STATE OF MICHIGAN

COURT OF APPEALS

JULIE JACKIMOWICZ,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA, ELDER AGENCY, INC., and NANCY LAURILA,

Defendants-Appellees.

UNPUBLISHED
February 24, 2011

No. 294472
Ingham Circuit Court
LC No. 08-000820-NZ

Before: MURPHY, C.J., and WHITBECK and MURRAY, JJ.

PER CURIAM.

Plaintiff Julie Jackimowicz appeals as of right the trial court's order granting summary disposition in favor of defendant Citizens Insurance Company of America (Citizens). We reverse and remand for entry of judgment in favor of plaintiff.

In July 2007, plaintiff was seriously injured in a motor vehicle accident, which occurred when the vehicle that plaintiff was driving, her Ford Escape, was struck nearly head-on by a Corvette that had crossed into her lane of travel. Citizens insured plaintiff and the Ford Escape, as well as a Dodge Ram owned in part by plaintiff, through a no-fault insurance policy that was originally issued back in November 2003. Plaintiff submitted a claim to Citizens seeking personal protection insurance (PIP) benefits and a payment covering losses related to damages to her car. Citizens denied the claim and rescinded the insurance contract, alleging that plaintiff, in November 2003, made material misrepresentations and failed to divulge material facts in her written application for the no-fault insurance policy.

Citizens asserted that plaintiff indicated in the application that the Ram and a newly purchased Chevy Blazer were garaged in Marquette, Michigan, and that she lived in Marquette, when in truth, she resided and garaged her vehicles in Lansing, Michigan. Citizens also contended that plaintiff failed to divulge that she was living with her boyfriend, Christopher McCormick, in his home in Lansing while she attended Michigan State University's College of Law, failed to divulge that he had a drunk driving conviction, failed to divulge that McCormick was on the title of the Ram along with plaintiff, and failed to divulge that he occasionally drove the household vehicles. Plaintiff maintained that she did not even fill out any application for a policy but simply informed her family's Marquette-area insurance agent, defendant Nancy

Laurila of defendant Elder Agency, Inc. (EAI), that she wanted coverage for the Blazer.[1] According to plaintiff, Laurila took care of the matter and obtained the policy. Plaintiff's mother, back in Marquette, signed plaintiff's name to the bottom of the written application form. Pursuant to protocol at the time, the written application form itself was not sent to Citizens; rather, Laurila submitted an electronic application to Citizens via the computer, using information that she had obtained through the application process or had been aware of from her history taking care of insurance matters for plaintiff's family. The written application, which was filled out by Laurila, was left blank with respect to yes/no questions concerning other drivers in the household, but the written application did indicate that plaintiff lived at the Marquette address of her parents. We note that plaintiff faithfully paid the premiums on the policy throughout the period of time at issue.

Plaintiff filed suit against Citizens, Laurila, and EAI, seeking an order declaring that the policy was improperly rescinded and that Citizens was contractually obligated to provide plaintiff with PIP benefits and other coverage under the policy. Plaintiff's claims against Citizens consisted of declaratory judgment and breach of contract counts, while the claims against Laurila and EAI were predicated on negligence, professional malpractice, and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* The trial court eventually granted Citizens' motion for summary disposition under MCR 2.116(C)(10), while denying plaintiff's cross-motion for summary disposition, finding that plaintiff, or plaintiff's mother acting as plaintiff's agent, made misrepresentations in the application such that Citizens was entitled to rescind the policy. Plaintiff appeals as of right. After denying several motions for partial summary disposition filed by Laurila and EAI, those parties and plaintiff stipulated to the dismissal of the suit after they reached a settlement.

On appeal, plaintiff argues that Citizens did not have the right to rescind the policy on the basis of purported misrepresentations, where plaintiff did not provide any of the information incorporated into the application for insurance, the application was completed and signed without plaintiff's knowledge, and where plaintiff was never given a chance to review the application before the insurance was secured. Plaintiff further contends that Citizens was not entitled to rescind the policy because the information on the hard copy of the application for insurance was never transmitted to Citizens, the hard copy remained in the custody of the insurance agent, and because the hard copy of the application was not even completed with respect to the information at issue in this case. Plaintiff also maintains that her mother was not her agent in regard to the application for a policy, where there was no evidence of any communications between the two relative to the application process. Plaintiff additionally asserts that even if her mother was plaintiff's agent, she did not make any misrepresentations. Plaintiff also asserts that her own innocence in the matter requires the payment of benefits even

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[1] Plaintiff had the Ram and a Toyota Celica, but she traded in the Celica when purchasing the Blazer in October-November 2003. In May 2007, about two months before the accident, plaintiff traded in the Blazer for the Escape.

if her mother was her agent. Plaintiff contends that this case is an example of sloppy practices by Citizens, not fraud.

Citizens argues that the trial court did not err in granting summary disposition in its favor, given that plaintiff and/or her mother, acting as plaintiff's agent, made material misrepresentations in the application for insurance such that the policy would not have been issued had the truth been disclosed. According to Citizens, premiums for insurance policies issued to Lansing area residents are higher than for Marquette area residents. Citizens also argues that given McCormick's drunk driving conviction it would never have issued the policy procured by plaintiff had it known that McCormick was a household member who occasionally drove the vehicles.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). The trial court's task in reviewing the motion entails consideration of the record evidence and all reasonable inferences arising from that evidence. *Skinner*, 445 Mich at 161. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition brought under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

"It is a well-established rule that '[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.*"' *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 359-360; 764 NW2d 304 (2009) (citation omitted; alteration in original); see also *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998); *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997); *Farmers Ins Exch v Anderson*, 206 Mich App 214, 218; 520 NW2d 686 (1994). We note that this Court has also stated that if an insurer relied on an insured's misrepresentations, rescission may be appropriate even if the misrepresentations were unintentional. *Lake States*, 231 Mich App at 331; *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995). "Reliance may exist when the misrepresentation relates to the insurer's guidelines for determining eligibility for coverage." *Lake States*, 231 Mich App at 331. A

material misrepresentation occurs when the misrepresentation "substantially increase[s] the risk of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985); see also *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993) ("A false representation in an application for no fault insurance that materially affects the acceptance of the risk entitles the insurer retroactively to void or cancel a policy"). The misrepresentation need not causally relate to the accident that results in the injury giving rise to the claim in order to be material. *Darnell*, 142 Mich App at 9; *Auto-Owners Ins Co v Comm'r of Ins*, 141 Mich App 776, 781-782; 369 NW2d 896 (1985). In general, an insurer is estopped from asserting fraud to rescind an insurance policy relative to mandatory coverage once an innocent party is injured in an accident in which coverage was in effect with respect to the relevant vehicle. *Lake States*, 231 Mich App at 331; *Hammoud*, 222 Mich App at 488 ("right to rescind ceases to exist once there is a claim involving third party"). Only the claim by an insured who committed a fraud as to a policy will be barred, not the claim of an insured under the same policy who is innocent of fraud. *Roberts*, 282 Mich App at 360. In *Anderson*, 206 Mich App at 219, this Court deemed "it unwise to permit an insurer to deny coverage on the basis of fraud after it has collected premiums, when it easily could have ascertained the fraud at the time the contract was formed."

The reasons given by Citizens for rescinding the policy of insurance were misrepresentations in the insurance application relative to garaging and residency, the identification of household members or additional drivers, the identification of all titled owners, and the identification of any household drivers who had drunk driving convictions or restricted licenses within the past five years. Looking solely at the conduct and communications of plaintiff, without consideration of her mother's actions, we conclude that there is no genuine issue of material fact that plaintiff did not engage in fraud or make misrepresentations with respect to the insurance application and the matters cited by Citizens.

There is no dispute that plaintiff did not fill out the written insurance application, that plaintiff did not sign the written application, that plaintiff did not view the written application, that plaintiff did not provide any of the information used by Laurila to fill out the written application other than possibly the Blazer's VIN, and that plaintiff was not asked questions pertaining to her address, the garaging of the vehicles, other household drivers and titled owners, drunk driving convictions, and restricted licenses. Plaintiff herself had nothing to do with the written application, and she certainly had no connection with supplying and entering information for purposes of the electronic transmission to Citizens through the computer system utilized by EAI and Citizens. Plaintiff's testimony concerning her phone call to Laurila when plaintiff purchased the Blazer revealed no discussion whatsoever with respect to the subject matter of the alleged misrepresentations, and Laurila did not even recall the phone conversation. There was no documentary evidence indicating that the phone conversation encompassed questions concerning plaintiff's address, the garaging of the vehicles, other household drivers and titled owners, drunk driving convictions, and restricted licenses. Rather, plaintiff's testimony suggests that the phone conversation simply entailed a request to cover the newly purchased Blazer with a no-fault policy, with Laurila indicating that "she would take care of it." When an underwriter for Citizens who was involved in the decision to rescind the policy was informed that plaintiff had not signed the application, she responded by testifying that, if true, plaintiff did not make any misrepresentations.

Given the very limited extent of plaintiff's involvement in the application process and the lack of any evidence reflecting inquiry by Laurila or Citizens directed to plaintiff on the matters related to the alleged misrepresentations, we cannot conclude that plaintiff engaged in fraud or made misrepresentations, intentional or otherwise. Citizens did not base its decision to rescind the policy on the premise that plaintiff should have divulged the information at issue without prompting or absent query.

Citizens relies on *Cunningham v Citizens Ins Co of America*, 133 Mich App 471; 350 NW2d 283 (1984), in support of its case for rescission. However, in *Cunningham*, this Court allowed rescission where the plaintiff applicant outright lied to the insurance agent when asked whether he had been convicted of drunk driving within the last five years; the applicant said "no" despite being convicted of drunk driving a year and a half earlier. We have no such inquiry followed by a lie or non-response in the case at bar relative to plaintiff.

We wish to briefly comment on the address-garaging issue. On the basis of plaintiff's, her mother's, and even Laurila's testimony, there does not appear to be any dispute that Laurila knew that plaintiff was living in Lansing and attending law school when the application was prepared in November 2003.[2] And, on the issue of address alone, even an adjuster and underwriter for Citizens testified that a student can use his or her parents' address while attending school. The debate concerning plaintiff's address is focused on whether the move to Lansing was temporary or permanent and whether she was financially independent, with Citizens emphasizing that plaintiff changed her address to Lansing on her driver's license, registered to vote in Lansing, and that plaintiff received no financial assistance from her parents. Plaintiff indicated that she had no specific plans to necessarily stay in Lansing following law school and that she unsuccessfully sought to find employment as an attorney in the Marquette area; she was apparently prepared to go wherever she could find employment. It is true that plaintiff was financially independent.

Even assuming that plaintiff, on inquiry, had informed Citizens that her address was in Marquette and that the vehicles were garaged in Marquette, there is no basis for rescission despite premiums being higher in Lansing than in Marquette. First, given that Laurila knew that plaintiff was living in Lansing and attending law school and that Laurila filled in the address information on the written application, the onus was on her to inquire more deeply if there was any concern about plaintiff's actual status as it could have easily been ascertained. See

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[2] We note that "[w]hen an insurance policy 'is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer.'" *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008), quoting *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). While Laurila was an independent insurance agent, we find it unnecessary to classify her as Citizens' agent in order to merely attribute her knowledge of the circumstances to Citizens for purposes of misrepresentation and reliance. Laurila processed the application on behalf of Citizens.

Anderson, 206 Mich App at 219. Second, the fact that there were two claims made and paid under the policy in 2005 and 2006 relative to damages occurring both times in the Lansing area, hundreds of miles away from Marquette, after investigation by an adjuster, supports a conclusion that Citizens could have easily ascertained whether plaintiff was permanently residing in Lansing. Next, it is reasonably arguable that the move was "temporary" under the circumstances, when viewed from plaintiff's perspective in November 2003, despite the changes in the driver's license and as to her voter registration card. Next, we do not see any particular question on the written application asking where the vehicles are to be garaged. Moreover, with respect to the issue of garaging, the record and logic would dictate that Laurila knew that the vehicles, especially the Blazer, were with plaintiff in Lansing and not sitting idle in Marquette. And again, this information could have easily been ascertained if Laurila had any doubts concerning the garaging location. Finally, an underwriter for Citizens testified that, had the only problem been with plaintiff's address and the garaging of the vehicles, Citizens would not have rescinded the policy.

Although the trial court examined the conduct and communications of plaintiff's mother, finding that she made misrepresentations and was acting as plaintiff's agent, we conclude that it was improper to take into consideration the actions of plaintiff's mother and to apply agency law, where plaintiff, the injured insured, was innocent of making any misrepresentations.

Plaintiff claims that she is an innocent insured party who made no misrepresentations and did not engage in fraud, thereby falling into the exception to the rule of rescission. *Roberts*, 282 Mich App at 360; *Lake States*, 231 Mich App at 331. Caselaw indicates that an innocent person seeking benefits is entitled to the benefits, regardless of material misrepresentations made by a person who qualifies as the innocent person's agent and who procured the policy by submitting an application.

In *Roberts*, 282 Mich App 339, a mother's son, the plaintiff, was injured while joyriding in a household vehicle generally used by the plaintiff's mother, and PIP benefits were sought by the plaintiff from the defendant insurer under a policy issued by the insurer to the plaintiff's mother. It was discovered that the plaintiff's mother had lied on the insurance application when she stated that she owned a particular vehicle when it was actually owned by another one of her sons. The plaintiff himself had made no misrepresentations to the insurer, but the insurer maintained that it was entitled to void the policy *ab initio* based on the mother's misrepresentations. *Id.* at 342-347. The *Roberts* panel disagreed with the insurer and invoked the innocent third party exception to allow the plaintiff to recover benefits. *Id.* at 359-361.

The Court noted that there was no dispute that the plaintiff's mother had lied about the vehicle's ownership, that the misrepresentation was material to the risk because the insurer would have increased the premium had it known the truth about the vehicle's ownership, and that the policy was procured through the mother's intentional misrepresentation in the insurance application. *Id.* at 360. The Court held:

> [A]n insurer may not void a policy of insurance *ab initio* where an innocent third party is affected. Therefore, only the claim of an insured who has committed the fraud will be barred, leaving unaffected the claim of any insured under the policy who is innocent of fraud. [The insurer] argues that this innocent

> third party doctrine does not apply in this case because, given that [the plaintiff] is a minor, it is [his mother] who is actually responsible for paying his medical expenses and therefore she is the person actually seeking to collect any insurance benefits.
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> However, caselaw demonstrates that the innocent third party doctrine ensures coverage for any person who is innocent of participation in the alleged fraud. For example in *Darnell*[, 142 Mich App 1], this Court held that the plaintiff was entitled to recover benefits where his wife, not the plaintiff, made the alleged misrepresentations. In contrast, in *Hammoud*[, 222 Mich App 485], this Court held that the plaintiff was not entitled to recover benefits because he was actively involved in defrauding the insurer by allowing his older brother to obtain the insurance policy by misrepresenting the plaintiff's status as a driver of the vehicle. Therefore, 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.
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> Here, it was [the mother], not [the plaintiff], who is alleged to have misrepresented facts on the application for insurance. Consequently, while we certainly do not condone [the mother's] actions, the fact remains that [the plaintiff] made no misrepresentation and coverage may not be denied to him on the basis of his mother's improper actions. [*Id.* at 360-361 (citations and internal quotations omitted).]

Plaintiff here was innocent with respect to any misrepresentations, and there was no evidence that she was actively involved in defrauding the insurer in the application process, where plaintiff testified, without evidence to the contrary, that she had no conversations or discussions with her mother about the application and that she had nothing to do with the written application. While the Court in *Roberts* did not specifically address the law of agency, certainly the mother there, like plaintiff's mother here, could have qualified as an agent of the injured insured. And in *Roberts*, the plaintiff's mother stood to benefit, despite her misrepresentations, by not having to pay her child's medical expenses. Here, plaintiff's mother did not receive any comparable benefit in executing the written application.

The *Roberts* panel cited *Darnell*, 142 Mich App 1, in support of its position. *Roberts*, 282 Mich App at 361. And *Darnell* makes an even stronger case for not imposing the law of agency.

In *Darnell*, the plaintiff husband was injured in a motor vehicle accident and sought PIP benefits under a policy of insurance. His wife had executed the insurance application on his behalf, and his wife, when asked by the insurer whether any drivers in the household had previously had their licenses revoked or restricted in the last three years, answered in the negative. The plaintiff, however, did have a restricted license, even though his wife claimed that she did not know about the restriction. The plaintiff husband himself made no misrepresentations to the insurer. The insurer declined to pay benefits, asserting that the policy was void *ab initio* due to the wife's material misrepresentation in the application. *Darnell*, 142 Mich App at 5-7. This Court held:

> Of most importance, however, is that, because plaintiff himself made no misrepresentation, Auto-Owners must justify rescission on the basis of Mrs. Darnell's statements. But, Mrs. Darnell's misrepresentation does not affect plaintiff's coverage. Auto-Owners argues that it was authorized to void the policy *ab initio* on the basis of the insured's *agent's* (Mrs. Darnell's) misrepresentation of a material fact. Auto-Owners reasons that plaintiff would not have been insured but for the misrepresentation of his wife who, *in addition to being his agent*, was a contractual insured under the policy. However, "only the claim of an insured who has committed the fraud" will be barred, leaving unaffected "the claim of any insured under the policy who is innocent of fraud." Consequently, while we certainly do not countenance the actions of Mrs. Darnell in this case, the fact remains that plaintiff made no misrepresentation, and coverage may not be denied him on the basis of his spouse's improper actions. We hold that summary judgment was properly granted in favor of plaintiff below[.] [*Darnell*, 142 Mich App at 10-11 (citations omitted; emphasis added).]

Looking solely at the conduct and communications of plaintiff, without consideration of her mother's actions, we conclude that there is no genuine issue of material fact that plaintiff did not engage in fraud or make misrepresentations with respect to the insurance application and the matters cited by Citizens. Accordingly, plaintiff was entitled to judgment on her motion for summary disposition, and the trial court erred in denying that motion and in granting Citizens' motion for summary disposition. Citizens is ordered to pay the benefits available under plaintiff's policy.

Reversed and remanded for entry of judgment in favor of plaintiff. Plaintiff, having prevailed in full, is awarded taxable costs under MCR 7.219. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Christopher M. Murray