STATE OF MICHIGAN
IN THE SUPREME COURT

MEEMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant/Appellant,

v

LOUISE M. FORTSON, RICHARD A. FORTSON, Individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON,

Defendants/Counter-Plaintiffs/Appellees.

Supreme Court No. 158302

Court of Appeals No. 337728

Berrien County Circuit Court
No. 14-260-CK

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PLAINTIFF-APPELLANT MEEMIC INSURANCE COMPANY'S REPLY BRIEF ON APPEAL

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The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

I.A. IS THERE MICHIGAN AUTHORITY SUPPORTING AN INNOCENT THIRD-PARTY RULE IN ANY CIRCUMSTANCE?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

I.B. IS MEEMIC SEEKING EQUITABLE RELIEF?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

STATEMENT OF QUESTIONS cont'd

II. DOES MICHIGAN LAW EXEMPT SPOUSES AND RESIDENT RELATIVES FROM THE UNAMBIGUOUS TERMS OF THE POLICY UNDER WHICH THEY ARE CLAIMING BENEFITS?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

III. DID THE CANCELLATION OF A SUBSEQUENT RENEWAL POLICY ALTER THE PARENTS' STATUS AS NAMED INSUREDS SUBJECT TO THE ANTI-FRAUD PROVISION OF THE POLICY UNDER WHICH RECOVERY IS SOUGHT IN THE INSTANT CASE?

The trial court did not address this issue.

The Court of Appeals answered, "Yes".

Plaintiff/Counter-Defendant/Appellant contends the answer should be, "No".

Defendants/Counter-Plaintiffs/Appellees contend the answer should be,"Yes".

I.A. THERE IS NO MICHIGAN AUTHORITY SUPPORTING AN INNOCENT THIRD-PARTY RULE IN ANY CIRCUMSTANCE. (Defendants' Issue I., p 8-9).

The sole legal argument made by Defendants on this issue is that *Bazzi v Sentinel Ins Co*, 502 Mich 390, 919 NW2d 20 (2018), is distinguishable from the instant case, and therefore the innocent third-party rule protects JUSTIN's claim. That is nothing more than a restatement of the Court of Appeals' holding. It is not a defense of it.

In its Brief on Appeal, MEEMIC explained that Michigan has no common law innocent third-party rule, in that *Bazzi* recognized that the rule did not survive this Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547 (2012), 502 Mich at 407, which reaffirmed its decision in *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959).

Thus, at no point since 1959 has Michigan jurisprudence had an innocent third-party doctrine. That conclusion follows from a fundamental tenet of Michigan jurisprudence:

> "'An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of [the Supreme] Court is binding upon lower courts. . . .The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions. . . . **Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided *or has become obsolete*.**'"

In re AGD, Minor, __ Mich App __ (2019), 2019 WL 1211505, p 3[1](italics in original) (other emphasis added). *Accord, Paige v City of Sterling Heights* 476 Mich 495, 524 (2006).

In short, there is no innocent third-party rule in Michigan. Distinguishing *Bazzi* does not create one.

[1] The Westlaw version is the only one currently available.

I.B. MEEMIC IS NOT SEEKING EQUITABLE RELIEF. (Defendants' Issue II, p 10-11).

The sole argument advanced by Defendants on this issue is that MEEMIC sought equitable — rather than contractual — relief in the trial court, because in its Complaint, MEEMIC asked for a determination whether Defendant's actions voided the policy. That argument fails at every level of analysis.

First, asking the trial court whether Defendants' actions voided the policy is perfectly consistent with its seeking legal relief under the terms of the policy, rather than seeking equitable relief under traditional common law principles. Defendants failed to explain how pleading a legal contractual claim for relief transmutes the claim into one for equitable relief.

Second, even if there were any inconsistency between the language in the Complaint and the nature of the relief sought by MEEMIC, MEEMIC's entitlement to contractual relief was litigated by the parties by consent in this case. Under the pertinent case law, Defendants waived any objection to MEEMIC receiving such relief.

The relevant Court Rule reads as follows:

> "(1) **When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings**. In that case, amendment of the pleadings to conform to the evidence and to raise those issues need be made on motion of a party at any time, even after judgement."

MCR 2.118 (C)(1) (emphasis added).

In *Township of Frazier v Haney*, 327 Mich App 1 (2019), the plaintiff sued to abate a public nuisance. The defendant filed a motion for summary disposition on the ground that the claim was barred by the statute of limitations. The trial court ruled that the statute of limitations did not apply. *Id.* at 3.

The Court of Appeals reversed, holding, *inter alia*, that in the circumstances the issue was litigated by consent:

> "**The parties briefed and presented their arguments concerning the applicability of the statute-of-limitations** to plaintiff's claim, though plaintiff did not argue until after this appeal was filed that defendants failed to properly assert the statute-of-limitations defense in their response of pleading. Under these circumstance, **we hold that the trial court tried the merits** of defendants' statute-of-limitations defense **with plaintiff's implied consent**. **The issue may therefore be treated as if it had been raised in defendant's pleadings**, and it is appropriate to remand the case to allow defendants to move to amend their response of pleading accordingly."

Id. at 6 (emphasis added).

That principle applies equally to a theory advanced by a plaintiff. In *Alston v Flint Emergency Physicians*, unpublished per curiam opinion of the Court of Appeals, rel'd 12/20/96 (No. 176065) (227a)[2], the plaintiff's medical malpractice complaint did not allege a claim against the defendant hospital independent of the negligence of its agents. The trial court granted the defendant's pre-trial motion to limit proofs to the allegations in the complaint. Nevertheless, the jury returned a verdict of $2 million against the hospital itself. (228a).

On appeal, the hospital challenged the verdict on the ground that the plaintiff should not have been allowed to argue to the jury that the hospital itself was negligent. (228a). The Court of Appeals rejected that argument, holding as follows:

> "First, defendant acceded to the jury instructions, which allowed the finding of fault for the 'doing of something which a hospital *or* its agents would not to' Doctor Kwiatowski's expert testimony helped define the hospitals' duty. . . . Second, there is no indication in the record that defendant objected to the jury form, which allowed a finding of negligence against the hospital itself as a defendant. Finally, despite the court's ruling that plaintiffs could present evidence only on the allegations in the complaint, the proofs and instructions placed the question of the hospital's negligence before the jury. **When**

[2] MEEMIC cites the unpublished opinion as an illustration of the legal principles set forth in *Haney*. MCL 7.215 (C)(1).

> **issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings**."

(229a) (italics in original) (other emphasis added).

In the instant case, MEEMIC premised its Motion for Summary Disposition on the policy provision allowing it to void the policy if any insured person intentionally misrepresents any material fact. (52a-53a, 104a, 110a-111a, 238a[3]). At no point in the trial court did Defendants object to MEEMIC's obtaining summary disposition on that basis.

Indeed, in the Court of Appeals, Defendants expressly recognized that the trial court granted relief based upon the above-quoted policy provision:

> "**DID THE TRIAL COURT COMMIT REVERSAL ERROR BY APPLYING THE PROVISIONS OF THE MEEMIC POLICY CONCERNING FRAUD TO THE ACTIONS OF LOUISE AND/OR RICHARD FORTSON WHEN THEY WERE NOT INSUREDS AT THE TIME THAT ALLEGED FRAUD TOOK PLACE?**"

(272a). That issue was discussed fully by Defendants in the Court of Appeals. (272a-276a).

In short, it is beyond question that the voiding of the policy was premised on the contractual provision allowing the policy to be voided. MEEMIC did not seek or obtain equitable relief. Therefore, the Court of Appeals erred by applying equitable principles to justify its result.

[3] The Brief in Support of MEEMIC's 2015 Motion for Summary Disposition (232a-250a) was inadvertently omitted from the Appendix submitted with MEEMIC's Brief on Appeal.

II. MICHIGAN LAW DOES NOT EXEMPT SPOUSES AND RESIDENT RELATIVES FROM THE UNAMBIGUOUS TERMS OF THE POLICY UNDER WHICH THEY ARE CLAIMING BENEFITS. (Defendants' Brief p 12-15).

At no point do Defendants attempt to defend the Court of Appeals' discussion concerning the validity of the policy's fraud exclusion as applied to JUSTIN (176a). Nor do they attempt to defend *Shelton v Auto-Owners Ins Co*, 318 Mich App 648; 899 NW2d 744 (2017), on which that discussion was based.

Defendants' presentation on this issue is thus unresponsive to MEEMIC's discussion. It does not attack the legal validity of the fraud exclusion as applied to JUSTIN. Rather, the gist of Defendants' argument seems to be that the provision does no apply because LOUISE and RICHARD were not "insured persons" after the July 29, 2010, cancellation of the policy which was the successor to the policy in effect at the time of the accident. Therefore, the argument goes, their fraud, which began in 2012, did not come within the ambit of the fraud exclusion.

That argument assumes that the July 29, 2010, cancellation of the successor policy altered the status of LOUISE and RICHARD under the policy which was in effect at the time of the accident. That argument was dispatched in Issues II.A - II.B. of MEEMIC's Brief on Appeal, which discussion will not be repeated here.

In short, MEEMIC's analysis of Section II.B.3. of the Court of Appeals opinion (176a) stands unanswered.

III. THE CANCELLATION OF A SUBSEQUENT RENEWAL POLICY DID NOT ALTER THE PARENTS' STATUS AS NAMED INSUREDS SUBJECT TO THE ANTI-FRAUD PROVISION OF THE POLICY UNDER WHICH RECOVERY IS SOUGHT IN THE INSTANT CASE. (Defendants' Brief Issue IV., p 16-18).

Here, again, Defendants' argument is not responsive to MEEMIC's discussion. There is no reference to the fact that rights and obligations under an occurrence policy are unalterably fixed at the time of the occurrence; or that the cancellation of a subsequent renewal policy can have no effect on rights and obligations under a previous policy; or that the parent/providers were claimants under the policy.

The gist of Defendants' argument seems to be that the No-Fault Act does not allow JUSTIN's right to benefits to be extinguished by the acts of his parents. The short answer is that MEEMIC's voiding of the policy did not extinguish JUSTIN's right to benefits under the statute, but only his right to recover them under the policy.

If voiding the policy left JUSTIN without coverage, he would have a right to claim benefits through the assigned claims plan, MCL 500.3172 (1). The point is that voiding the policy did not extinguish any statutory rights to benefits. It only absolved MEEMIC of the responsibility for paying them.

Moreover, JUSTIN should not be materially disadvantaged. His parents will undoubtedly continue to provide the attendant care services. There has been no showing of any other services that will not be available to him as a result of the policy being voided.

RELIEF REQUESTED

Plaintiff-Appellant, MEEMIC INSURANCE COMPANY, asks this Court to issue an opinion holding that:

(1) There is no innocent third-party rule even where the fraud occurs in the claim for benefits, as opposed to in the application for insurance;

(2) A person's status as an insured person under a policy may not be ignored in order to avoid the application of an anti-fraud provision; and

(3) The cancellation of a no-fault policy after a loss occurs does not nullify the policy's terms and conditions applicable to the loss.

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