STATE OF MICHIGAN

COURT OF APPEALS

TYRONNE MEYERS,

Plaintiff-Appellee,

v

TRANSPORTATION SERVICES, INC., and ZURICH AMERICAN INSURANCE COMPANY,

Defendants/Cross-Defendants-Appellees/Cross-Appellees,

and

TITAN INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellant/Cross-Appellee,

and

FARMERS INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee/Cross-Appellant.

UNPUBLISHED
September 24, 2013

No. 300043
Wayne Circuit Court
LC No. 09-000755-NF

TYRONNE MEYERS,

Plaintiff-Appellee,

v

TRANSPORTATION SERVICES, INC., and ZURICH AMERICAN INSURANCE COMPANY,

Defendants/Cross-Defendants-Appellees,

and

No. 303405
Wayne Circuit Court
LC No. 09-000755-NF

TITAN INSURANCE COMPANY,

Defendant-Appellant,

and

FARMERS INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee.

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

These consolidated appeals arise from plaintiff's claim for personal protection insurance (PIP) benefits following a truck-pedestrian collision that occurred on January 11, 2008. In Docket No. 300043, defendant Titan Insurance Company (Titan) appeals by leave granted the circuit court's denial of its motion for summary disposition, and defendant Farmers Insurance Company (Farmers)[1] cross-appeals the circuit court's order denying its motion for summary disposition. In Docket No. 303405, Titan appeals by leave granted the circuit court's grant of partial summary disposition in favor of Farmers with respect to Farmers's cross-claim. In Docket No. 300043, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. In Docket No. 303405, we vacate and remand for further proceedings consistent with this opinion.

I

On January 7, 2008, plaintiff applied to purchase a Titan no-fault insurance policy through independent agent Robert Abbo of the Insurance Max Agency in Detroit. The insurance application form signed by plaintiff contained the following question: "Does the applicant's household have any unlicensed drivers or any drivers with a suspended or revoked driver's license?" Plaintiff checked "No." Plaintiff's Titan insurance policy, Policy No. 01-PA-3199736, was issued that same day.

On January 11, 2008, at about 10:00 p.m., plaintiff was walking on southbound I-75 in Wayne County when he was hit by a semi truck owned by Transportation Services, Inc. (TSI). TSI is a self-insured trucking company and its excess insurance carrier is Zurich American Insurance Company (Zurich). According to the driver of the truck, plaintiff "jumped from the

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[1] On December 16, 2009, the parties filed a stipulation agreeing that all references to "Farmers Insurance Company" should be amended to read "Farmers Insurance Exchange." Nevertheless, the parties continued to refer to the entity as "Farmers Insurance Company" in various pleadings and documents. Because we refer to the entity simply as "Farmers" throughout this opinion, the entity's precise name is not at issue.

shoulder into his path." Plaintiff sustained severe head trauma, multiple broken bones, and numerous other serious, internal injuries.

At some point, Titan requested a copy of plaintiff's driving record from the Michigan Secretary of State. The Secretary of State's report, generated on January 17, 2008, indicated that plaintiff's driver license had been suspended "indefinite[ly]" as of September 12, 2007, for failure to pay a driver responsibility fee. The Secretary of State's report went on to state: "License Not Valid Until Reinstatement Fee Paid[.]" Titan employee Beverly Barrows opined in her affidavit that plaintiff had made a "material" misrepresentation in his insurance application by indicating that his driver license was not suspended or revoked. Barrows initially averred that Titan had relied on the representations in plaintiff's application and would not have issued Policy No. 01-PA-3199736 if it had known that plaintiff's driver license was suspended.

On February 1, 2008, Titan sent a letter to plaintiff "rescinding any and all coverage" with respect to Policy No. 01-PA-3199736. The letter went on to provide:

> It has been discovered that material information was misrepresented on the application. Michigan Department of State Records reveals [sic] that your driver's license was suspended/revolked [sic] on the date of the original application. State of Michigan Law ([MCL] 500.2103(1)(b)) indicates that any person with an [sic] suspended or revolked [sic] driver's license is ineligible for automobile insurance.

Plaintiff requested PIP benefits from Titan, TSI, and Zurich. Titan denied plaintiff's claim for PIP benefits on the grounds that plaintiff had made a material misrepresentation in his insurance application and that Policy No. 01-PA-3199736 had been rescinded. TSI and Zurich denied plaintiff's claim for PIP benefits on the grounds that Titan was higher in priority and that plaintiff's injuries may have been intentionally caused. On January 9, 2009, plaintiff sued TSI, Zurich, and Titan in the Wayne Circuit Court, claiming that all three entities were in breach of contract as a result of their failure to pay PIP benefits.

On April 8, 2009, Titan moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it no longer had a contract with plaintiff and was consequently not obligated to pay plaintiff's claim. Titan contended that plaintiff had made a material misrepresentation in his insurance application and it had therefore rescinded plaintiff's policy.

Plaintiff responded on May 22, 2009, arguing that there were several questions of material fact that precluded summary disposition. On June 1, 2009, TSI and Zurich filed a joint response to Titan's motion. TSI and Zurich contended that plaintiff had not made a material misrepresentation in his insurance application and that Titan had not been entitled to rescind plaintiff's policy. They pointed out that it was independent agent Robert Abbo, and not plaintiff, who actually completed the application. TSI and Zurich also suggested that Titan would have issued Policy No. 01-PA-3199736 even if plaintiff had not provided any information concerning his driving record. According to TSI and Zurich, it is not Titan's usual practice to consider an applicant's driving record before issuing a no-fault insurance policy. As such, TSI and Zurich contended that Titan could not demonstrate that it had actually relied on the representations in plaintiff's application. Lastly, TSI and Zurich asserted that Titan had continued to accept

plaintiff's premium payments even after it discovered that plaintiff's driver license was suspended. TSI and Zurich acknowledged that Titan had refunded these payments to plaintiff, but argued that Titan had nonetheless reinstated plaintiff's policy on February 5, 2008.

In reply, Titan acknowledged that it had mistakenly accepted a premium payment from plaintiff following the cancellation of Policy No. 01-PA-3199736, and that a new declaration page was inadvertently generated indicating that plaintiff's policy had been reinstated. However, in a second affidavit, Barrows averred that the new declaration page had been created in error, had been destroyed, and had never been mailed to plaintiff. Barrows further averred that plaintiff's policy "was never reinstated" and that the late-accepted payment from plaintiff had been fully refunded.

During the pendency of the proceedings, plaintiff filed an application with the Michigan Assigned Claims Facility, which assigned plaintiff's claim to Farmers on January 22, 2009. In a letter dated April 20, 2009, Farmers denied plaintiff's claim for PIP benefits on the ground that "the bodily injuries sustained appear to [have] be[en] caused by an intentional act."

On September 28, 2009, plaintiff moved to amend his complaint to add Farmers as a defendant. The circuit court granted plaintiff's motion to amend and plaintiff filed a first amended complaint naming Farmers as an additional defendant.

On January 14, 2010, Farmers filed a cross-complaint, alleging that any PIP benefits payable to plaintiff were the responsibility of Titan, TSI, or Zurich. Farmers asserted that Titan, Zurich, and TSI (as a self-insurer) were all higher in priority than the Assigned Claims Facility. Among other things, Farmers sought reimbursement for any benefits that it had already paid to plaintiff, together with costs and attorney fees.

On March 18, 2010, Titan filed a renewed motion for summary disposition under MCR 2.116(C)(10), again arguing that it had been entitled to rescind plaintiff's policy on the basis of a material misrepresentation in plaintiff's application. Titan also asserted that, pursuant to MCL 500.2103(1)(b), plaintiff was not "[e]ligible" for no-fault automobile insurance when he applied on January 7, 2008, because his license was suspended at that time. Titan pointed out that it had rescinded plaintiff's policy on February 1, 2009, less than 55 days after its issuance, in conformity with MCL 500.3220(b). Titan reiterated its position that, because plaintiff's policy was properly rescinded, it did not have an enforceable contract with plaintiff and was not responsible for paying the claimed PIP benefits.

Titan attached a letter from the Michigan Department of State, dated November 6, 2009, explaining that plaintiff had actually failed to pay two different driver responsibility fees. The letter explained that an earlier suspension of plaintiff's driver license had been resolved, but that plaintiff's license was again suspended on September 12, 2007, "for failure to pay a different driver responsibility fee . . . ." The letter confirmed that, as of the date of plaintiff's insurance application on January 7, 2008, "[plaintiff's] driver license was suspended due to the 9/12/2007 indefinite suspension which has never been cleared."

TSI and Zurich then moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that Titan was higher in priority and that, assuming plaintiff was entitled to any PIP

benefits at all, those benefits were the sole responsibility of Titan.[2] TSI and Zurich again claimed that plaintiff had not made a material misrepresentation in his insurance application on January 7, 2008. TSI and Zurich again asserted that Titan does not rely on an applicant's representations concerning his or her driving record when deciding whether to issue a no-fault insurance policy. TSI and Zurich also contended that Titan should be equitably estopped from rescinding plaintiff's policy in light of the fact that Titan continued to accept plaintiff's premium payments and "never bothered to run [plaintiff's driving record] until after it received notice of [plaintiff's] involvement in the [collision]."

TSI and Zurich attached the transcribed deposition of Sonia Simmons, a Titan claims representative. Simmons testified that the Secretary of State's report showing that plaintiff's driver license was suspended on January 7, 2008, was the "sole basis" for which Titan had cancelled plaintiff's policy. Simmons further testified that Titan relies on driving record reports generated by the Michigan Department of State and does not generally attempt to independently confirm the accuracy of such reports. Citing MCL 500.3220, Simmons confirmed that Titan would not have checked plaintiff's driving record at all if the collision had occurred more than 55 days after the policy was issued. TSI and Zurich also attached the transcribed deposition of Beverly Barrows. Barrows testified that she never attempted to independently verify whether plaintiff had a valid driver license and that, if plaintiff had not been involved in the collision, Titan would never have checked his driving record. When asked, "Are there situations where Titan will issue an insurance policy to someone who has a suspended license, maybe as an excluded driver or something along those lines," Barrows responded, "Yes."

Farmers moved for summary disposition on April 16, 2010, arguing that it was beyond genuine factual dispute that Titan was plaintiff's no-fault insurer at the time of the collision on January 11, 2008, that Titan was therefore highest in the order of priority, and that Titan was exclusively responsible for the PIP benefits, if any, that were payable to plaintiff.

On April 30, 2010, plaintiff moved for summary disposition arguing that he had properly claimed PIP benefits through the Assigned Claims Facility given the coverage dispute among carriers. Plaintiff contended that there was no genuine issue of material fact and that Farmers was required to pay his claimed PIP benefits as a matter of law. According to plaintiff, Farmers had initially paid approximately $4,000 or $5,000 in benefits, but had then stopped paying altogether. Plaintiff asserted that Farmers had "no reasonable basis to cease paying PIP benefits" and argued that he was entitled to interest on the unpaid, overdue benefits. Plaintiff also contended that he was entitled to costs and attorney fees from Farmers as a result of its unreasonable denial of benefits.

At oral argument on May 7, 2010, plaintiff's counsel asserted that "[a]t the time that [plaintiff] signed up for insurance with Titan, he thought he had a valid license." Counsel argued that plaintiff had only discovered later, sometime after submitting his application, that his driver

[2] Farmers concurred in the motion filed by TSI and Zurich. According to TSI and Zurich, the question whether "[plaintiff's] actions . . . were intentional, thus excluding his eligibility for no-fault benefits pursuant to MCL 500.3105(1) and (4)," was an "issue[] to be raised at a later date."

license was suspended. Counsel pointed to a letter that plaintiff had received from the Michigan Department of State in July 2007. That letter confirmed that an earlier license suspension had been cleared, and stated that plaintiff should carry the letter with him while driving as evidence that his license was restored. According to plaintiff's counsel, plaintiff relied on this letter and believed that he had a valid driver license as of January 7, 2008.

However, counsel for Titan pointed out that plaintiff had subsequently failed to pay a second driver responsibility fee, and that his license was again suspended on September 12, 2007. Thus, regardless whether plaintiff knew or not, it was beyond factual dispute that his driver license was in suspended status at the time he applied for no-fault insurance on January 7, 2008.

Following the attorneys' arguments, the circuit court made the following remarks from the bench:

> Now with regard to the motion of Titan, [plaintiff] didn't make an intentional misrepresentation.
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> At any rate notwithstanding the representation that was made regarding licensure . . . , it wasn't material. The deposition testimony supports the fact that the policy would have been issued . . . no matter.
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> Further, the presence or absence of the licensure didn't make a difference here because the plaintiff wasn't injured while driving. He was injured as a pedestrian. As a result Zurich is out, Titan is his priority insurer. That leaves us with the initial question I asked to Farmers. [F]inding that Titan is the priority carrier, does Farmers walk out the door? I don't think so. I think Farmers stays in on the question of whether or not the plaintiff can recover penalty interest and possibly attorney fees once we have the trial and the circumstances are gone into as to the basis for the failure to pay. The reasonableness of the conduct would be reserved for the trial itself.
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> The question of eligibility, that will be resolved by the jury and if in fact he was not eligible for the reasons initially asserted by Farmers then no one will be responsible including Titan. [B]ut that is something for the jury to determine . . . and there will be a box on the verdict form for the jury to make a finding as to that point[.]
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> Assuming that he was eligible and this was not an intentional attempted suicide, whatever, then they can make the call as to whether or not under the circumstances Farmers should have paid . . . .

On June 21, 2010, the circuit court entered an order denying Titan's motion for summary disposition, granting summary disposition in favor of TSI and Zurich, and dismissing with prejudice all claims and cross-claims against TSI and Zurich. On July 26, 2010, the circuit court entered a second order denying Farmers's motion for summary disposition, determining that Farmers was responsible for paying any no-fault benefits incurred through May 7, 2010, ruling that "any misrepresentation on the insurance application for Titan automobile insurance that

might have occurred was not material," and concluding that Titan was the insurance carrier of highest priority for no-fault benefits incurred after May 7, 2010. Titan moved for reconsideration of both orders, but the motions were denied.

On September 7, 2010, Titan filed an application for leave to appeal the circuit court's order of July 26, 2010. This Court initially denied Titan's application for leave to appeal,[3] but subsequently granted Titan's application on reconsideration.[4] Farmers filed its claim of cross-appeal on July 22, 2011.

On December 22, 2010, Farmers moved for summary disposition with respect to its cross-claim against Titan pursuant to MCR 2.116(C)(10). Farmers requested that the circuit court enter an order declaring that it was entitled to reimbursement from Titan for any and all claims ultimately deemed payable by Farmers. Farmers argued that, as a carrier assigned by the Assigned Claims Facility, it was entitled to reimbursement from Titan for all PIP benefits and other costs paid to plaintiff, including interest and attorney fees.

On February 18, 2011, the circuit court entered an order granting in part and denying in part Farmers's motion for summary disposition with respect to its cross-claim against Titan. The court ruled that Farmers "is entitled to reimbursement of reasonable expenses related to Plaintiff's PIP claim, if and when it pays such expenses for said claim, from Titan Insurance Company." The court also ruled, however, that Farmers "is not entitled to reimbursement of any expenses deemed unreasonable, including but not limited to interest penalties pursuant to MCL 500.3142, or attorney fees pursuant to MCL 500.3148, or both." The court determined that there remained an issue of fact concerning whether plaintiff was entitled to interest and attorney fees.

On March 15, 2011, the circuit court entered an order granting a stay of proceedings pending appeal. On April 5, 2011, Titan filed an application for leave to appeal the circuit court's order of February 18, 2011. This Court granted Titan's application for leave on December 1, 2011, and consolidated the matter with Titan's appeal that was already pending in Docket No. 300043.[5]

II

We review de novo the circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that

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[3] *Meyers v Transportation Services, Inc*, unpublished order of the Court of Appeals, entered February 24, 2011 (Docket No. 300043).

[4] *Meyers v Transportation Services, Inc*, unpublished order of the Court of Appeals, entered July 1, 2011 (Docket No. 300043).

[5] *Meyers v Transportation Services, Inc*, unpublished order of the Court of Appeals, entered December 1, 2011 (Docket No. 303405).

the moving party is entitled to judgment as a matter of law." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "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).

III

This case is replete with triable issues of fact that must first be addressed in the circuit court. We fully acknowledge that "an insurer may rescind an insurance policy and declare it void *ab initio* where such policy was procured through the insured's intentional misrepresentation of a material fact in the application for insurance." *Auto-Owners Ins Co v Comm'r of Ins*, 141 Mich App 776, 780; 369 NW2d 896 (1985). However, the central issues in these consolidated appeals are controlled by our Supreme Court's recent decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). As the decision in *Hyten* makes clear, the fact that Titan did not timely investigate the representations in plaintiff's insurance application, and the fact that Titan did not attempt to independently verify whether plaintiff was a licensed driver, have no bearing on Titan's ultimate entitlement to rescind plaintiff's insurance policy on the basis of fraudulent misrepresentation. Instead, the real question is whether plaintiff did, indeed, make a material misrepresentation when he indicated on his insurance application that he had a valid driver license (or, alternatively, if independent agent Abbo completed the application, whether plaintiff made a material misrepresentation when he signed it). Specifically, in order to support its rescission of plaintiff's no-fault policy, Titan will have to prove that (1) plaintiff made a material misrepresentation, (2) the representation was false, (3) plaintiff knew the representation was false when he made it or made it recklessly without knowledge of its truth, (4) plaintiff made the representation with the intent that it would be acted on by Titan, (5) Titan acted in reliance on the representation, and (6) Titan thereby suffered injury. *Hyten*, 491 Mich at 571-572.

As noted, genuine issues of material fact remain with respect to these questions. However, if Titan can ultimately prove these elements, it will be able to establish that plaintiff's insurance policy was properly rescinded. In such a case, Titan will not be responsible for paying any PIP benefits to plaintiff. See *id.* at 572. It does not matter that Titan could have ascertained the alleged fraud by conducting its own investigation. *Id*.

Of course, plaintiff claims that at the time he completed his insurance application on January 7, 2008, he could not have made any intentional misrepresentations because he did not know that his driver license was suspended. He also claims that even if he made a false representation on his insurance application, it was not material and Titan did not actually rely on the representation to issue the policy of insurance. However, there is substantial countervailing evidence pertaining to these issues. In other words, these matters also present genuine issues of material fact that require development in the circuit court. Whether a misrepresentation was material and whether it was relied on are generally questions of fact for the jury. See *Bergen v Baker*, 264 Mich App 376, 388-389; 691 NW2d 770 (2004).

Lastly, there certainly remains a genuine issue of material fact concerning whether plaintiff's injuries were self-inflicted. We note that, if the jury ultimately concludes that

plaintiff's injuries were caused intentionally, plaintiff will not be entitled to PIP benefits from *any* insurer, and each of the defendants will be entitled to judgment as a matter of law.

In Docket No. 300043, we affirm the circuit court's order denying Titan's motion for summary disposition, affirm the circuit court's order denying Farmers's motion for summary disposition, and reverse the circuit court's order dismissing TSI and Zurich. We also reverse the circuit court's conclusions that Farmers was responsible for paying any no-fault benefits incurred through May 7, 2010, that Titan was the insurance carrier of highest priority with respect to no-fault benefits incurred after May 7, 2010, and that any misrepresentation on plaintiff's insurance application "was not material."

IV

In Docket No. 303405, we vacate the circuit court's ruling on Farmers's motion for summary disposition with regard to its cross-claim against Titan. Quite simply, it would be premature to address whether Farmers is entitled to reimbursement from Titan. This issue cannot be resolved until after it is determined whether Titan was entitled to rescind plaintiff's policy of insurance in the first place. If the elements of actionable fraud are ultimately proven, and Titan is consequently entitled to judgment in this regard, Titan will not be responsible for reimbursing Farmers. Any remaining question concerning plaintiff's entitlement to costs, interest, and attorney fees will depend on the resolution of the main issues in this case.

In Docket No. 300043, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. In Docket No. 303405, we vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Kelly