STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM HALL, Plaintiff-Appellant,	UNPUBLISHED December 22, 2009
v	No. 288345 Oakland Circuit Court LC No. 04-057715-CK
ALLSTATE INSURANCE COMPANY, and REBECCA BAILEY, Defendants-Appellees.	

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

This case arose from a claim made by plaintiff to defendant Allstate Insurance Company for damages related to the theft of his automobile, a 1995 Mercedes Benz S500, on December 24, 2002. Plaintiff appeals as of right the trial court's grant of partial summary disposition to defendants pursuant to MCR 2.116(C)(8) and (10). We affirm.

I. Summary of Facts and Proceedings

In 2001 and 2002, plaintiff worked part-time as a general helper at Page Toyota. During his employment, plaintiff became interested in a used 1995 S500 Mercedes. Plaintiff ultimately purchased the Mercedes on December 19, 2002 for $35,000. According to plaintiff, the vehicle was covered by a full 24-month warranty under an extended warranty from Page Toyota. In addition, at the time he purchased the vehicle, he also purchased an insurance policy through the dealer that "in the event of a Total Loss, Constructive Total Loss, or Unrecovered Theft, The Seller/Lender/Lessor will apply the proceeds of the GAP coverage against the outstanding loan/lease balance." Plaintiff insured the vehicle under a policy issued by defendant Allstate. On December 24, 2002, plaintiff reported the vehicle stolen, filing a police report and notifying defendant of the theft. The vehicle was recovered shortly after being stolen. The vehicle's engine had been completely removed. Plaintiff stated in his initial recorded statement that when the vehicle was returned, the "ignition was messed up."

Plaintiff's claim was originally reviewed by a representative in its claims department who flagged the claim as suspicious and referred it to Rebecca Bailey, an agent in Allstate's Special Investigations Unit. Bailey conducted an investigation to determine whether the claim was valid or fraudulent. The investigation included obtaining a recorded statement on January 7, 2003, taking plaintiff's examination under oath (EUO) on March 19, 2003, obtaining records related to

the purchase of the car, obtaining records related to the maintenance history of the car and a review and analysis of those records by a certified master mechanic.

Allstate ultimately denied the claim. On April 17, 2003, Bailey sent a denial letter to plaintiff in care of his attorney. The letter was captioned "**PERSONAL AND CONFIDENTIAL TO BE OPENED AND READ BY ADDRESSEE ONLY**." The letter stated that the claim was being denied because Allstate had concluded that plaintiff's claim fell within a policy exclusion that bars coverage for "loss caused intentionally by or at the direction of an insured person." The letter went on to specify the grounds for denial as follows:

> You are not entitled to recovery under the policy of insurance for the following reasons:
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> 1. The loss of the 1995 Mercedes S500 did not occur as claimed and was caused intentionally by you or others at your direction or acquiescence.
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> 2. In your Affidavit of Automobile Total Theft, your Sworn Statement in Proof of Loss and in your testimony during your Examination under Oath, you have committed fraud and false swearing and have misrepresented the facts and circumstances concerning the loss, the condition of the vehicle prior to and at the time of loss, the nature of the loss and the extent of the loss, with the intent that Allstate rely upon said representations in honoring your claim, all contrary to the provisions of the policy and Michigan common law.
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> 3. You have failed to provide the Company with full and complete documentation concerning your financial condition, income and credit history, contrary to the conditions precedent in the policy of insurance set forth above, thereby denying it an opportunity to determine if there are other bases upon which the Company has a right to deny your recovery under the policy of insurance.
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> 4. The amount claimed to be the actual cash value of the vehicle at the time of the loss is greatly in excess of the real actual cash value of the vehicle.

The letter also stated that the letter was being provided to plaintiff "in confidence."

On April 21, 2004, plaintiff filed suit against Allstate for breach of contract, declaratory relief that payment was due under the policy, intentional infliction of emotional distress, violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.* (MCPA), and violation of MCL 500.2006 under the Michigan Insurance Code. On October 27, 2004, plaintiff filed an amended complaint, adding Bailey as a defendant and adding counts of tortious interference with a contract and tortious interference of an expectancy interest against Bailey and vicarious liability against Allstate.

In August 2005, Allstate filed for summary disposition on all counts except for plaintiff's breach of contract and declaratory relief. Plaintiff agreed to the dismissal of the vicarious liability count and the claim to attorney fees under the insurance code, but denied that summary disposition was appropriate as to any other counts. The trial court held a hearing and granted Allstate's motion at its conclusion.

The breach of contract claim proceeded to trial. The jury concluded that the loss of the vehicle was not caused intentionally by or with the consent or knowledge of plaintiff and awarded him $15,000 for his breach of contract claim. Allstate moved for a judgment notwithstanding the verdict or, alternatively, a new trial on damages because, under the policy, Allstate's liability was limited to "the least of" either "the actual cash value of the property or damages part of the property at the time of loss, which may include a deduction for depreciation" or "the cost to repair or replace the property or part to its physical condition at the time of the loss . . . ." Allstate argued that plaintiff failed to provide any evidence regarding the cost or value of a like-kind engine for the vehicle, instead arguing that he was entitled to the full value of the vehicle or an amount in the good judgment of the jury. Defendant argued that by failing to provide the jury with any evidence of what it would cost to replace the engine, the plaintiff required the jury to determine damages based on speculation.

Judgment was originally entered on June 2, 2006, for $16,936.01, inclusive of interest and costs. However, on June 6, 2006, the trial court agreed with Allstate that the jury's allocation of damages "was based on speculation" and granted a new trial as to damages. On September 26, 2008, the parties entered into a settlement and order that entered judgment for plaintiff in the amount of $8,000 as to the breach of contract claim. Plaintiff now appeals the trial court's dismissal of his non-contract claims.

II. Standard of Review

"We review de novo a trial court's determination regarding a motion for summary disposition." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). For a motion brought under MCR 2.116(C)(10), we review the pleadings, admissions, and other evidence in the light most favorable to the nonmoving party and, if there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 466-467. For a motion brought under MCR 2.116(C)(8), we consider only the pleadings. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Such a motion tests the legal sufficiency of the complaint, taking all well-pleaded factual allegations as true and in the light most favorable to the nonmoving party. *Id.* at 119. A motion under MCR 2.116(C)(8) is granted "only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

III. Intentional Infliction of Emotional Injury

Plaintiff alleged that the actions of Allstate and Bailey in denying his claim and accusing him of having been involved in the theft and lying about it were, "extreme and outrageous and taken with the explicit intent of denying plaintiff the benefits due him pursuant to the insurance agreement and to cause his reputation to be besmirched in the community including his loss of esteem, the loss of this credit and humiliation and embarrassment."

"To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). The trial court concluded that plaintiff did not offer sufficient evidence to create a question of material fact as to

defendant's extreme and outrageous conduct or as to defendant's intent or recklessness. We agree.

Taking the facts in the light most favorable to plaintiff we find no evidence in the record of harassment or an attempt to besmirch plaintiff's reputation. Defendants' letter made accusations against plaintiff that could reasonably cause a person innocent of those accusations[1] to experience emotional distress or even severe emotional distress. However, there is no evidence that this letter was sent to or published to any person other than plaintiff and his attorney. This fact weighs strongly against a finding of extreme and outrageous conduct in the issuance of the denial itself.

Having said that, however, we must consider not only whether plaintiff's reputation was besmirched by the investigation's conclusion, but also whether defendant's conduct during the investigation could reasonably be found to be extreme and outrageous. After a review of the entire record, we find no evidence of such conduct and conclude that a reasonable trier of fact could not conclude that such conduct took place.

Plaintiff argues that there was at least a fact question as to whether the conduct was outrageous, citing *McCahill v Commercial Union Ins Co*, 179 Mich App 761; 446 NW2d 579 (1989). However, the conduct complained of in *McCahill* went well beyond the insurer's denial of the claim or its denial letter asserting that the claimant had engaged in "arson, fraud, and false swearing." In *McCahill*, the defendant's agents engaged in the following activities: sent copies of the policy and proof of loss forms to the address of the burned residence rather than to the address that it knew the claimant had moved to; entered plaintiff's property on several occasions without the plaintiff's knowledge, consent, or presence; altered the fire scene without plaintiff's consent or knowledge; contacted the plaintiff at or near midnight and demanded that the plaintiff provide a proof of loss statement over the telephone; and the defendant procured a report that arson was the cause of fire when there was an internal document that indicated the cause and origin investigator found no evidence of arson. *Id.* at 769-770.

An insurer need not engage in conduct identical to or as egregious as was present in *McCahill* to reach the "extreme and outrageous" threshold. However, we do not believe that the confidential letter sent by defendants could be reasonably said to do so. Plaintiff has not argued that there was any other action by defendants that alone, or in combination with the letter, met the standard. Plaintiff does point out that defendants were aware that plaintiff had suffered a brain injury several years before and that this should have put defendants on notice that plaintiff was particularly vulnerable to emotional injury. We do not dispute that such knowledge may be relevant to the determination of the nature of defendant's conduct and intent. However, the mere fact that defendants investigated the case and reached the conclusion (ultimately determined by the jury to be erroneous) that the claim was fraudulent, without evidence of harassment or the absence of a good faith basis upon which to deny the claim,[2] does not constitute extreme or

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[1] Which, after hearing all the evidence at trial, the jury found that plaintiff was.

[2]As noted, there was no evidence of harassment in the instant case and defendants brought forth substantial evidence of a good faith basis for its findings. For example, the vehicle was designed

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outrageous conduct or an intent to cause emotional injury. Accordingly, we conclude that the trial court properly granted summary disposition on plaintiff's intentional infliction of emotional injury claim.

IV. Tortious Interference

Plaintiff alleged both tortious interference with a contractual relationship and tortious interference with a business expectancy against Bailey. "The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005).

> "The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." [*Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (citations omitted).]

This Court, in *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993), dealt with a tortious interference with economic relations claim and noted that "[i]t is now settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." Plaintiff has provided no evidence that Bailey acted solely for her own benefit and there is no evidence that she received any additional compensation or employment benefit for denying the claim. Therefore, the trial court properly granted summary disposition as to the tortious interference claims.

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with an anti-theft alarm system and a start lockout system that required a specifically programmed transmitter and an infrared key to open the doors and engage the starter. Plaintiff testified at his EUO that he was given two keys for the vehicle at the time of purchase, both of which remained in his possession at all times, even at the time of the theft. However, the responding police found no glass at or near where the Mercedes was parked prior to the theft and all of the windows were intact when it was ultimately recovered. Thus, there was no evidence of forced entry, and defendant's investigation concluded that the ignition cylinder, steering column and gearshift selector were all intact and remained in the locked position. Allstate also discovered that this claim was plaintiff's third stolen vehicle claim during a five-year period. Finally, Allstate obtained sale and repair records for the vehicle that its expert concluded evidenced a history of serious engine problems.

V. Consumer Protection Act

Plaintiff's final claim on appeal is that the trial court improperly granted summary disposition as to his claim that Allstate violated the MCPA by failing to make any payments to plaintiff without legal justification. Plaintiff relies on *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). In *Smith*, our Supreme Court considered MCL 445.904 of the MCPA. MCL 445.904(1) provides that the MCPA does not apply to:

> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

Our Supreme Court held that this provision exempted insurance sales from the MCPA because such transactions were "specifically authorized" as provided. At the time the Court decided *Smith*, however, MCL 445.904(2) provided:

> Except for the purposes of an action filed by a person under [MCL 445.911], this act does not apply to an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by:
>
> (a) Chapter 20 of the insurance code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws.

Relying on this exception, the Court concluded:

> Although [MCL 445.904(1)(a)] generally provides that transactions or conduct "specifically authorized" are exempt from the provisions of the MCPA, [MCL 445.904(2)] provides an exception to that exemption by permitting private actions pursuant to [MCL 445.911] arising out of misconduct made unlawful by chapter 20 of the Insurance Code. Therefore, the exemptions provided by [MCL 445.904(1)(a) and (2)(a)] are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code. [*Smith*, *supra* at 467.]

Thus, plaintiff is correct that under *Smith*, MCPA claims were permissible under MCL 445.911. *Id.* at 467-468. However, after *Smith* was decided, the Legislature amended MCL 445.904, pursuant to 2000 PA 432, effective March 28, 2001, and eliminated the ability to bring an MCPA claim against an insurance company. That amendment added MCL 445.904(3), which provides:

> This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093.

Thus, the Legislature's amendment statutorily overruled the exception set forth in *Smith* upon which plaintiff seeks to rely.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borello
/s/ Douglas B. Shapiro