits from defendant by misrepresenting whether he was temporarily unemployed in order to receive a higher benefit amount. We affirm, albeit based upon a failure to mitigate not due to fraud.

I. BACKGROUND

This case arises from a December 3, 2017 motor vehicle accident that occurred after plaintiff swerved to avoid hitting a deer and crashed into a tree. Plaintiff was driving his mother's vehicle that was insured by defendant. After the accident, plaintiff contacted defendant to file a claim for wage loss benefits under the insurance policy. In response, defendant's claims adjuster contacted plaintiff regarding plaintiff's work history. According to the adjuster's notes, plaintiff indicated that

> he worked for Michel's Corporation (3 weeks), . . . when the job had ended at Michel's Corporation ('temporarily laid off') he called his cousin, who worked at

[1] Auto-Owners Insurance Company was dismissed as a defendant in the trial court.

> RAM construction. His cousin told him that they had an opening, and that [plaintiff] should show up and ask for the position. When [plaintiff] showed up, the position was already filled.

In April 2018, plaintiff's physician released plaintiff to immediately return to light duty work. Defendant issued plaintiff a check for $9,215.50 as payment for plaintiff's work loss for the period of December 3, 2017, the date of plaintiff's accident, through April 9, 2018, the date of plaintiff's release to return to work. The amount was calculated using three paystubs from Michels provided by plaintiff. A letter from defendant accompanying the check informed plaintiff that defendant would not be issuing any further wage loss benefit to plaintiff given his physician's okay to return to work.

Plaintiff filed a complaint for additional personal injury protection benefits, including for "[w]ork loss consisting of loss of income from work that Plaintiff would have performed during the three years after the date of the accident, if [he] had not been injured." In his answers to interrogatories, plaintiff stated that he worked at Michels from November 2017 to the date of accident and made $30.75 per hour. When deposed, plaintiff testified that he began working for Michels on November 12th or 13th of 2017 and worked every week, 60 hours a week, for $36.20 per hour, up until the accident. Plaintiff testified that at the time of the accident, "[he] was off for the week because [they] just finished a job, and the supervisor/foreman told [him] [he] had to take a week off while they moved every – all the heavy equipment to the next job site, and then [he] would be right back at it." While he was off work from Michaels and waiting to be called back, plaintiff "help[ed] a buddy cut firewood." Plaintiff explained it as "more of a favor" and that if his friend "wanted to give [him] money, he could". Before Michel's, plaintiff worked 40 to 50 hours per week at TNS Landscaping from April 2017 until mid-November 2017 and was paid $14.25 per hour.

Defendant filed a motion for summary disposition under MCR 2.116(C)(10) as to plaintiff's whole complaint or in the alternative partial summary disposition as to plaintiff's wage loss claim. Defendant argued that it was entitled to summary disposition because plaintiff committed fraud by stating that he was employed at the time of the accident. Defendant argued that during discovery, defendant reviewed an affidavit from plaintiff's employer at Michels, Eric Mersino, that indicated plaintiff was fired nearly a month before the accident. In his affidavit, Mersino averred that on November 6, 2017, plaintiff walked off the job site after plaintiff was observed to have impaired verbal and motor skills. Mersino averred that plaintiff was not brought back to another job site with Michels Corporation, and was not eligible for re-hire. Defendant asserted that plaintiff's misrepresentations constituted fraudulent conduct that voided the insurance policy under the policy's fraud provision. Defendant also argued that plaintiff failed to mitigate his damages when, despite an April 2018 physician's letter that plaintiff could return to light duty work, plaintiff failed to seek employment in any capacity.

Plaintiff argued that his statement, that he thought he was laid off and could return to work in the future, was not fraudulent. He contended that he submitted the proper documentation to defendant's adjuster in March 2018 that he was not working at Michels at the time of the accident and that his plans to return were indefinite. He reasoned, therefore, that his later statements were not material because they were not relied upon by the adjuster or used in the calculation of lost wages. Plaintiff argued that a question of fact existed as to whether his statements concerning his

employment status were false because Mersino's affidavit never indicated that plaintiff was fired and plaintiff testified by affidavit and at his deposition that he was laid off or let go from Michels and told he would be rehired when other work became available.

After a hearing, the court granted the summary disposition motion. The trial court found that there was no genuine issue of material fact that plaintiff's employment with Michels was terminated permanently on November 6, 2017, and that plaintiff made statements in interrogatories and at his deposition that were false and made for the purpose of inducing payment of benefits at a higher wage. It further found the misrepresentations relevant and material to a determination of actual work loss for the period of April 2018 to August 2019, and to a calculation of plaintiff's claim for continued work loss benefits. The court ruled that plaintiff was not entitled to additional work loss benefits and granted defendant partial summary disposition on that claim. An order followed the hearing dismissing plaintiff's complaint in toto.

On appeal, plaintiff argues that the trial court erred in granting defendant summary disposition because plaintiff did not commit fraud and the question of whether plaintiff failed to mitigate his damages post-accident was for the trier of fact.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Bronson Health Care Group, Inc v State Auto Prop & Cas Ins Co*, 330 Mich App 338, 341; 948 NW2d 115 (2019). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). "In deciding a motion pursuant to MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions, admissions, or other documentary evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists." *Titan Ins v N Pointe Ins*, 270 Mich App 339, 342; 715 NW2d 324 (2006). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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.*

"To the extent this case involves the interpretation of an insurance policy, insurance policies are interpreted like any other contract." *Meemic Ins Co v Fortson*, 506 Mich 287, 296-297; 954 NW2d 115 (2020). "Where no ambiguity exists, this Court enforces the contract as written." *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). Courts are to construe exclusionary clauses strictly in favor of the insured. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

We also review de novo "questions of law, such as the proper interpretation of a statute." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97; 754 NW2d 259 (2008).

B. FRAUD

Plaintiff argues that he was entitled to work-loss benefits from defendant because he was temporarily unemployed at the time of the accident, and therefore, the trial court erred in granting defendant summary disposition. Under Michigan's no-fault act, MCL 500.3101 *et seq*., personal protection insurance benefits are payable for the income lost due to one being injured in an auto accident. "Work loss" is defined as "loss of income from work an injured person would have performed . . .if he or she had not been injured. . . ." MCL 500.3107(1)(b). "Subject to the provisions of section 3107(1)(b), work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident." MCL 500.3107a (footnote omitted). "[T]aken together, [MCL 500.3107(1)(b) and MCL 500.3107a] provide that an insured who is temporarily unemployed at the time of the accident is entitled to work-loss benefits for a maximum period of three years following the accident." *Frazier v Allstate Ins Co*, 231 Mich App 172, 176; 585 NW2 d 365 (1998). "An insured may be found to be temporarily unemployed for purposes of §§ 3107(b) and 3107a where, although he or she is unemployed at the time of the accident, that person is, or would have been but for the accident, actively seeking employment and there is evidence showing the unemployed status would not have been permanent if the injury had not occurred." *Clute v Gen Acc Assur Co of Canada*, 179 Mich App 527, 536–37; 446 NW2d 839 (1989). "[A] bare assertion of intent to secure employment, absent independent corroboration of such intent or actions taken to obtain employment during the period of unemployment, is insufficient to render the injured person 'temporarily unemployed.' " *Id*. at 537.

Defendant argues that the insurance policy under which plaintiff claimed benefits was void as to plaintiff because plaintiff fraudulently represented his employment status to defendant. "[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims." *Auto–Owners Ins Co*, 440 Mich at 567. "Reliance on an exclusionary clause in an insurance policy is an affirmative defense; therefore, defendant has the burden of proof." *Id*. See *Auto–Owners Ins Co v Seils*, 310 Mich App 132, 146; 871 NW2d 530 (2015) (An "insurance company has the burden to prove that one of the policy's exclusions applies."). "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." *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (2017). Here, the insurance policy contained an exclusionary clause that excluded coverage in the instance of fraud; it read, "We will not cover any person seeking coverage under this policy who has made fraudulent statements or engaged in fraudulent conduct with respect to procurement of this policy or to any occurrence for which coverage is sought."

To prove fraud and void the policy coverage as to plaintiff, defendant was required to show plaintiff willfully misrepresented a material fact, by proving 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. [*Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014)].

"A statement is material if it is reasonably relevant to the insurer's investigation of a claim." *Shelton*, 318 Mich App at 657 (quotation marks and citation omitted).

We disagree with the trial court that the fraud exclusion in the insurance contract applies to void the policy as to plaintiff. Plaintiff represented to defendant that he was temporarily unemployed from Michels. In April 2018, plaintiff reported to defendant's claims adjuster that he worked at Michels for approximately three weeks and was then temporarily laid off. Plaintiff responded to interrogatories that he worked at Michels from November 2017 up until the date of the accident and testified at his deposition that he was on a one week furlough from Michels at the time of the accident. It was not until the discovery of Mersino's affidavit that defendant learned that plaintiff was permanently, and not temporarily, unemployed from Michels. The affidavit stated that Mersino was called to a job site where plaintiff was working to assess whether plaintiff could safely work due to a change in behavior and decline in skills. Mersino also stated that when he arrived at the site plaintiff was not there. The affidavit indicated that plaintiff was disciplined and terminated on that same date but did not state that either action was communicated verbally or in writing to plaintiff. Subsequent to Mersino's affidavit the plaintiff provided his own affidavit in which he explicitly stated that he was unaware of any termination. Since an element of fraud is that the misrepresentation must have been known to be false when it was made this record contains competent evidence that the plaintiff did not have knowledge of the falsity of the assertion. Thus, there remained a question of fact as to fraud.

Setting aside the issue of fraud, plaintiff otherwise failed to prove that he was actively seeking employment at the time of the accident. See *Frazier*, 231 Mich App at 176 ("Although unemployed at the time of the accident, an insured may be found to be 'temporarily unemployed' where he is, or would have been but for the accident, actively seeking employment and there is evidence showing the unemployed status would not have been permanent if the injury had not occurred."). Plaintiff told defendant's claims adjuster that after his employment with Michels ended, he went to apply for a position at RAM construction on a lead from his cousin, but learned that it was already filled. This job search appears to have occurred in the week plaintiff claimed to have been on temporary furlough prior to the accident. It is competent evidence that he was in the job market immediately prior to the accident and supports a claim of temporary unemployment at the time of the injury.

C. MITIGATION

Plaintiff also argues that the court misapplied the law and used a failure to mitigate to find that he was not temporarily unemployed when the accident occurred. However, a review of the record belies that contention. Instead the court found, as do we, that plaintiff failed to mitigate his damages by failing to seek employment once released from physician-imposed disability.

"Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998).

> Where one person has committed a Tort, breach of contract, or other Legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided. [*Shiffer v Gibraltar School Dist Bd of Ed*, 393 Mich 190, 197; 224 NW2d 255 (1974) (quoting McCormick, Damages, § 33, p. 127).].

"[T]he right to work-loss benefits provided by § 3107(1)(b) of the no-fault act is subject to the common-law obligation to mitigate damages." *Marquis v Hartford Acc & Indem*, 444 Mich 638, 655; 513 NW2d 799 (1994). Generally, "the question whether an employee was reasonable in not seeking or accepting particular employment is one to be decided by the trier of fact." *Rasheed v Chrysler Corp*, 445 Mich 109, 124; 517 NW2d 19 (1994). Mitigation of damages is an affirmative defense; the burden of which is on the defendant to prove. *Id*.

To the extent that plaintiff's contention on appeal is that plaintiff was physically unable to work, the record does not support this argument. In April 2018, Dr. Wiater, released plaintiff to light duty work. Plaintiff correctly argues that approximately three months later, in June 2018, Dr. Jackson prescribed that plaintiff "should remain off work from 04/08/2018 - 09/20/2018." However, at his August 8, 2019 deposition, plaintiff testified that he was under the light duty work restrictions order of Dr. Wiater. He also testified that he had not looked for any employment since the accident; his reasoning for not having done so was drawn out in the following colloquy:

> *Defendant's Counsel*. Have you looked for work at any point since the accident?
>
> *Plaintiff*. I haven't.
>
> *Defendant's Counsel*. Not light duty, not anything, just no work?
>
> *Plaintiff*. I'm more of a hands-on person as far as, like, working physically. When it comes to, like, computers or anything like that, I'm not no good at how to use my phone.
>
> *Defendant's Counsel*. So your position is, you want to be doing the labor intensive type work that you did before the accident?
>
> *Plaintiff*. I don't really want to, but that's all I know how to do.
>
> *Defendant's Counsel*. Okay. So in terms of, you know, a desk job, that's not something that you've applied for?
>
> *Plaintiff*. No.
>
> *Defendant's Counsel*. Would you agree with me that, according to Dr. Wiater, that is something that you would be capable of doing though?
>
> *Plaintiff*. Yes.

The record is clear that plaintiff's reason for failing to seek employment was not because of a physical inability to do so, but over a belief that a sedentary job confined him to work with computers that he rendered himself unqualified for. Plaintiff was "only required to make efforts that are reasonable under the circumstances to find employment." *Morris*, 459 Mich at 264. Further, he was not required to look for like employment. *Id*. at 267. Plaintiff's untested belief concerning the positions available to him prevented plaintiff from looking for any work at all. The lack of any effort on plaintiff's part supported the trial court's finding that plaintiff failed to mitigate his damages.

Based upon this evidence, it was not error for the court to determine that there was no genuine issue of material fact that plaintiff failed to mitigate his damages. While defendant was

not requesting that plaintiff pay back the $9,215 amount, the court properly dismissed plaintiff's claim as to additional work loss benefits based upon that failure.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens