[Cite as *Finger v. Liberty Mut. Personal Ins. Co.*, 2023-Ohio-2308.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

AARON FINGER, :

Plaintiff-Appellant, :

No. 112349

v. :

LIBERTY MUTUAL PERSONAL INSURANCE CO., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 6, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-944384

Appearances:

James E. Boulas Co., L.P.A., and James E. Boulas, *for appellant*.

Frost Brown Todd LLP, Frank S. Carson, and William M. Harter, *for appellees*.

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Plaintiff-appellant, Aaron Finger ("Finger"), appeals from the trial court's judgment granting the motion for summary judgment of defendant-appellee

Liberty Mutual Personal Insurance Company ("Liberty"). For the reasons that follow, we affirm.

I. Background

{¶ 2} Finger owned a single-family house on East 130th Street in Cleveland, Ohio that was used solely as a rental property (the "Property"). It is undisputed that he never lived at the Property.

{¶ 3} On October 28, 2019, Finger visited Liberty's online website to purchase insurance for the Property. The online application reflects that in response to the question "Do you currently have property insurance?" Finger said he had insurance through Geico that would expire on November 29, 2019. It is undisputed that Finger never had prior insurance on the Property, although he did have homeowners insurance through Geico on another property he owned.

{¶ 4} Finger found the online application too complicated and did not complete it. The next day, a Liberty representative telephoned him and helped him complete the remainder of the application. Finger contends that during this call, he advised the Liberty representative that the Property was used as a rental property. He also contends that Liberty recorded this call but subsequently deleted the recording.

{¶ 5} Following the call, Finger received via email a "Home Insurance Application" (the "Application") from Liberty. The Application asked Finger to "verify" his answers to the 11 listed questions "to ensure proper coverage." Finger

answered the questions and electronically signed the Application, which included the following "Applicant Authorization and Acknowledgement," in pertinent part:

> Signing this form does not bind the applicant to complete the insurance, but it is agreed that this form and the answers provided by you to questions asked as part of the application process shall be the basis of the contract should a policy be issued. In the event that any material misrepresentations, omissions, concealment of facts and/or incorrect statements are made by or on behalf of the insured during the application process, we may exercise whatever legal remedies may be available to us under the laws and regulations of this state.

{¶ 6} Liberty issued a homeowners policy of insurance (the "Policy") to Finger in October 2019, effective October 30, 2019, through October 30, 2020. The Declarations page of the Policy identified the Property on East 130th Street as the Insured Location and an address in Euclid, Ohio as Finger's mailing address. Following the Declarations page, the Policy contained a "Definitions" page, which stated that "'Insured Location" means the "residence premises.'" The Definitions defined "residence premises" as "[t]he one family dwelling, other structures, and grounds, or that part of any other building, where you reside and which is shown as the 'residence premises' in the Declarations." Under Coverages, the Policy stated that it covered "the dwelling on the 'residence premises' shown in the Declarations[.]"

{¶ 7} Regarding the "Conditions" of the Policy, the Policy stated:

> Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an "insured" has:
>
> a. Intentionally concealed or misrepresented any material fact or circumstance;
>
> b. Engaged in fraudulent conduct; or

c. Made false statements;

relating to this insurance.

{¶ 8} Finally, the Ohio Endorsement to the Policy provided that

> [t]he application for this policy is incorporated herein and made a part of this policy. When we refer to the policy, we mean this document, the application, the Declarations page, and any applicable endorsements. The Insured agrees that all of the statements in the application for this policy are his or her statements, and constitute warranties. The Insured agreed that this policy is issued in reliance upon the truth of the Insured's warranties in the application. If it is determined that any warranty made in the application is incorrect, this policy shall be void ab initio (void back to the date of inception) upon return of the policy premium.

{¶ 9} After a fire at the Property in May 2020, Finger sought coverage from Liberty for the damage caused by the fire. Liberty investigated the claim. During a recorded telephone call between Finger, who is Black, and Liberty's investigator, Karl Intemann, who is White, Intemann asked Finger if he owned any other real estate, to which Finger responded that he owned three properties. The following colloquy then occurred:

> Intemann: Yeah. And, um, do you have any mortgages on any of these properties?
>
> Finger: No.
>
> Intemann: No mortgages at all?
>
> Finger: None at all.
>
> Intemann: How was it you were able to afford buyin' (sic) these things?

{¶ 10} After completing its investigation, Liberty denied the claim because Finger did not live at the Property, as required by the Policy, which limits coverage

to the "residence premises." It also rescinded the Policy, declaring it to be null and void as of October 30, 2019, due to what it considered to be Finger's material misrepresentations. In its rescission letter to Finger, Liberty stated:

> This action has been taken by the Company because of what is believed to be material misrepresentations on your application for homeowners insurance. Specifically, the following information was undisclosed, concealed or otherwise misrepresented:
>
> You indicated that you had prior insurance, expiring on November 29, 2019. Our investigation has revealed this was not true, and that you did not have insurance on the property when you applied for this policy.
>
> Had we known about this information, we would not have issued this policy.

{¶ 11} Liberty also sent Finger a new Declarations page for the Policy, which stated that the reason for the new page was "Cancellation" of the Policy.

{¶ 12} In 2021, Finger filed suit against Liberty. He subsequently filed an amended complaint, asserting claims for breach of contract, bad faith, promissory estoppel, spoliation of evidence, intentional infliction of emotional distress, and declaratory judgment against Liberty.[1] Liberty answered the complaint and asserted a crossclaim against Loftus and two counterclaims for declaratory judgment. After discovery was completed, Liberty filed a motion for summary judgment.

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[1] Finger also sued Milton Loftus ("Loftus"), his tenant in the Property at the time of the fire. Although Loftus was served with the amended complaint, he never filed an answer. Because this appeal relates solely to Liberty's motion for summary judgment and the trial court issued a Civ.R. 54(B) entry following its judgment granting Liberty's motion, we have jurisdiction to proceed even though Finger's claim and Liberty's crossclaim against Loftus remain pending.

{¶ 13} In its motion, Liberty argued that except for the claim for intentional infliction of emotional distress, all of Finger's claims failed as a matter of law because even if Liberty had not rescinded the Policy and the claim were to be considered under the Policy, the Policy provides no coverage because Finger did not reside at the Property at the time of the fire, as required by the Policy. In short, Liberty contended that because the Property was not Finger's "residence premises" at the time of the loss, the Policy would not provide coverage for the claim, even if the Policy had not been rescinded.

{¶ 14} In his brief in opposition, Finger argued that Liberty's rescission of the Policy was unjustified because he made no representation on the online application that he had prior insurance on the Property. He asserted that Liberty's denial of the claim was likewise unjustified because he never represented to Liberty that he lived at the Property and, in fact, advised the Liberty representative who assisted with the application that the Property was a rental property. Further, he asserted that the Policy's "residence premises" requirement was ambiguous, especially because that term did not appear anywhere on the online application (instead, the application referred to "principal residence," "residential properties," "primary residence," and "primary residential") and nowhere did the application ask "Will you be living at the premises?" Last, Finger contended that Liberty's cancellation of the Policy was unjustified because Liberty did not provide him with the requisite notice regarding cancellation, as required by the Policy. Accordingly,

he argued that Liberty was not entitled to summary judgment on the breach of contract and bad-faith claims.

{¶ 15} With respect to the promissory estoppel claim, Finger argued that Liberty's promise on the emailed Application to "ensure proper coverage" upon his verification of his answers to the 11 questions on the Application caused him to rely on Liberty's promise of coverage and forgo buying homeowners insurance elsewhere. He argued that the spoliation of evidence claim was based on Liberty's destruction of the recorded telephone conversation between him and the Liberty representative wherein he allegedly told the representative that the Property was a rental property.

{¶ 16} Regarding the claim for intentional infliction of emotional distress, Finger argued that he experienced shock and mental and physical anguish as a result of Intemann's question "How is it you were able to afford buyin' (sic) these things?" — which Finger asserted was wholly inappropriate, especially when asked by a White man of a Black man. Finally, Finger contended he was entitled to declaratory judgment that Liberty wrongfully denied his claim and, further, to an order requiring Liberty to adopt and implement a written policy on racial profiling and stereotyping by its employees. Liberty filed a reply brief, again asserting that all of Finger's claims failed as a matter of law.

{¶ 17} The trial court subsequently granted Liberty's motion for summary judgment on Finger's claims against it and entered judgment in favor of Liberty on its counterclaims for declaratory judgment. The court found that Finger's breach of

contract claim was based on Liberty's denial of coverage, its alleged wrongful rescission of the Policy, and its cancellation of the Policy without notice. With respect to Liberty's denial of coverage, the court found that although some terms in the online application differed from those in the Policy, "the plain and ordinary definitions of the words in the Policy and application are not ambiguous about what is covered." The court found that by using the terms "principal residence" and "primary residence" on the application, "it is clear that Liberty's application is asking residents for the address of the place where they chiefly live." The trial court found the terms to be consistent with the Policy definition of "residence premises," and accordingly, it found that because Finger did not reside at the Property, as required by the Policy, there was no coverage for damage caused by the fire and, thus, Finger's breach of contract claim based on Liberty's denial of coverage failed as a matter of law.

{¶ 18} The court further found that Finger had no breach of contract claims for Liberty's alleged wrongful rescission and cancellation of his Policy without proper notice. The court reasoned that a breach of contract claim requires the non-breaching party to demonstrate damages but because Finger had not identified any damages from Liberty's rescission and cancellation of the Policy independent of those arising from its denial of the claim, and because Liberty properly denied coverage, Finger's breach of contract claims related to rescission and cancellation failed as a matter of law.

{¶ 19} With respect to the bad-faith claim the trial court found there were no genuine issues of material fact for trial because Liberty's denial of coverage because Finger did not live at the "residence premises" was a reasonable justification to deny the claim. Regarding Finger's promissory estoppel claim, the trial court found that in light of the unambiguous language of the Policy, which required Finger to live on the "residence premises," any reliance by Finger on the promise of coverage in the Application was not reasonable.

{¶ 20} Regarding Finger's fraud claim, the trial court found that Finger had not produced evidence that Liberty intended to mislead him at any point nor identified any statements by Liberty that were false. Accordingly, the court found he could not prevail on a fraud claim.

{¶ 21} With respect to the spoliation of evidence claim based on the deletion of the recorded telephone call between Finger and the Liberty representative, the trial court found that Finger had not produced any evidence regarding when the phone record was deleted. Accordingly, the trial court found that Finger could not satisfy all the elements of a spoliation claim, which require the plaintiff, among other things, to show the defendant's knowledge of pending or probable litigation involving the plaintiff when the evidence is destroyed.

{¶ 22} Finally, with regard to the intentional infliction of emotional distress claim, the trial court found that Intemann's question did not rise to the level of outrageousness required by Ohio courts to give rise to a claim for intentional infliction of emotional distress and, accordingly, the claim failed as a matter of law.

{¶ 23} Finger filed a timely appeal of the trial court's judgment granting summary judgment to Liberty.

II. Law and Analysis

{¶ 24} In his five assignments of error, Finger contends that the trial court erred in granting Liberty's motion for summary judgment.

A. Standard of Review

{¶ 25} An appellate court reviews the grant or denial of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). In a de novo review, this court affords no deference to the trial court's decision and we independently review the record to determine whether the granting of summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12 (8th Dist.).

{¶ 26} Summary judgment is appropriate if after construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion that is adverse to the party against whom the motion for summary judgment is made. *Grafton* at 105, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 631 N.E.2d 150 (1994).

{¶ 27} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial

responsibility of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing there is a genuine issue of material fact. *Id.*

B. General Insurance Principles

{¶ 28} "An insurance policy is a contract whose interpretation is a matter of law." *Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 6. Courts must "examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. In doing so, courts "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Id.* "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Id.* "Where, however, the provisions of an insurance policy are 'reasonably susceptible to more than one interpretation,' the ambiguity in the policy language is construed against the insurer and liberally in favor of the insured." *Raudins v. Hobbs*, 2018-Ohio-2309, 104 N.E.3d 1040, ¶ 26 (8th Dist.), quoting *Sharonville* at *id.* Nevertheless, a court may not employ the general rule of liberal construction to create an ambiguity where one does not exist. *Progressive Ins. Co. v. Heritage Ins. Co.,* 113 Ohio App.3d

781, 784 682 N.E.2d 33 (8th Dist.1996), citing *Karabin v. State Auto Mut. Ins. Co.*, 10 Ohio St.3d 163, 166, 462 N.E.2d 403 (1984).

C. Breach of Contract

{¶ 29} Our de novo review demonstrates that the trial court did not err in granting summary judgment to Liberty on Finger's breach of contract claim. As noted above, the Policy states that Liberty will "cover" "[t]he dwelling on the 'residence premises' shown in the Declarations." "Residence premises" is defined in the Policy as "[t]he one family dwelling * * * or [t]hat part of any building *where you reside* and which is shown as the 'residence premises' in the Declarations." (Emphasis added.) Thus, under the Policy, for property coverage to apply at a loss location, the location (1) must be shown in the Declarations; and (2) must be where the insured resides. *See, e.g., Riley v. Liberty Ins. Corp.*, N.D.Ohio No. 3:17 CV 1595, 2019 U.S. Dist. LEXIS 104333 (June 21, 2019) (construing identical language and holding that dwelling coverage following a fire loss exists only when the loss location is listed as the insured location on the declarations page and is where the insured resides on the date of the fire).

{¶ 30} It is undisputed that Finger did not live at the Property at the time of the fire, or at any other time. Accordingly, the Property was not a "residence premises" under the Policy. Because the Policy did not afford coverage for property that was not Finger's "residence premises," Liberty properly denied the claim. Thus, Liberty's denial was not a breach of contract and it was entitled to judgment as a matter of law on Finger's breach of contract claim.

{¶ 31} In his first assignment of error, Finger argues that Liberty was not entitled to summary judgment, however, because the Policy is ambiguous. Specifically, Finger claims that the undefined terms "principal residence," "primary residence," and "primary residential" appear in the online application but do not appear in the Policy, while the defined phrase "residence premises," which is found in the Policy and upon which Liberty relied to deny coverage, does not appear anywhere in the application documents. Finger contends that pursuant to the Ohio Endorsement on the Policy, the application documents are incorporated into and made part of the Policy and, therefore, the Policy is ambiguous. Finger's argument is without merit.

{¶ 32} There is no ambiguity in the Policy; it provides coverage at the property "where you reside and which is shown as the 'residence premises' in the Declarations." Ohio and federal courts have already determined that identical "residence premises" language was "clear and unambiguous" and therefore enforceable. *See Riley*, N.D.Ohio No. 3:17 CV 1595, 2019 U.S. LEXIS 104333; *Whitaker v. Grange Mut. Cas. Co.,* 2d Dist. Montgomery No. 20474, 2004-Ohio-5270, ¶ 18; *Spangler v. Wenninger*, S.D.Ohio No. 1:06 CV 229, 2008 U.S. Dist. LEXIS 75571 (Sept. 9, 2008). Because the Property was not Finger's "residence premises," there is no coverage under the Policy.

{¶ 33} Furthermore, the online application does not create any ambiguity in the Policy. It is axiomatic that a court must "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from

the contents of the policy." *Westfield Ins.*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849, at ¶ 11. Although Finger takes issue with the trial court's reference to the dictionary definitions of "primary," "principal," and "resident" in determining that the online application asks the insured "for the address of the place where they chiefly live," "the fact that a court resorts to checking the definition of a particular word in a dictionary, as the trial court did here, does not mean the document is ambiguous." *Com. Intertech Corp. v. Guyan Interntl. Inc.*, 11th Dist. Portage No. 99-P-0119, 2001 Ohio App. LEXIS 1556, 5 (Mar. 30, 2001). A dictionary definition "is a reliable source for finding the plain and ordinary meaning of a word." *Id.*

{¶ 34} The trial court concluded, as we do, that the language in the online application asking for the applicant's "principal residence," "primary residence," and "primary residential" are consistent with the Policy definition of "residence premises." That is, the application and the Policy unambiguously contemplate coverage for the place where the insured resides. Because Finger did not reside at the Property, it was not his "residence premises," "principal residence," or "primary residence," and there is no coverage under the plain and unambiguous terms of the Policy.

{¶ 35} Finger also contends that the trial court erred in granting summary judgment on the breach of contract claim because the trial court ignored language in the emailed Application that "ensured proper coverage" upon his verification of his answers to the 11 questions on the Application. Finger contends that his verification of his answers to the questions — none of which asked if he lived at the

Property — guaranteed coverage for his rental property, despite the language in the Policy specifying that only Finger's "residence premises" was covered. Finger also contends that Liberty was on notice that the Insured Location was his rental property because the emailed Application listed a different mailing address for him than that of the Insured Location. Finger argues that "these conflicting provisions" create an ambiguity that can only be resolved by a trier of fact and not on summary judgment as a matter of law.

{¶ 36} Finger's argument is without merit because there is no ambiguity between the Application and the Policy. The Applicant Authorization and Acknowledgement section of the Application, which Finger signed, expressly provides that the Application is nonbinding ("the answers provided by you to questions asked as part of the application process shall be the basis of the contract *should a policy be issued*." (Emphasis added.) Accordingly, despite Finger's assertion otherwise, Liberty did not guarantee coverage upon Finger's verification of his answers to the 11 questions on the Application.

{¶ 37} Furthermore, although the Application lists a mailing address for Finger different than the Insured Location, the Application specifically refers to the "Insured Location" as "Principal Residence." Nowhere does the Application refer to a "residence premises" for Finger that is different than the Insured Location. Moreover, the fact that Finger listed a mailing address other than the Insured Location did not put Liberty on notice that he did not live at the Property. *See Spangler*, S.D.Ohio No. 1:06 CV 229, 2008 U.S. Dist. LEXIS 75571, at 16 (where

plaintiff did not live at the property at the time of the loss but argued that the insurer waived the non-residence exclusion because she provided a different mailing address than that of the insured property, the court found that the insurer did not have sufficient notice that the plaintiff was not living at the property because merely "providing a mailing address different from that of the property is not necessarily an indication that [plaintiff] was not living at the address").

{¶ 38} The Policy terms are unambiguous, and the plain language of the Policy must be applied. Because the Property was not Finger's "residence premises," the Policy does not provide coverage for the Property and, therefore, Finger's breach of contract claim fails as a matter of law. The first assignment of error is overruled.

D. Promissory Estoppel

{¶ 39} In his second assignment of error, Finger contends that the trial court erred in granting summary judgment on his promissory estoppel claim.

{¶ 40} To establish a claim for promissory estoppel, a plaintiff must show (1) a clear and unambiguous promise; (2) reliance on the promise; (3) that the reliance is reasonable and foreseeable, and (4) that he was injured by his reliance. *Stern v. Shainker*, 8th Dist. Cuyahoga No. 92301, 2009-Ohio-2731, ¶ 6.

{¶ 41} Finger argues that his promissory estoppel claim arises from Liberty's rescission of the Policy because the Application remained in effect after the Policy was rescinded. He argues that in reliance on Liberty's promise of "proper coverage" upon his verification of his answers to the questions in the Application, he reasonably believed the Insured Location was properly insured and did not seek to

purchase insurance elsewhere. Finger's argument is without merit because he could not reasonably rely on a promise of "proper coverage" in the Application.

{¶ 42} First, the Application expressly and unambiguously refers to the Insured Location as a Principal Residence — not a rental. As the trial court correctly found, "Principal Residence" is unambiguous as a matter of law; it refers to where the insured actually lives. Because the Insured Location identified in the Application was not Finger's "Principal Residence," he could not reasonably believe, based on the Application, that he had coverage for a rental property.

{¶ 43} Second, the Application expressly states it is an "Application" and "does not bind" coverage. It further states that a future contract will exist "should a policy be issued." These express disclaimers tempered any representation of "proper coverage," and accordingly, there was no "clear and unambiguous promise" of coverage upon which Finger could rely. *See Cleveland Bldrs. Supply Co. v. Farmers Ins. Group of Cos.*, 102 Ohio App.3d 708, 657 N.E.2d 851 (8th Dist.1995) (summary judgment properly granted to insurer on plaintiff's promissory estoppel claim where although agent intimated to insured that umbrella coverage would likely be approved, the application contained an express disclaimer that the application did not bind coverage).

{¶ 44} Finally, we observe that Finger's argument that he could rely on the Application after the Policy's rescission is inconsistent with his earlier contention that the Application was incorporated into the Policy by virtue of the Ohio Endorsement to the Policy ("The application for this policy is incorporated herein

and made a part of this policy."). If the Application was part of the Policy, it too was rescinded upon the rescission of the Policy and, like the Policy, was therefore void.

{¶ 45} Nevertheless, assuming for the sake of argument that the Application existed separately after rescission of the Policy, because it expressly and unambiguously pertains to a "Principal Residence," not a rental, and is non-binding, Finger could not reasonably rely upon the Application as a source of property coverage. Absent reasonable reliance, his promissory estoppel claim fails as a matter of law. Accordingly, the trial court properly granted summary judgment on this claim and the second assignment of error is overruled.

E. Bad Faith

{¶ 46} Next, Finger contends, without pointing to any evidence, that the trial court erred in granting summary judgment on the bad-faith claim because a jury should decide whether Liberty's failure to pay his claim was in bad faith.

{¶ 47} An insurer has a duty to act in good faith in handling a claim. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 275, 452 N.E.2d 1315 (1983). "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 554, 644 N.E.2d 397 (1994). Denial of a claim may be reasonably justified, however, when the claim is "fairly debatable and the refusal is premised on either the status of the law at the time of the denial or the facts that gave rise to the claim." *Tokles & Son, Inc. v. Midwestern Indem. Co.,* 65 Ohio St.3d 621, 630, 605 N.E.2d 936 (1992).

"'The test, therefore, is not whether the insurer's decision to deny benefits was correct but whether the decision to deny benefits was arbitrary or capricious and there existed a reasonable justification for the denial.'" *Barbour v. Household Life Ins. Co.,* N.D.Ohio No. 1:11 CV 110, 2012 U.S. Dist. LEXIS 46004, 13 (Apr. 2, 2012), quoting *Thomas v. Allstate Ins. Co*., 974 F.2d 706, 711 (6th Cir.1992).

{¶ 48} In its motion for summary judgment, Liberty pointed to the Policy terms, the plain and unambiguous meaning of "residence premises" as interpreted by various Ohio and federal courts, and Finger's admission that he never lived at the Property as evidence of reasonable justification for its denial of Finger's claim. To withstand summary judgment, Finger was required to point to evidence suggesting that Liberty did not have a reasonable justification for denying his claim. *Barbour* at 28. His mere assertion that a jury should decide whether Liberty's denial was in bad faith, without any evidence demonstrating that Liberty did not have a reasonable justification for denying the claim, is insufficient to meet this burden. *Id.; Hartford Ins. Co. of the Midwest v. Cleveland Public Library,* N.D.Ohio No. 1:99 CV 1701, 2004 U.S. Dist. LEXIS 31494, 8 (Feb. 9, 2004) ("[T]o withstand a motion for summary judgment, an insured must oppose * * * [the] motion with evidence which tends to show that the insurer had no reasonable justification for refusing the claim."). Accordingly, the trial court property granted summary judgment on the bad-faith claim and the third assignment of error is overruled.

F. Fraud

{¶ 49} In the amended complaint, Finger alleged that (1) Liberty misrepresented to him that answering the questions in the Application would "ensure proper coverage;" (2) he relied on Liberty's representation, purchased the Policy, and did not shop for other insurance; and (3) he incurred damages when Liberty wrongfully rescinded the Policy.

{¶ 50} In its motion for summary judgment, Liberty argued that it was entitled to judgment as a matter of law on Finger's fraud claim because even if the Policy had not been not rescinded, it would not cover the claim. Liberty argued that because the claim would not have been covered under the Policy, the allegedly improper rescission, even if fraudulent, caused Finger no damages.

{¶ 51} The trial court found that Finger "arguably" did not oppose summary judgment on the fraud claim because "his brief only mention[ed] the word 'fraudulently' once in a parenthetical." The trial court found, however, that even if the issue had been fully briefed, "Finger's fraud claim cannot prevail because he has not demonstrated that Liberty had an intent to mislead him at any point or what specific statements it made that were false," two of the necessary elements of a fraud claim.[2]

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[2] Fraud requires proof of (1) a representation, or where there is a duty to disclose, omission of a fact, (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge can be inferred, and (4) with the intent to mislead another into relying upon it, (5) justifiable reliance upon the representation or concealment, and

{¶ 52} On appeal, Finger argues that the trial court erred in granting summary judgment on the fraud claim because "the issue was not even presented in the motion for summary judgment" and, for various reasons, his claim satisfies the elements of a fraud claim.

{¶ 53} Finger is incorrect; our review of the record demonstrates that Liberty expressly moved for summary judgment in its motion, arguing that "Plaintiff has no viable claim for fraud." And, as the trial court found, Finger did not argue his fraud claim or present evidence identifying an issue of fact regarding any of the elements of the claim in his brief in opposition to Liberty's motion.

{¶ 54} A party cannot raise new issues or arguments for the first time on appeal; failure to raise an issue before the trial court results in waiver of that issue for appellate purposes. *Scott-Fetzer Co. v. Miley*, 8th Dist. Cuyahoga No. 108090, 2019-Ohio-4578, ¶ 40-42; *Lycan v. Cleveland*, 8th Dist. Cuyahoga Nos. 107700 and 107737, 2019-Ohio-3510, ¶ 32-33 ("It is well-established that arguments raised for the first time on appeal are generally barred and a reviewing court will not consider issues that the appellant failed to raise in the trial court.").

{¶ 55} Accordingly, Finger has waived the issue and we need not address the merits of the fourth assignment of error. The trial court's judgment granting summary judgment on Finger's fraud claim is therefore affirmed.

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(6) a resulting injury proximately caused by the reliance. *Volbers-Klarich v. Middletown Mgt.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27.

G. Intentional Infliction of Emotional Distress

{¶ 56} Last, Finger contends that the trial court erred in granting summary judgment to Liberty on his claim for intentional infliction of emotional distress.

{¶ 57} Intentional infliction of emotional distress occurs when "one who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another." *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374, 453 N.E.2d 666 (1983), *abrogated on other grounds*, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051. To prevail on such a claim, a plaintiff must prove that (1) the defendant either intended to cause emotional distress, or knew or should have known that its conduct would result in serious emotional distress to the plaintiff; (2) the defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered utterly intolerable in a civilized community; (3) the defendant's actions proximately caused psychological injury to the plaintiff; and (4) the plaintiff suffered serious emotional distress of a nature no reasonable person could be expected to endure. *Stancik v. Deutsche Natl. Bank*, 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, ¶ 43, citing *Rhoades v. Chase Bank*, 10th Dist. Franklin No. 10AP-469, 2010-Ohio-6537, ¶ 15.

{¶ 58} Finger's claim for intentional infliction of emotional distress is based on Intemann's question to him "How was it you were able to afford buyin' these things?" (referring to his three rental properties) during Liberty's investigation of his claim, a question obviously irrelevant to its investigation. Although the trial

court found that Liberty was entitled to summary judgment because the question did not rise to the level of outrageousness required for such a claim, we find that Finger's claim fails as a matter of law because he did not provide any evidence that he suffered the type of serious mental anguish required to establish a claim for intentional infliction of emotional distress.

{¶ 59} In *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983), the Ohio Supreme Court described "serious emotional distress" as "emotional injury which is both severe and debilitating." *Id.* at 78. The court set forth some examples of serious emotional distress: "A non-exhaustive litany of some examples of serious emotional distress should include traumatically-induced neurosis, psychosis, chronic depression, or phobia." *Id.*

{¶ 60} Finger produced no evidence that he suffered a "severe and debilitating" emotional injury. Although he asserted that he was "shocked" by the question and, as a result, experienced mental and physical anguish that affected his health, appetite, and sleep patterns, he offered no evidence from an expert or third party as to the emotional distress he suffered and there is no evidence that he sought treatment for any alleged emotional distress. "Summary judgment is appropriate when the plaintiff presents no testimony from expert or third parties as to the emotional distress suffered and where the plaintiff does not seek medical or psychological treatment for the alleged injuries." *Stancik,* 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, at ¶ 45, citing *Crable v. Nestle USA, Inc.*, 8th Dist. Cuyahoga No. 86746, 2006-Ohio-2887, ¶ 58. Accordingly, the trial court did not err

in granting Liberty summary judgment on Finger's intentional infliction of emotional distress claim. The fifth assignment of error is overruled.

III. Conclusion

{¶ 61} Finger does not challenge the trial court's grant of summary judgment to Liberty on his spoliation of evidence and declaratory judgment claims or Liberty's counterclaims for declaratory judgment. Accordingly, he has waived any objection to the trial court's judgment on those claims and the trial court's judgment is affirmed. Having found no reversible error regarding the trial court's grant of summary judgment to Liberty regarding the other claims, we affirm the trial court's summary judgment ruling in its entirety.

{¶ 62} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EMANUELLA D. GROVES, J., and
MICHAEL JOHN RYAN, J., CONCUR