STATE OF MICHIGAN

COURT OF APPEALS

FORREST HILL, BARBARA HILL, and GREGORY S. HILL,

Plaintiffs-Appellees,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 2, 2001

No. 222646
Livingston Circuit Court
LC No. 99-017064-CZ

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

In this case involving a dispute over insurance coverage, defendant appeals by right from an order granting plaintiffs' motion for summary disposition under MCR 2.116(C)(8) and (10). We affirm.

The material facts are undisputed. Plaintiffs Forrest and Barbara Hill received from defendant an automobile insurance policy covering themselves on several vehicles, including a 1997 Dodge Ram four-wheel-drive pickup truck, in exchange for a premium payment. In applying for coverage in early October of 1997, Forrest and Barbara had not mentioned to defendant's agent that plaintiff Gregory Hill, their son, was living with them and driving their vehicles at the time. On October 24, 1997, defendant learned that Gregory might be living with his parents. Defendant obtained a motor vehicle report on Gregory on November 17, 1997 and learned that nine points had been assessed against his driver's license.

Despite this knowledge, on November 19, 1997, defendant issued an automobile insurance policy covering Forrest, Barbara, and Gregory with an effective date of October 9, 1997. On November 20, 1997, because of Gregory's deficient driving record, defendant issued a cancellation notice effective December 15, 1997. On November 19, 1997, Gregory was involved in an accident while driving the pickup truck.

Defendant became aware of the accident on or about November 24, 1997. On December 29, 1997, defendant sent plaintiffs a letter seeking to rescind plaintiffs' policy and to return their

premium payment. After plaintiffs filed the instant actions, the trial court granted them summary disposition and ruled that *Burton v Wolverine Mutual Ins Co*, 213 Mich App 514; 540 NW2d 480 (1995), prevented defendant from rescinding the policy because it had already issued a cancellation notice with an effective cancellation date of December 15, 1997.

Defendant contends that the trial court erred in relying on *Burton.* Upon our de novo review, see *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), we disagree. In *Burton*, one of the two plaintiffs misrepresented his driving record in an application for automobile insurance he submitted to the defendant insurance company. *Burton, supra* at 515-516. The defendant learned of the misrepresentation and mailed a notice of cancellation on October 27, 1986, informing the plaintiffs that their policy would be terminated on November 17, 1986. *Id*. at 516. On November 8, 1986, the other plaintiff was in an automobile accident. *Id*. The defendant learned of the accident sometime after November 10, notified the plaintiffs on November 24 that their policy was rescinded, and returned the remainder of the plaintiffs' premium. *Id*.

On appeal, the defendant argued that it was "entitled as a matter of law to rescind coverage ab initio for material misrepresentations of fact in the application for insurance." *Id.* at 517. In ruling for the plaintiffs, this Court stated:

> Clearly, defendant's intent upon learning of plaintiff's misrepresentation on the application for insurance was, while to decline the risk over the long term, to cover the risk until November 17, 1986, and to retain a premium earned for that period. That is, there is nothing in the record to suggest that had this accident never occurred defendant would not have allowed the policy to remain in effect until November 17, 1986, and retained a premium for the period from the effective date of the policy of October 14 until the effective date of cancellation, November 17.
>
> *The remedy that defendant seeks is untenable. Defendant wishes, upon the discovery of a misrepresentation in the application, to have the right to collect a premium and provide coverage as long as there are no losses and yet remain entitled to choose rescission and deny coverage if a loss occurs. In short, defendant wishes to be able to earn a premium without having to provide coverage. That, however desirable it may be to defendant, is not an available option*. Rather, it must either rescind the policy upon discovery of the misrepresentation and refund the premium or cancel the policy, retaining the premium earned until the effective date of the cancellation and provide coverage until the effective date of the cancellation. But it cannot have its premium and deny coverage too. [*Id*. at 519-520 (emphasis added).]

Like the defendant in *Burton*, defendant in the instant case had the option to rescind plaintiffs' policy ab initio once it determined that misrepresentation occurred; instead, defendant chose to cancel the policy and keep plaintiffs' premium payment. Like the plaintiff in *Burton*, Gregory was in an accident during the covered period before a cancellation notice was to take effect. Defendant in the instant case, like the defendant in *Burton*, attempted to rescind plaintiffs' policy once it learned of the accident. As in *Burton*, defendant is not entitled to do so.

Indeed, defendant had already chosen its remedy by canceling plaintiffs' policy instead of rescinding it, and it cannot "have its premium and deny coverage too." *Id*. at 520. The trial court did not err by relying on *Burton* to rule for plaintiffs.

Defendant contends that *Burton* is distinguishable from the instant case because in *Burton,* the plaintiffs received the cancellation notice before the accident and thus relied on its terms (i.e., relied on the fact that coverage would be in place until November 17), while in the instant case, the cancellation notice was issued *after* the accident. This argument is without merit. Indeed, *Burton, supra* at 519-520, makes clear that the defendant's choice to issue a cancellation notice and to retain the premium earned until the effective date of the cancellation was *in itself* sufficient to void the rescission. In other words, we are convinced that while the timing of the cancellation notice in *Burton* provided *support* for the Court's decision in that case, the Court did not consider the timing issue *essential* to holding for the plaintiffs. The trial court in the instant case properly relied on *Burton*.

Next, defendant contends that it did not act wrongfully in denying coverage and that the trial court therefore erred in awarding attorney fees, costs, and penalty interest. MCL 500.3148(1) provides for attorney fees in no-fault insurance disputes:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

This Court has construed this statute as follows:

> The purpose of this penalty provision is to ensure prompt payment to the insured. *Allstate Ins Co v Citizens Ins Co*, 118 Mich App 594, 607; 325 NW2d 505 (1982). A refusal or delay in payment by an insurer will not be found unreasonable under this statute where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. *United Southern Assurance Co v Aetna Life & Casualty Ins Co*, 189 Mich App 485, 492; 474 NW2d 131 (1991). However, where there is such a delay or refusal, a rebuttal presumption of unreasonableness arises such that the insurer has the burden to justify the refusal or delay. *Bloemsma v Auto Club Ins Co*, 174 Mich App 692, 696-697; 436 NW2d 442 (1989). The trial court's finding of unreasonable refusal or delay will not be reversed unless it is clearly erroneous. *United Southern Assurance Co, supra*. [*McKelvie v Auto Club Ins Assoc*, 203 Mich App 331, 335; 512 NW2d 74 (1994).]

As noted, the dispute in this case involved the applicability of *Burton, supra*. *Burton* is so closely on point to the present case, and the distinction that defendant attempted to draw between the situation in the present case and that in *Burton* so untenable under the rationale of *Burton*, that we cannot conclude that the trial court clearly erred in awarding attorney fees here.

MCL 500.3142 imposes a penalty on insurers that refuse to pay claimed personal protection insurance benefits promptly after a claim is filed:

> (1) Personal protection insurance benefits are payable as loss accrues.
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> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof . . . of loss sustained.
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> * * *
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

A finding of unreasonableness is not required regarding this interest penalty. Indeed, this Court has ruled that

> [p]enalty interest must be assessed against a no-fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits. [*Davis v Citizens Ins Co*, 195 Mich App 323, 328; 489 NW2d 214 (1992).]

The *Davis* Court elaborated that "an insurer's good faith in withholding payment of benefits is relevant in awarding attorney fees under the act, but it is irrelevant to liability under the penalty interest statute. *Id*. at 329. Therefore, the trial court did not err in awarding penalty interest in this case.[1]

Affirmed.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter

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[1] While defendant contends in its statement of questions presented that the trial court erred in awarding attorney fees, penalty interest, *and costs*, defendant makes no attempt to address the issue of costs in the body of its brief. Accordingly, defendant effectively waived the issue of costs for appellate review. Indeed, a party may not merely announce a position and leave it to this Court to search for relevant authority. See *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 151-152; 577 NW2d 200 (1998), and *Mann v Mann*, 190 Mich App 526, 536-537; 476 NW2d 439 (1991).