

STATE OF MICHIGAN
COURT OF APPEALS

KENYA ALISHA FROST, GENERAL MOTORS
ACCEPTANCE CORPORATION (GMAC), and
ALLY FINANCIAL, INC.,

Plaintiffs,

and

CITIZENS INSURANCE COMPANY OF
AMERICA,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE
COMPANY, a/k/a PROGRESSIVE MARATHON
INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 23, 2014

No. 316157
Wayne Circuit Court
LC No. 11-002947-NF

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant Progressive Insurance Company appeals by right the circuit court's order granting summary disposition in favor of intervening plaintiff Citizens Insurance. We vacate the summary disposition order and remand to the circuit court.

In April 2010, plaintiff Kenya Frost obtained a liability insurance policy from Progressive to cover her car. The following month, the car was destroyed. The month after that, Frost's minor daughter was injured in an accident while an occupant in an uninsured car. The Assigned Claims Facility assigned Frost's daughter's claim to Citizens. In September 2010, Progressive informed Frost that her policy was rescinded *ab initio*, alleging that Frost had procured the policy through fraud. In 2011, Frost filed suit against Progressive seeking

reimbursement for losses incurred when her car was destroyed.¹ Citizens intervened as a party plaintiff to seek reimbursement from Progressive benefits that Citizens had paid on behalf of Frost's daughter.

Citizens and Progressive filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2) respectively. Citizens argued that Progressive could not void a policy of insurance *ab initio* where an innocent third party is affected. Defendant argued that Frost committed actionable fraud, and that, pursuant to the Michigan Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), the claims of an innocent third party do not bar rescission of the policy *ab initio*.

The circuit court found that the accident had occurred before Progressive had attempted to rescind the policy, and that once the accident occurred, Progressive lost its ability to rescind as to Frost's daughter. The court entered an order granting Citizens' motion for summary disposition and denying Progressive motion.

The issue on appeal is whether the circuit court erred by ruling that Progressive could not rescind the policy *ab initio* as to Frost's daughter. We conclude that the circuit court's ruling is inconsistent with our Supreme Court's holding in *Hyten*, 491 Mich at 571. In *Hyten*, our Supreme Court held that absent statutory provisions to the contrary, "an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party." *Id.* Accordingly, the claim by Frost's daughter did not bar Progressive from rescinding the policy in this case.

The *Hyten* holding does not fully resolve the issues in this case. To prevail on its rescission claim, Progressive must establish proper grounds for rescission. Because the circuit court did not expressly rule on the grounds for rescission, the case must be remanded for further proceedings.

The court's order granting summary disposition to Citizens and denying summary disposition to Progressive is vacated. The case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

¹ Frost was eventually joined by plaintiffs GMAC and Ally Financial, Inc., who dismissed their claims against defendant and are not parties in the instant appeal.