STATE OF MICHIGAN

COURT OF APPEALS

LAKELAND NEUROCARE CENTER and ALWAYS THERE PROFESSIONAL HOME CARE, INC.,

Plaintiffs-Appellees,

v

JASON O'NEAL,

Defendant-Appellee,

and

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
March 27, 2007

No. 266878
LC No. 03-334158-CK

JASON PAUL O'NEAL and BERTILE CARMELA O'NEAL,

Plaintiffs-Appellees,

v

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

No. 267093
LC No. 03-314621-NF

Before: Jansen, P.J., and Neff and Hoekstra

PER CURIAM.

In Docket No. 266878, defendant Automobile Club Insurance Association (ACIA) appeals as of right the trial court's order granting the motion of plaintiffs Lakeland Neurocare Center and Always There Professional Home Care, Inc. (hereinafter collectively referred to as

"Lakeland") to dismiss defendant Jason O'Neal and for entry of final judgment against ACIA, following the trial court's grant of summary disposition against ACIA for payment of medical services provided to Jason by Lakeland after an automobile accident. In Docket No. 267093, ACIA appeals as of right the trial court's order of judgment in favor of Jason, as plaintiff, following a jury trial regarding Jason's claim for benefits under an automobile insurance policy with ACIA. In both cases, we affirm.

ACIA argues that the trial court erred in denying its motions for summary disposition, directed verdict or dismissal, judgment notwithstanding the verdict (JNOV), and for reconsideration, because all pertinent and necessary facts were undisputed and ACIA made out a case of insurance fraud as a matter of law. We review the trial court's decision regarding summary disposition and directed verdict de novo, considering the evidence in the light most favorable to the nonmoving party to determine whether there existed a material question of fact upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 182-183; 665 NW2d 468 (2003); see also *Smith v Foerster-Bolser Construction, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). A trial court's decision regarding a motion for judgment notwithstanding the verdict is also reviewed de novo, and similarly entails consideration of the evidence and all reasonable inferences arising therefrom in the light most favorable to the nonmoving party to determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123-124; 680 NW2d 485 (2004). If the evidence is such that reasonable jurors could disagree, JNOV is improper. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005). After such review, we find no error in the trial court's denial of ACIA's motions.

Generally, "[w]here a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void ab initio." *Hammoud v Metropolitan Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997). However, "[a]n insurer may only void a policy of insurance ab initio where an innocent third party is not affected thereby and where it can be shown that the insured intentionally misrepresented a material fact communicated at the time of effecting the insurance . . . ." *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985). The relevant inquiry is whether the injured third party was innocent with respect to the misrepresentation made to the insurance company, or was actively involved in defrauding the insurer. *Hammoud*, *supra* at 488-489.

Throughout this case, whether there was fraud in the insurance application and whether Jason participated in any fraud were genuine issues of material fact that precluded judgment as a matter of law. The evidence submitted below indicates that Jason's mother, plaintiff Bertile O'Neal, helped Jason purchase a Ford Focus in April 2001. On the same day, Bertile obtained insurance on the Focus from ACIA and provided the information on the application. Jason did not supply any information to the insurance company. The application form did not ask for an address, where the car was garaged, or who owned the car. Bertile testified that all information provided in the application was accurate. The application asked Bertile to list everyone who lived with her, so she did not write Jason's name because he lived at his grandparents' address, which was on the title and registration for the Focus.

Darryl Webb, Underwriting Operations Manager for ACIA, indicated that insurance coverage for the vehicle would most likely have been initiated by a telephone conversation, and the application Bertile signed represented that the information she gave over the phone was consistent with the written application form. However, the phone call was not recorded, and the only documentation ACIA had regarding the creation of the policy was the application form.

Jason was involved in an automobile accident with the Focus on April 24, 2002. Bertile made a claim to ACIA over the phone and stated that the Focus had been involved in an accident. ACIA became aware that Jason was driving the Focus at the time of this accident and placed a log in the file stating that Jason did not reside in Bertile's household per the motor vehicle record. Bertile received a policy change endorsement from ACIA that changed the principal driver to Jason and increased the premium. However, the policy change endorsement referred to Bertile's Mercury Sable, so Bertile called ACIA and told them Jason was the principal driver of the Focus, not the Sable, and she told them where Jason was living. Jason paid some of the increased premiums for the insurance.

The accident that is the subject of this case occurred on March 9, 2003, well after ACIA had learned that Jason was the record owner and principal driver of the Focus. Bertile had an operative certificate of insurance with ACIA on this date. During its investigation of this accident, ACIA discovered that Bertile had been using a post office box rather than the address of her residence. The post office box was listed in ACIA's system as both the residence and mailing address. Bertile explained that she had used a post office box address on her driver's license for over 20 years because she traveled so often during her time in the military. Bertile further explained that, consistent with this practice, she also used the post office box address for her automobile insurance. Webb testified that this was the point where ACIA discovered that a youthful operator, Jason, was the principal operator of the Focus even though he did not live in the household of the principal named insured.

Viewing the evidence in the light most favorable to plaintiffs, reasonable minds could differ regarding whether Bertile made any misrepresentation in the insurance application and, if so, whether Jason was actively involved in trying to defraud ACIA. *Hammoud*, *supra* at 488-489. Indeed, it is not clear that Bertile intentionally made a misrepresentation of a material fact in the insurance application, or that Jason knew of any misrepresentation. In fact, it appears that ACIA knew that Jason was the principle driver of the Focus and did not live in Bertile's residence after the first accident in April 2002, but did not rescind the policy at that time. This matter was, therefore, properly submitted to the jury and the trial court did not err by failing to determine, as a matter of law, that there was fraud in the application for the insurance policy.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra