STATE OF MICHIGAN

COURT OF APPEALS

AMANDA A. KITTERMAN,

Plaintiff-Appellant,

and

GREGG MILLER

Plaintiff

v

MICHIGAN EDUCATIONAL EMPLOYEES MUTUAL INSURANCE COMPANY,

Defendant-Appellee,

UNPUBLISHED
June 29, 2004

No. 247428
Saginaw Circuit Court
LC No. 01-040630-CK

Before: Jansen, P.J., and Markey and Gage, JJ.

PER CURIAM.

Plaintiff Kitterman appeals by right the trial court's order granting summary disposition in favor of defendant Michigan Educational Employees Mutual Insurance Companies (MEEMIC) on her claims for breach of contract and violation of Michigan's Consumer Protection Act (MCPA), MCL 445.901, *et seq*. Because the trial court failed to view the evidence before it in the light most favorable to plaintiff, made factual findings, and misapplied the law, we reverse.

I. Summary of Facts and Proceedings

This case arises out of an automobile accident which occurred February 21, 2001, when defendant Foster Boshans ran a stop sign striking a 2000 Chevrolet Malibu driven by plaintiff Gregg Miller, the "significant other" of the Malibu's owner, plaintiff Kitterman. MEEMIC rescinded insurance coverage for the Malibu contending Kitterman made material misrepresentations regarding who would drive the vehicle. Accordingly, MEEMIC refused to

pay for collision damage and personal injury protection (PIP) benefits for Miller. Kitterman sued MEEMIC alleging breach of contract and violation of the MCPA. Miller also sued for PIP benefits, which was settled after case evaluation. Plaintiffs' negligence claim against defendant Boshans was dismissed after he was granted a discharge in bankruptcy proceedings.[1] Defendant contended it properly rescinded the contract based on plaintiff's misrepresentation and failure to disclose that Miller drove the Malibu. After discovery, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Plaintiff was a single school teacher who had insured motor vehicles with defendant for many years through the VanRoeyen insurance agency. At some point plaintiff began a relationship with Miller. On October 22, 1999, Miller transferred title to a 1978 or 1979 Dodge pickup to plaintiff. On or about October 11, 1999, plaintiff added the pickup to her MEEMIC automobile insurance policy. Plaintiff transferred the pickup title back to Miller on March 28, 2001. No claims were ever submitted to MEEMIC concerning the pickup.

On January 31, 2000, plaintiff spoke by telephone to Mary Ann George of the VanRoeyen agency to request that the insurance on the pickup be cancelled and the Malibu be added. George filled out a "Policy Change Endorsement" form and mailed it to plaintiff for her review, signature and return. The form, under the heading "description and use of the vehicle to be insured" indicated that plaintiff was the owner (lessee) and the "principal driver of [the] vehicle." Plaintiff signed and returned the form on or about February 15, 2000. Plaintiff has always been the titled owner of the Malibu and made all the payments for it and the insurance.

George testified by deposition that she had no independent recollection of the January 31, 2000 telephone conversation with plaintiff. But George identified a printout of email correspondence between herself and Leann Aberlich, an underwriter for defendant, concerning the change endorsement plaintiff requested. The printout showed Aberlich sent an email message to the VanRoeyen agency on February 3, 2000, at 1:11 p.m., which reads, "Noticed insd has 2 very new vehicles on policy, Please find out if any other household members and if she is only driver. Why 2 cars?" George responded at 1:58 p.m. as follows:

> Actually, I asked her about this when car was added because I thought the same thing. She indicated she was only driver and both cars were in her name. We are waiting for signed end to come back. In the event of a loss, it would probably be a situation like the one we had for Walworth pap0620250. Just wanted you to know that I did inquire. Thanks, Maryanne.

Miller testified by deposition that he did not begin living with plaintiff until the "middle of June 2000." Miller admitted that he transferred the title to his pickup to plaintiff for a few months for "insurance purposes" because plaintiff did not want him to drive without insurance and it was cheaper for plaintiff to insure. According to Miller, plaintiff leased the Malibu

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[1] Hereafter, "plaintiff" refers only to Kitterman.

because she was generating too many miles on her leased Mercury Mountaineer and needed a car that obtained better gas mileage.

Plaintiff testified in a statement under oath that Miller was her "significant other" who began living with her in May or June 2000. In January 2000 she added the Malibu to her insurance policy by calling and speaking to someone who she believed was a secretary at the VanRoeyen agency. Plaintiff answered "myself" when asked who would be driving the Malibu. Miller was not living with her at the time. Plaintiff never spoke to anyone from the VanRoeyen agency about the insurance coverage after that first telephone conversation. Plaintiff explained she never informed defendant or the VanRoeyen agency about Miller moving in with her because "I did not know that I needed to let them know that someone was living with me." Plaintiff claimed that Miller's pickup was placed in her name because she could better afford necessary repairs before it was sold. She denied the Malibu was Miller's car and denied Miller was the primary driver. But plaintiff admitted that because she and Miller were together most of the time, Miller drove the Malibu "maybe 50% of the time."

The trial court, in granting defendant's motion for summary disposition, concluded:

> Each action taken by the Plaintiffs in and by themselves may not show an intentional misrepresentation, but taken together as a whole, they show there is no genuine issue of material fact that a misrepresentation had occurred. For the above reasons, MEEMIC has the right to rescind the insurance policy and declare it void *ab initio*. Therefore, because no contract exists, Plaintiffs' Count II - Violation of the Michigan Consumers Protection Act no longer has merit. [Opinion and Order of the trial court, p 5.]

The trial court subsequently denied reconsideration and plaintiff appeals by right.

II. Standard of Review

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of plaintiff's claim. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and support its position with affidavits, depositions, admissions, or documentary evidence, MCR 2.116(G)(3)(b); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden, supra* at 120. If the moving party carries its initial burden, the party opposing the motion must then demonstrate with admissible evidence that a genuine and material issue of disputed fact exists, MCR 2.116(G)(4). If the non-moving party fails to do so, summary disposition is properly granted, *Smith, supra* at 455. But a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). This Court will liberally find the existence of a genuine issue of material fact. *Lash, supra.*

III. Analysis

A. The Remedy of Rescission

To establish intentional misrepresentation or common-law fraud requires proof that (1) there was a material representation; (2) it was false; (3) it was made with knowledge that it was false, or made recklessly, without knowledge of its truth and as a positive assertion; (4) the party who made it intended that it should be acted upon; (5) the party to whom the misrepresentation was directed acted in reliance upon it and (6) thereby suffered injury. *Hord v Environmental Research Inst (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000); *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). "Innocent misrepresentation" in the making of a contract is established when a false statement of fact, made without knowledge of its falsity or intent to deceive, is relied upon by the other party to the contract to their detriment resulting in the unjust enrichment of the party that made the false statement. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 115-118; 313 NW2d 77 (1981); *McConkey*, *supra* at 27-28.

In the context of an automobile insurance policy, the general rule is that if an insured intentionally or innocently misrepresents a material fact in the application for the policy, rescission that voids the policy ab initio is an appropriate remedy. *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998); *Lash, supra* at 102-103. An insurer may establish materiality and reliance if the misrepresentation affects the insurer's risk or relates to the insurer's underwriting guidelines. *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993); *Lake States, supra.* See also *Lash, supra* at 103 (absent the misrepresentation the insured would not have been eligible under the insurer's underwriting guidelines). But an insured's misrepresentation does not limit the insurer's liability to an innocent third party with respect to coverage mandated by statute. MCL 257.520(f)(1); *Lake States, supra* at 331-332; *Auto-Owners Ins Co v Johnson,* 209 Mich App 61, 64; 530 NW2d 485 (1995). And, rescission may not be appropriate where the insurer has continued to accept premiums but the alleged fraud could easily have been detected. *Farmers Ins Exchange v Anderson*, 206 Mich App 214, 219; 520 NW2d 686 (1994).

Finally, some basic principles of fraud and misrepresentation apply to the case at bar. First, to establish either an intentional or innocent misrepresentation, there must be a material false statement. *Hord, supra* at 410; *McConkey*, *supra* at 28. Second, the misrepresentation must relate to an existing or past fact rather than being a promise of future performance. *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998); *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

B. Intentional or Innocent Misrepresentation

In the case at bar, the evidence, when viewed in a light most favorable to plaintiff, does not establish she made a false statement of an existing or past fact in her application for insurance coverage for the Malibu. Plaintiff's telephone conversation with George, an employee of the VanRoeyen agency, occurred on January 31, 2000. Plaintiff signed the change endorsement form on February 15, 2000. These events occurred months before Miller moved in with plaintiff according to the uncontradicted testimony of both plaintiff and Miller. Further,

plaintiff's admission that Miller may have driven the Malibu 50% of the time viewed in context and in the light most favorable to her, related only to the time-frame when Miller was living with her after May or June 2000 and the two were "together most of the time." Again, this time-frame was months after the Malibu was added to the insurance policy. Moreover, plaintiff denied that Miller was ever the primary or main driver of the Malibu.

Evidence that plaintiff told George she was the "only" driver of the Malibu is extremely weak. George testified she had no independent recollection of her telephone conversation with plaintiff. Assuming without deciding that the email correspondences between George and defendant's underwriter are admissible as exceptions to the rule against hearsay either as recorded recollection, MRE 803(5), or regularly recorded activity, MRE 803(6), they do not establish that plaintiff made a false written or oral statement. Viewed in the context of George's testimony and in a light favorable to plaintiff the email correspondence shows only that George asked plaintiff "if she were [sic] the only driver of the household" or if "there was [sic] any other drivers in the household." Based on the undisputed testimony of plaintiff and Miller, plaintiff's responses to George were truthful.

Thus, viewing the evidence in a light most favorable to plaintiff, there is little or no evidence that she made a material false statement in her dealings with defendant's agent to add the Malibu to her insurance policy. Plaintiff and Miller's actions with respect to Miller's pickup do not change this view of the evidence. Moreover, the trial court's reliance on *Hammoud v Metropolitan Prop & Cas Ins Co,* 222 Mich App 485, 489; 563 NW2d 716 (1997) ("an insurer does not owe a duty to the insured to investigate or verify that individual's representations or to discover intentional material misrepresentations"), is misplaced because there is no evidence whatsoever that plaintiff made an intentional material misrepresentation of an existing or past fact in respect to the Malibu. The trial court's contrary conclusion based on plaintiff's and Miller's actions "taken together as a whole" is impermissible fact finding at a motion for summary disposition.

In sum, the only possible relevant misrepresentation that plaintiff could have made of an existing or past fact was that she was the "principal" driver of the Malibu between the time she acquired it and when she signed the change endorsement form on February 15, 2000. The trial court must be reversed because it did not view the evidence in a light most favorable to Kitterman and impermissibly resolved this disputed issue of material fact on a motion for summary disposition. *Skinner, supra* at 161.

C. Intentional Concealment

Despite the fact that the trial court accepted its argument, defendant apparently recognizes the weakness of its position regarding misrepresentation and also argues that the trial court reached the correct result based on the insurance contract's "concealment or fraud" clause. This Court will not reverse the trial court where it reaches the right result for the wrong reason. *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 531 n 6; 644 NW2d 765 (2002); *Hall v McRea Corp*, 238 Mich App 361, 369, 366; 605 NW2d 354 (1999), remanded 465 Mich 919 (2001).

The insurance contract at issue contains the following clause:

> This entire Policy is void if an insured person has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> a) this insurance;
>
> b) the Application for it;
>
> c) or any claim made under it.

On appeal, defendant does not clearly argue how this clause applies to the case at hand. On brief, defendant vaguely argues that "there was misrepresentation with regard to the claim." An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims, *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003), nor leave it to this Court to search for the factual basis to sustain or reject its position, *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Nevertheless, this argument must fail as a basis for summary disposition for the same reason that defendant's claim regarding intentional or innocent misrepresentation fails: disputed issues of material fact exist for trial. Moreover, looking at the evidence in a light most favorable to plaintiff, we find little or no evidence of intentional concealment. It is undisputed that defendant's policy change form did *not* request information regarding others who might be living in plaintiff's household or who might be driving the Malibu. Further, neither MEEMIC nor the VanRoeyen Agency ever requested this information from plaintiff after the Malibu was added to the insurance policy. Thus, plaintiff's contention that she did not know she was required to inform her insurer when her boyfriend moved into her home is reasonable. Accordingly, the trial court's grant of summary disposition in favor of defendant on plaintiff's breach of contract claim must be reversed.

D. The MCPA Claim

The trial court based its dismissal of plaintiff's MCPA claim on its ruling that because defendant had properly rescinded its contract so that it was void ab initio, there could be no violation of the MCPA. Because the trial court erred in granting summary disposition on plaintiff's contract claim, the underpinning of the trial court's reasoning evaporates. Further, the trial court's reasoning is flawed because plaintiff's claims do not flow from the insurance contract but from defendant's alleged violations of the MCPA.

The MCPA prohibits "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). The act defines "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity." MCL 445.902(d). Thus, the MCPA is intended to protect consumers in their purchase of goods and services. *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000). But the MCPA exempts from its purview a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under

statutory authority of this state or the United States." MCL 445.904(1)(a). This exemption focuses on "whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'" *Smith, supra* at 464; see also *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617; 327 NW2d 805 (1982).

In *Smith, supra,* our Supreme Court considered whether an action alleging violation of the MCPA could be brought against an insurance company. The *Smith* Court interpreted MCL 455.904 before it was amended effective March 28, 2001 by 2000 PA 432. At issue in *Smith* was the manner in which the defendant represented the benefits and conditions of its credit life and disability policy. The Court first concluded that "§ 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA . . . ." *Smith, supra* at 465. The Court also concluded that "§ 4(2)(a) specifically exempts from the MCPA unfair, unconscionable, or deceptive methods, acts, or practices made unlawful by chapter 20 of the Insurance Code." *Id*. at 466. But then the Court held that the first clause of § 4(2)(a) provided an exception to the first two exemptions, thus permitting private causes of action under the MCPA against insurance companies. The Court explained:

> Giving effect to both § 4(1) and § 4(2), we conclude that private actions are permitted against an insurer pursuant to § 11 of the MCPA regardless of whether the insurer's activities are "specifically authorized." Although § 4(1)(a) generally provides that transactions or conduct "specifically authorized" are exempt from the provisions of the MCPA, § 4(2) provides an exception to that exemption by permitting private actions pursuant to § 11 arising out of misconduct made unlawful by chapter 20 of the Insurance Code. Therefore, the exemptions provided by §§ 4(1)(a) and 4(2)(a) are inapplicable to plaintiff's MCPA claims to the extent that they involve allegations of misconduct made unlawful under chapter 20 of the Insurance Code. [*Smith, supra* at 467.]

The enactment of 2000 PA 432 amended MCL 445.904 to move the former subsection 2(a) to its own subsection (3), thus removing actions rendered unlawful by chapter 20 of the Insurance Code from the purview of the of a private cause of action under section 11 of the MCPA. Defendant argues that because it did not rescind the policy at issue until after the effective date of the amendment, plaintiff's MCPA claim is barred because it alleges acts made unlawful by the Insurance Code. Plaintiff contends that her action alleges violations of the MCPA occurring from the date she added the Malibu to her insurance policy, January 31, 2000, to the date of the accident, February 21, 2001. Thus, plaintiff argues her MCPA is viable under *Smith, supra*.

The essence of plaintiff's MCPA claim is that defendant engaged in "unfair, unconscionable, or deceptive methods, acts, or practices," MCL 445.903(1), which led her to believe she had insurance coverage for the Malibu when in fact defendant later denied she ever had coverage. Thus, although the alleged deception did not become apparent until defendant rescinded the policy after March 28, 2001, the deceptive acts and practices alleged all occurred before the effective date of the amendment to MCL 445.904. Because defendant voided the policy ab initio, we conclude plaintiff's MCPA cause of action arose before March 28, 2001. In other words the alleged deceptive acts and practices occurred before that date

and before the statute was amended. So, the question next presented is whether the amendment of MCL 445.904 applies retrospectively or only prospectively.

This Court recently addressed this question in *Kubiak v Heritage Ins Co*, unpublished opinion per curiam of the Court of Appeals (No. 240936, dec'd January 27, 2004). The panel wrote:

> Defendant argues that because the amendment was effective "prior to trial" it precludes plaintiffs' claim based on unlawful insurance practices. "Amendments of statues are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v Providence Hosp,* 244 Mich App 626, 661-662; 624 NW2d 548 (2001). Generally, when a statute is amended, the pertinent date for determining whether to apply the amended statute is the date the cause of action arose. *Hill v General Motors Acceptance Corp,* 207 Mich App 504, 513-514; 525 NW2d 905 (1994). Unless the Legislature clearly indicates otherwise, a statute is not given retroactive effect if it impairs vested rights. On the other hand, a statute may be given retroactive effect if the statute is remedial or procedural in nature. *Tobin, supra* at 661-663. The amendment at issue here is not remedial or procedural in nature. But it does abolish a cause of action under the MCPA for actions that are unlawful under chapter 20 of the Insurance Code. Accordingly, because the Legislature has not otherwise stated, the amendment should not be applied retroactively. Because the amendment was effective after plaintiffs' claim arose and after their complaint was filed, it does not apply to plaintiffs' claim. [*Kubiak, supra,* slip op at pp 3-4; footnote omitted.]

We conclude the facts of this case should yield the same result for the reasons set forth in *Kubiak*. Although we may not rely on an unpublished case, we may find it persuasive. We find persuasive the reasoning set forth in *Kubiak* to resolve this issue. Accordingly, the trial court's order granting summary disposition on plaintiff's MCPA claim must be reversed.

We reverse and remand to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage