SECREST WARDLE

no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

Nothing but the Proof: Court of Appeals reaches different results in applying *Bahri*

By: Paul Shkreli and Drew W. Broaddus **July 15, 2016**

SECREST WARDLE NOTES

In *Bahri v IDS Property Cas Ins Co*, 308 Mich App 420 (2014), the Court of Appeals held that a fraud exclusion in an automobile no-fault policy can be applied to bar a claim for PIP benefits, and that the existence of fraud can be determined on summary disposition where no genuine issues of material fact exist.

Although unpublished, *Thomas v Frankenmuth* and *Sampson v Home-Owners* lend insight into how fraud exclusions can be applied to first-party no-fault claims following *Bahri*.

In *Thomas*, the court was unmoved by the plaintiff's argument that his deposition testimony regarding his inability to drive were a mistake, noting they were reckless, if not knowing, misrepresentations.

In *Sampson*, on the other hand, the same panel found that surveillance footage of the plaintiff performing various tasks, during a relatively narrow window of time, did not directly contradict his deposition testimony and therefore, the insured had not established fraud, distinguishing *Bahri*.

* * *

The Michigan Court of Appeals recently released two decisions applying *Bahri* to insurers' claims that the plaintiff's fraudulent representations disqualified them from recovering PIP benefits. The first of these, *Thomas v Frankenmuth Mut Ins Co*, an unpublished opinion per curiam of the Court of Appeals, issued July 12, 2016 (Docket No. 326744), dealt with a plaintiff's appeal from a trial court order granting summary disposition to an insurer pursuant to *Bahri*.

The *Thomas* plaintiff was involved in a motor vehicle accident on July 6, 2013. One of the plaintiff's treating physicians instructed him not to drive from July 2013 through January 2014. But the insurer's surveillance, conducted on November 18, 2013, revealed Plaintiff driving a vehicle on two separate occasions, yet using medical transportation to attend his physical therapy appointments.

The insurer discontinued benefits, and the plaintiff filed suit. The insurer moved for summary disposition, pursuant to MCR 2.116(C)(10), arguing the fraud exclusion in the policy barred the plaintiff's claims. The policy provided, in relevant part: "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." *Thomas,* unpub op at 2.

In its motion, the defendant argued that the surveillance videos demonstrated that the plaintiff was driving during the same time period he was proscribed from doing so by his treating physician. Also, at his deposition, plaintiff denied driving during the relevant time period. A large portion of his claim was for transportation costs to and from his appointments. In response, plaintiff argued that the defendant had not established several of the elements of fraud, including the materiality of plaintiff's representation that he did not drive during the relevant time period. Plaintiff also claimed that he lacked the requisite intent to defraud the defendant.

The trial court, relying on *Bahri*, held that plaintiff's conduct in driving an automobile on the same day he received medical transportation services, along with his statements at his deposition, constituted fraud under the policy. As such, the trial court granted the insurer's motion for summary disposition. Plaintiff appealed by right, and the Court of Appeals affirmed.

In affirming, the panel noted that rules of contract interpretation apply to the interpretation of insurance contracts, meaning the language in the contract must be construed to give effect to every word, clause, and phrase. When the policy language is clear, a court must enforce the specific language of the contract. The Court further reviewed the requirements for establishing fraud with regard to an insurance policy's fraud exclusion (the same elements recited in *Bahri*):

> To void a policy because the insured has willfully 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 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. *Thomas*, unpub op at 3.

The Court drew a parallel between *Thomas'* facts and *Bahri*, and found that the *Bahri* decision compelled the same result in this case. The *Thomas* plaintiff's claim for PIP benefits involved a claim for transportation services due to his purported inability to drive. This claim was directly contradicted by surveillance footage of the plaintiff driving his vehicle multiple times on the same day he used medical transportation services. When provided a chance to explain why he drove on that particular day, plaintiff doubled-down on his assertion, representing multiple times he had not driven ***at all*** during the relevant time period. As such, these representations were "reasonably relevant to the insurer's investigation of the claim." *Bahri*, 308 Mich App at 425.

The *Thomas* panel rejected the plaintiff's argument that he actually required transportation services, in contrast to the plaintiff in *Bahri* who was not observed receiving the specific services. The panel rejected Thomas' argument that that his repeated assertions during his deposition, that he did not drive, were innocent mistakes. Rather, the panel found that if they were not knowing misrepresentations, then they

were certainly reckless ones in the face of the proof that he drove his car at least twice on the same day he used transportation services.

But the same three-judge panel (Judges Kathleen Jansen, Karen Fort Hood, and Mark Boonstra) reached a very different result two days later in *Sampson v Home-Owners*, an unpublished opinion per curiam of the Court of Appeals, issued July 14, 2016 (Docket No. 326561). In *Sampson,* the plaintiff was injured in a December 20, 2012 motor vehicle accident, and late filed suit seeking payment for replacement services, such as driving and running errands, which were provided by Ciara Beard. Beard submitted a household services statement for March 2013, which is the statement at issue in this case. The applicable policy contained the following general fraud exclusion: "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." *Sampson,* unpub op at 2.

The insurer acquired surveillance video showing plaintiff driving, lifting objects, and running errands on March 6, 2013, and March 9, 2013. The insurer moved for summary disposition under MCR 2.116(C)(10), contending that the videotape evidence established that plaintiff engaged in fraud in connection with his claim for replacement services and that his claim for benefits was therefore barred under the fraud condition in the insurance policy. In response, the plaintiff claimed that the videotape evidence did not disprove his claim that he required and received assistance at other times during those days based on his fluctuating pain levels. The trial court agreed with plaintiff and denied the insurer's motion, reasoning, "He could have, for all I know, not needed medication until noon and so drove, and lifted a 10- or 15-pound bike not above his waist before noon. And then by later in the afternoon the pain hits, he takes medication, and he needed a ride later that day." *Sampson,* unpub op at 2.

The Court of Appeals affirmed, *Sampson,* unpub op at 4, finding:

> The videotapes only depict plaintiff at several points during the day on March 6, 2013 and March 9, 2013, and they do not depict plaintiff's conduct during every hour of the relevant days. Plaintiff contended that he could perform certain tasks during certain times of the day when his pain level was not too high and his pain medication did not prevent him from doing so. There is nothing depicted on the videotapes that contradicts plaintiff's position or establishes that the services were never performed on those days. Beard is depicted in the March 9, 2013 videotape recording, which further supports plaintiff's contention that Beard provided replacement services for him on the days in question. Additionally, defendant did not prove falsity because the forms do not establish on what dates the driving and errand-running services were claimed. Again, the squares are not prenumbered to correspond with the dates of the applicable month, no numbers were added, and there were no affidavits or testimony to otherwise establish what entries corresponded to what dates. Accordingly, the trial court correctly concluded that there was a genuine issue of material fact with regard to whether plaintiff's conduct on the videotape recordings indicated that plaintiff committed fraud….

The panel distinguished *Bahri*, as the fraud in that case was far more apparent (the *Bahri* plaintiff sought, among other things, compensation for replacement services provided during the 19 days before the accident). *Sampson*, unpub op at 4.

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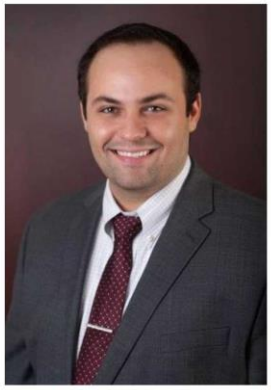

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