

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE M. STAPLETON,

Plaintiff-Appellee,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

July 24, 2007

No. 273392

Mainstee Circuit Court

LC No. 03-011337-NF

Before: Schuette, P.J., and O’Connell and Davis, JJ.

DAVIS, J. (*concurring in part and dissenting in part*).

I agree with my colleagues’ determination that defendant was not entitled to a jury trial on the basis of its contentions that plaintiff lacked credibility.¹ I respectfully disagree with my colleagues’ decision to reverse and remand on the basis of plaintiff’s alleged false statements.

It is undisputed that the no-fault insurance policy at issue in this case contains the following provision:

¹ Irrespective of who has the burden of proof at trial, the nonmoving party cannot survive a motion for summary disposition pursuant to MCR 2.116(C)(10) without some affirmative showing that a genuine factual issue actually exists for trial. Defendant failed to do so, asserting only that the jury might plausibly choose to disbelieve plaintiff’s theory. As the trial court admonished defendant below, “if that argument is the test, a party can always come in and say, well, we don’t really have any evidence to contravene what’s been said except we just don’t believe him. So therefore there’s got to be a trial.” As the majority explained, the nonmoving party may not survive a motion for summary disposition by denials alone.

There is no coverage under this policy if you or any other person insured under this policy has [sic] made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

Unfortunately, defendant has not provided a copy of the actual policy, either to this Court or to the trial court. See MCR 2.113(F) and the comments thereto. Apparently, this Court must accept the policy language in a vacuum, without the benefit of the context that might be provided by the rest of the policy. This is not helped by the fact that part of the provision is phrased in the past tense, implying false statements made prior to executing the policy contract, and part of it is clearly specific to an insured's claim, implying false statements made during the investigation of a particular claim. It does not appear that any meaningful attempt to parse the language has been undertaken.

Defendant argues that plaintiff had previously required medical treatment for lower back problems, yet at his recorded statement and examination under oath, he indicated that any prior problems he had with his back were minor or only for his upper back. Therefore, defendant asserts that there is at least a question of fact whether plaintiff made the kind of false statements prohibited by the anti-fraud provision of the policy. The majority correctly states that the trial court did not address this question. However, my review of the record reveals that the trial court did not address this issue because defendant did not make this argument to the trial court, and in fact defendant's position below was inconsistent with the position defendant takes now. This Court has the discretion to consider unpreserved issues. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). I do not believe this is an appropriate case for doing so.

Defendant ostensibly raised the issue of the anti-fraud policy provision in its response brief to plaintiff's first motion for summary disposition – but defendant argued that the policy provision was implicated by the possibility that the jury's credibility assessment of plaintiff might lead to the conclusion that plaintiff had staged the accident, *not* that he had misrepresented his prior medical problems as a *per se* violation of the policy. The remainder of defendant's pleadings and arguments to the trial court at hearings reflects the same context: defendant's concern was whether any disability plaintiff might genuinely be suffering was actually caused by the accident. In fact, defendant's arguments concerned allegations that plaintiff had misrepresented facts regarding *the accident itself*, and his statements about prior back problems allegedly supported the defendant's central theory, which was that *the accident was staged*. Defendant argued that there were credibility issues surrounding “whether or not [plaintiff] committed any misrepresentations or false swearing in procuring the policy” and “whether he's telling the truth around the circumstances and facts of this accident.” But the former was in the context of why Delynn Curtis switched from a prior, paid-up policy to a new one with defendant when she did; and the latter again appeared to be referring to the actual accident, such as whether he ran over the manhole or just the manhole cover, whether he appeared injured or not immediately after the accident, when he first experienced pain, or whether he put his arm through the steering wheel.

In other words, defendant's argument strongly implied that the relevant policy provision pertained to falsehoods made prior to executing the policy agreement, or in order to obtain the policy agreement. In short, no meaningful argument was presented to the trial court to the effect that plaintiff's alleged misrepresentation of his back condition constituted a violation of the anti-

fraud provision of the policy. Rather, the argument presented was that the alleged misrepresentation suggested that plaintiff's injuries were preexisting and not caused by the accident, and that plaintiff ran afoul of the anti-fraud provision by staging the accident or by entering into the policy itself through the use of false statements. I cannot find any argument made by defendant below suggesting that plaintiff's statements about whether he had previously suffered back problems were *per se* violations of the policy; rather, defendant argued that plaintiff's statements indicated that his injuries predated the accident and therefore the accident was likely staged; the staging then being the alleged violation of the anti-fraud provision. Even defendant's final motion for reconsideration does not even mention the policy provision, arguing again only that plaintiff's contradictory statements suggested that plaintiff lied *about the accident*.

In summary, the precise argument now being addressed by this Court – whether plaintiff's apparently untrue statements about whether he had suffered lower back pain prior to the accident constitutes (or could constitute) a violation of the anti-fraud provision of the auto insurance policy – was *never actually made below*. More importantly, defendant's position below was that those statements had a completely different significance to the case – supporting the theory that plaintiff lied about the accident itself.

The “purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice.” *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Furthermore, “[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (quotation omitted). Defendant did not attempt to bring this argument to the trial court's attention. More importantly, defendant's consistent theory of the case below was that the anti-fraud provision was violated because plaintiff lied about the facts and circumstances of the accident itself. Defendant's position prior to this appeal was that plaintiff's statements about his back pain cast doubt on whether the accident actually occurred, or whether it occurred as he described it. Defendant's argument that plaintiff's false statements about whether he previously suffered back pain are *in the abstract* violations of the anti-fraud policy are new on appeal.²

I am therefore of the opinion that the combination of factors at work in this case – defendant's failure to make this argument below, the inconsistency between defendant's argument on appeal and defendant's argument below, and the skeletal nature of the argument defendant makes on appeal – make consideration of this issue inappropriate. I respectfully disagree with my colleagues' decision to reverse and remand on this basis.

/s/ Alton T. Davis

² I would further note that defendant does not explain how the statements are either material or clearly for the purpose of concealing or misrepresenting material facts connected to the claim.