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STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE HINES,

Plaintiff-Appellant,

and

LATRELLE WILLIAM, GABRIELLE MULLEN,
and SHARON SANDERS as next of friend of
MAURION SANDERS, minor,

Plaintiffs,

v

MICHIGAN AUTOMOBILE INSURANCE
PLACEMENT FACILITY,

Defendant-Appellee,

and

UNNAMED ASSIGNEE, XHOANA CEKAJ,
SOKOL SEKAJ, and NATIONWIDE INSURANCE
COMPANY,

Defendants.

UNPUBLISHED

November 18, 2021

No. 352079

Wayne Circuit Court

LC No. 18-008006-NF

Before: STEPHENS, P.J., and K. F. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Michelle Hines, appeals as of right the September 23, 2019 trial court order granting summary disposition pursuant to MCL 500.3173a(2) and MCL 500.3113(a) to defendant, Michigan Automobile Insurance Placement Facility (MAIPF). We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This is an action for personal injury protection (PIP) benefits arising from a motor vehicle accident after Hines was struck by another driver who failed to yield. Hines was not a named insured and the vehicle she drove belonged to a family friend, Lee Beard. Beard was also not insured; Hines therefore submitted a claim for benefits with MAIPF which in turn would assign Hines's claim to an insurer.

MAIPF moved for summary disposition of Hine's claim after the completion of the depositions of Hines and Beard. MAIPF argued that Hines was not a permissive user of the vehicle and that she made a material misrepresentation on her application for benefits when she stated that she had permission to use the vehicle. Hines unequivocally testified that she obtained express permission to use the vehicle in a phone call made to Beard on the morning of the accident. She provided an unequivocal answer of "yes" in writing to MAIPF's inquiry as to whether she had permission to use the vehicle. In her deposition, she not only stated that she placed the call to Beard on the morning of the accident but also provided the number of the device she used to make the call.

Counsel: Did you -- what -- can you describe the conversation you had with Mr. Beard?

Hines: Yes. I called him. And when he answered the phone, I said, 'My sister not answering the phone. Can I please drive your car to go pick up my daughter from school?' He asked was Latrelle William awake. And I said yes, but he didn't feel like driving. And I said, 'I really have to go to get the -- my child from school.' And that's when he said, 'You can go. Just get her and come straight back to the car. And when you get back to the house, tell Latrelle to bring my car.'

Beard's testimony regarding the phone conversation was less emphatic but he confirmed that it occurred.

Counsel: The morning of March 15th, 2018, did you talk to Michelle Hines?

Beard: I believe so.

Counsel: What was the conversation about?

Beard: The vehicle.

Counsel: What was -- what did the conversation entail?

Beard: That -- pretty much selling the vehicle.

Beard's testimony on the nature of the conversation was vastly different than Hines' version.

Counsel: Did Michelle or Latrelle ever have to ask you for permission to drive the vehicle?

Beard: I guess, yes.

Counsel: What do you mean by that?

Beard: Like I said, the vehicle wasn't running so it wasn't too many questions or conversations about it except trying to get it up and running. Nobody really had a conversation about driving the vehicle.

Counsel: So on March 15th, 2018, did Michelle Hines ask you to borrow the vehicle?

Beard: No.

* * *

Counsel: I want to make sure I have some clarification. The vehicle, when it was left at Ms. Hines and Mr. Williams home, what was the understanding of whether or not anyone had permission to drive the vehicle or was it just not to be driven?

Beard: Actually, there was no conversation about it at all.

Counsel: So at no point did you give Ms. Hines or Mr. Williams permission to drive the vehicle?

Beard: True

MAIPF submitted cellular phone records for Hines's telephone number from the day of the accident to show that there was no phone call from the number Hines provided in her deposition to Beard's phone number on the day of the accident. The circuit court granted the motion for summary disposition and this appeal ensued. On appeal, Hines argues that genuine issues of material fact existed as to whether she unlawfully took the vehicle, i.e. had permission to use it, and whether she made a material misrepresentation on the application for benefits to MAIPF.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id.* at 120. "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). We review the evidence in the light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120.

The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to

present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto*, 451 Mich at 362-363].

“A genuine issue of material facts exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). In reviewing a motion for summary disposition the courts “may not resolve factual disputes or determine credibility in ruling on a summary disposition motion.” *Burkhardt v Bailey*, 260 Mich App 636, 646–647; 680 NW2d 453 (2004). See also *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) (“The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment.”).

III. ANALYSIS

MAIPF argued below, as it does here, that Hines falsely and knowingly represented that she had permission to use the vehicle involved in the accident in her claim forms and in her deposition testimony. MAIPF claims that these misrepresentations were material. “A statement is material if it is reasonably relevant to the insurer’s investigation of a claim.” *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 425; 864 NW2d 609 (2014) (citation omitted). The parties have no dispute as to whether Hines had permission to use the vehicle was relevant to the insurer’s ultimate decision in the investigation of the claim concerning Hines’s eligibility for benefits.

The court held:

Plaintiff has not presented any evidence to show that she did not know that the statement was false in her deposition of the conversation or the numbers. No reasonable jury would come to the conclusion that plaintiff called Mr. Beard on the day of the accident to ask permission. And the phone records show otherwise. And Mr. Beard testified otherwise. There’s only her own self-serving statement. And there was no dispute that whether Hines had permission to drive the vehicle was material to the claim.

Therefore, the Court finds there’s no genuine issue of material fact that Plaintiff Hines presented a cause [sic] to be presented statements as part of or in support of her claim to the MAIPF knowing that statements contained false information concerning her claim. Thus, plaintiff’s claim is ineligible for payment of benefits pursuant to MCL 500.3173(A)(2).

We agree with the trial court that only Hines testified that she was given express permission to use the vehicle via a phone call on the morning of the accident. We also agree that she represented that she was a permissive user in her application for benefits. Finally, we agree that, despite her post deposition assertion that she erred regarding which phone was used to place the call to Beard, there is no competent evidence that any phone call originated from Hines’ number to Beard’s on the day of the accident. We do however, disagree with the court’s conclusion that no material question of fact remains regarding permissive use.

The phone records are un rebutted as to whether a call originated between the two numbers provided by Hines at her deposition. However, both Hines and Beard testified that a phone conversation occurred that morning, albeit they disagreed as to the content of that conversation. Hines testified that she spoke to Beard regarding use of the vehicle on the morning of the incident and that she was given permission to use that vehicle during that call. Beard admitted receiving Hines's call, but denied giving her permission to use the vehicle in the call. Hines's testimony alone is sufficient to raise a question of fact on the nature of the conversation. The phone records are not dispositive of the contents of the call which both parties to call admit occurred. Assuming at trial, Hines testifies that she used another phone to reach Beard, she will be subject to blunt impeachment. Her only path to recovery will be to establish that she was given express permission on the day of the incident in a phone call. The fact-finders will then resolve the conflicting testimony because, as the jury instruction reads, the fact finders "are free to believe all, none, or part of any person's testimony." M Civ JI 97.13.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Kirsten Frank Kelly
/s/ Michael J. Riordan