STATE OF MICHIGAN

COURT OF APPEALS

THOMAS BURTON,

Plaintiff-Appellant,

v

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY and KENNETH POWERS,

Defendants-Appellees,

and

DENNIS ADRIAN,

Defendant.

UNPUBLISHED
June 18, 1999

No. 208265
Jackson Circuit Court
LC No. 95-074501 CZ

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We affirm.

This action arises out of a dispute over an automobile insurance policy between plaintiff and defendant Metropolitan Property and Casualty Insurance Company (Metropolitan). The application signed by plaintiff contained misrepresentations of fact with respect to his driving record and as to whether he continuously maintained no-fault insurance coverage for the six-month period preceding plaintiff's signing of the application for insurance. Plaintiff's vehicle was allegedly vandalized and several boxes of uninstalled stereo equipment, a compact disc player, approximately thirty compact discs and other miscellaneous items were stolen from the vehicle. Upon investigating plaintiff's claim, Metropolitan discovered the misrepresentations, denied the claim, and rescinded the contract of insurance. Plaintiff filed suit alleging several theories for recovery.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted the summary disposition motion with respect to defendants Metropolitan and Kenneth Powers. Plaintiff voluntarily dismissed defendant Dennis Adrian. This appeal followed.

On appeal, plaintiff argues that the misrepresentations of fact were not material but, even if they were material, rescission of an insurance contract is not justified where the misrepresentations of fact were innocent in nature.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). We review a trial court's grant or denial of summary disposition de novo, examining the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins,* 458 Mich 288, 294; 582 NW2d 13 (1998).

Plaintiff first argues that the misrepresentations made in his application were not material. Plaintiff signed the application for insurance indicating that he had not been convicted of a moving violation or had his license suspended during the last five years and that he had continuously maintained no-fault insurance for the past six months. Plaintiff, in fact, was convicted of two speeding violations, driving while his license was suspended, driving while his license was invalid, and for failing to produce proof of insurance during the previous five-year period. In addition and contrary to his representations, plaintiff's no-fault insurance was canceled almost six months before he signed the application.

In *Keys v Pace,* 358 Mich 74, 82; 99 NW2d 547 (1959), our Supreme Court, quoting 29 Am Jur, Insurance, § 525, stated:

> The generally accepted test for determining the materiality of a fact or matter as to which a representation is made to the insurer by an applicant for insurance is to be found in the answer to the question whether reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium.

Since the holding in *Keys*, however, the courts of this state have not focused on the question of whether the insurer would have been entitled to charge an increased premium but for the misrepresentation. Instead, the inquiry has been limited to whether the insurer would have rejected the application altogether if the true facts had been represented. *Zulcosky v Farm Bureau Life Ins Co of Michigan,* 206 Mich App 95, 99; 520 NW2d 366 (1994). Defendants submitted the affidavit of Margaret Bishop, an underwriter for Metropolitan, as part of their motion for summary disposition. Bishop averred that based on his driving record, plaintiff was ineligible for automobile insurance through Metropolitan. Plaintiff failed to offer any evidence supporting his claim that even with the misrepresentations, he would have been eligible for insurance with Metropolitan. Therefore, as a matter

of law, we find that the misrepresentations made by plaintiff on his application for insurance were material.

Plaintiff next argues that even if the misrepresentations were material, rescission of the contract for insurance was not justified because the misrepresentations were innocent. Plaintiff alleges that Metropolitan's former employee, Dennis Adrian, incorrectly filled out plaintiff's application for insurance. Plaintiff contends that he informed Adrian of his complete driving history and that Adrian failed to incorporate that history into plaintiff's application. Plaintiff further alleges that his estranged wife allowed their auto insurance to lapse and that he was not aware of that fact when he signed the application. Even if we accept as true plaintiff's assertion that the misrepresentations were innocent, plaintiff cannot prevail.

It is well settled that a material misrepresentation made in an application for no-fault insurance entitles the insurer to rescind the policy. *Auto-Owners Ins Co v Johnson*, 209 Mich App 61, 64; 530 NW2d 485 (1995). Moreover, in *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995), this Court held that rescission is available to the insurer even if the misrepresentation was innocent, if the insurer relies upon the misrepresentation.

In *Lash*, the defendant Allstate rescinded a no-fault insurance contract for material misrepresentations made on the policy application as to the plaintiff's driving record. The plaintiff represented that he had no traffic violations within the last three years when in fact he had received a citation for impaired driving. The plaintiff contended that his misrepresentation was merely a mistake and that he honestly believed that his citation was issued more than three years before he applied to defendant for insurance. In reversing the trial court's decision denying the defendant's motion for summary disposition, we stated:

> Rescission is justified in cases of innocent misrepresentation if a party relies upon the misstatement, because otherwise the party responsible for the misstatement would be unjustly enriched if he were not held accountable for his misrepresentation. This is true, even as in this case, if it was a mutual mistake of fact. In this case, the belief that plaintiff had no traffic citations related to a basic assumption of the parties upon which the contract was made and materially affected the parties' performances. Allstate would not have issued the policy had it known about plaintiff's citation because plaintiff would have been ineligible under its guidelines. Plaintiff should not be unjustly enriched at Allstate's expense because of his misrepresentation, even accepting that it was innocent. Accordingly, rescission was appropriate and the trial court erred in denying Allstate's motion for summary disposition. [*Id.*, 103-104 (citations omitted).]

Here, Metropolitan produced record evidence that plaintiff would have been ineligible for insurance based upon his actual driving record. Metropolitan was justified in rescinding plaintiff's insurance policy as a matter of law. Accordingly, the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy