STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MCGARRY,

Plaintiff-Appellant,

v

HORACE MANN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 17, 1999

No. 210854
Kent Circuit Court
LC No. 96-009477 NF

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition of plaintiff's claim for no-fault benefits pursuant to MCR 2.116(C)(10). We reverse and remand.

On May 7, 1995, plaintiff, a passenger in a 1985 Ford Thunderbird driven by his longtime girlfriend Karen Mercer, sustained injuries when the vehicle rolled over. At the time of the accident, plaintiff held title to the Thunderbird, but had given the Thunderbird to Mercer for use in the course of her health care employment.[1] Approximately one month prior to the accident, Mercer had contacted defendant to arrange for no-fault insurance coverage of the Thunderbird. According to the affidavit of defendant's director of automobile underwriting, Mercer misrepresented in her insurance application for coverage of the Thunderbird that she owned this vehicle, and failed to report that plaintiff was a "non-driver over the age of 14" who resided in her household.[2] Defendant issued a no-fault policy covering the Thunderbird on April 12, 1995. After the accident, plaintiff sought no-fault benefits from defendant. Defendant paid plaintiff no-fault benefits for approximately seven months, but then refused to pay further benefits and rescinded Mercer's policy ab initio on the basis that Mercer had misrepresented information in her application for insurance coverage on the Thunderbird. The trial court concluded that because plaintiff did not qualify as an innocent third party claiming coverage under Mercer's policy based on plaintiff's failure to satisfy his statutory obligation as the Thunderbird's owner to secure insurance and his improper delegation of this responsibility to Mercer when she had no insurable interest in the Thunderbird, summary disposition was properly granted defendant.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for

summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). In reviewing a motion pursuant to MCR 2.116(C)(10), we must examine all relevant affidavits, pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party to determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997).

Plaintiff contends that the trial court improperly granted defendant summary disposition because plaintiff presented evidence creating a genuine issue of fact with respect to whether he qualified as an innocent party to Mercer's misrepresentations in obtaining defendant's insurance coverage of the Thunderbird. Where 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. *Hammoud v Metropolitan Property & Casualty Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997); *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985). The insurer's right to rescind ceases to exist, however, once an innocent third party becomes involved in a claim under the policy. *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993); *Darnell*, *supra*. 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. *Hammoud*, *supra* at 485.

Our review of the instant record reveals that a disputed question of fact exists with respect to whether plaintiff either participated in or knew of Mercer's misrepresentations to defendant. Plaintiff explained that he had given the Thunderbird to Mercer for her to utilize in the course of her employment. Plaintiff did not have a license at the time of the underlying accident because it had been revoked; therefore, he did not drive the Thunderbird. Plaintiff stated that Mercer obtained insurance coverage for the Thunderbird because she was driving it. Plaintiff's deposition testimony regarding his knowledge of Mercer's contact with defendant reads as follows:

> *Plaintiff's counsel*: And when [Mercer] obtained the insurance on the T-Bird, did you read the application for the insurance that she filed, that she signed?
>
> *Plaintiff*: No.
>
> *Plaintiff's counsel*: Okay. Were you aware that there was a representation in that application for insurance that she was the owner of the vehicle?
>
> *Plaintiff*: No.
>
> *Plaintiff's counsel*: Had you had any discussions with her concerning the question of if [defendant] were to raise a question about who owned the vehicle?

* * *

Plaintiff: When [Mercer] said she was going to call, she says—she asked me, "What should I say if they ask me who owns the car?" I said, "Tell them that I own it if they ask you."

Plaintiff's counsel: Did you have any reason whatsoever to believe that there was any problem with the insurance on that vehicle at the time of the accident in which you were injured?

Plaintiff: No.

This testimony clearly tends to establish that plaintiff knew nothing of Mercer's misrepresentations. While defendant contends that *Hammoud*, *supra* mandates our conclusion that plaintiff cannot qualify as an innocent party, *Hammoud* is distinguishable on its facts.[3] As proof that plaintiff had knowledge of Mercer's misrepresentations, defendant relies on plaintiff's statement that at some point he "looked at" the insurance application. Plaintiff unequivocally denied reading the application, and it is unclear from the testimony when plaintiff may have looked at the application. To the extent plaintiff's acknowledgment that he looked at the insurance application at some point might permit a reasonable mind to infer that plaintiff knew of Mercer's misrepresentations, summary disposition in favor of plaintiff is inappropriate.[4] *Gibson*, *supra*.

Because conflicting evidence existed concerning plaintiff's knowledge of Mercer's misrepresentations to defendant, we conclude that the trial court improperly granted defendant summary disposition pursuant to MCR 2.116(C)(10).

We reverse the trial court's grant of summary disposition to defendant and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[1] Plaintiff testified that he purchased the Thunderbird intending to give it to Mercer. Plaintiff explained that he did not drive the Thunderbird because his driver's license had been revoked. At the time of his deposition, however, plaintiff's license had apparently been restored.

[2] The underwriter asserted that had defendant known of plaintiff's residence in Mercer's household it would have obtained plaintiff's driving record and ultimately denied coverage due to plaintiff's history of license suspensions and revocations.

[3] In *Hammoud*, this Court observed that the plaintiff/third party, motivated by his desire to save money by insuring in the plaintiff's brother's name the car to which the plaintiff held title, had "allowed his older brother to obtain the necessary insurance by misrepresenting plaintiff's status as a driver of the vehicle." *Id*. at 487, 488-489. Thus, because the plaintiff actively involved himself in defrauding the defendant, this Court affirmed the trial court's grant of summary disposition to the defendant. *Id*. at 489. Defendant accuses plaintiff and Mercer of purposefully failing to transfer title in the Thunderbird from

plaintiff to Mercer in an effort to avoid state taxes, apparently attempting to analogize the instant plaintiff's behavior to the *Hammoud* plaintiff's actions. Contrary to the facts in *Hammoud*, however, absolutely no indication exists that the instant plaintiff urged Mercer to misrepresent any information to defendant, and plaintiff further denies having any knowledge of Mercer's misrepresentations.

Defendant also incorrectly maintains, without citing any legal authority, that plaintiff could not be an innocent party because he "was charged with knowledge of the law which stated that Mercer could not legally get insurance." See MCL 500.3101(1), (2)(g)(i); MSA 24.13101(1), (2)(g)(i) ("'Owner' means any of the following . . . A person renting a motor vehicle or *having the use thereof*, under a lease *or otherwise*, for a period that is greater than 30 days.") (emphasis added).

[4] Lastly, we note that defendant's argument that plaintiff is not entitled to personal protection benefits because he was the owner of a motor vehicle involved in an accident with respect to which the required security was not in effect to be somewhat disingenuous. The record shows that defendant issued Mercer a policy covering the Thunderbird on April 12, 1995. Defendant did not seek to rescind the policy on the basis of Mercer's misrepresentations until after the accident occurred on May 7, 1995. While defendant's argument assumes the policy was rendered void ab initio by Mercer's misrepresentations, as we have indicated, whether plaintiff had knowledge of Mercer's misrepresentations and whether Mercer's policy was therefore void ab initio with respect to plaintiff's claim remains undetermined.