STATE OF MICHIGAN

COURT OF APPEALS

FDB, a legally incapacitated person, by Guardian/Conservator REGINA THOMAS,

Plaintiff,

v

MEEMIC INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellee,

and

ALLSTATE INSURANCE COMPANY,

Defendant/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

CHARLEITTE NICOLE SMITH and JOHN DOE,

Defendants-Appellees,

and

GEICO INDEMNITY COMPANY,

Third-Party Defendant-Appellant.

UNPUBLISHED
July 25, 2024

No. 363534
Wayne Circuit Court
LC No. 19-015503-NI

Before: LETICA, P.J., and BOONSTRA and MARIANI, JJ.

PER CURIAM.

Third-party defendant Geico Indemnity Company (Geico) appeals by right an October 4, 2022 stipulated order of dismissal, which dismissed plaintiff FDB's claim against defendant

Charleitte Nicole Smith. However, the issues on appeal involve two prior orders of the trial court granting defendant/cross-defendant Meemic Insurance Company's (Meemic) and partially granting defendant/cross-plaintiff/third-party plaintiff Allstate Insurance Company's (Allstate) motions for summary disposition, as well as the trial court's entry of a judgment requiring Geico to reimburse Allstate for PIP benefits already paid and to assume liability for payment of future PIP benefits. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On November 23, 2018, an unidentified driver struck FDB, a pedestrian, with his vehicle in a hit-and-run collision. FDB asserted at his deposition that Smith had also struck him with her vehicle because someone had told him that is what happened, but FDB had no independent memory of the accident. Smith testified that the mirror on the driver's side of her vehicle hit something as she drove past FDB, who was standing in the middle of the road. However, Smith did not know for certain whether her vehicle had contact with FDB. There was no blood on Smith's vehicle. Smith was insured by Geico at the time of the collision. FDB did not have his own insurance, but was living with his mother, Regina Thomas, who was insured by Meemic at the time of the collision. However, Thomas's insurance application form, which she filled out with the assistance of an IDJ Insurance Company (IDJ) agent, indicated that she was the only person living in her house. This was inaccurate because FDB was living with Thomas when she filled out the application, and continued to live with her thereafter.

After the accident, Meemic sent Thomas a rescission letter informing her that Meemic had rescinded her insurance policy because she had misrepresented a material fact when she applied for her insurance policy with Meemic. Specifically, Thomas had misrepresented that she was the only household resident, when in fact FDB was residing with her. Meemic concluded that this misrepresentation was material because FDB's extensive history of driving infractions made both himself and Thomas ineligible to be insured by Meemic. Accordingly, Meemic rescinded Thomas's policy and enclosed a check with the rescission letter reimbursing Thomas for the insurance premiums she had paid Meemic. Thomas signed and cashed the check.

FDB filed suit in 2019, asserting claims of negligence against the unidentified driver and Smith as a result of their negligence in hitting him with their respective vehicles, and claiming entitlement to personal protection insurance (PIP) benefits and uninsured motorist benefits from Meemic because he resided with Thomas, whom Meemic insured at the time of the collision. In the alternative, FDB asserted that he was entitled to PIP benefits from Allstate Insurance Company (Allstate), the insurance company assigned to this matter by the Michigan Automobile Insurance Placement Facility (MAIPF), because he did not own a motor vehicle that was insured, and did not live with a resident relative who had insurance. Allstate added Geico as a third-party defendant, alleging that Geico was higher in priority than Allstate for the payment of PIP benefits.

Meemic filed a motion for summary disposition under MCR 2.116(C)(10), arguing, in relevant part, that Thomas had made a material misrepresentation in her application for insurance with Meemic, entitling Meemic to rescind its insurance policy with Thomas. Allstate filed a cross-motion for summary disposition under MCR 2.116(C)(10), arguing, in relevant part, that Geico was higher than Allstate in the order of priority to pay the benefit claims because there was no genuine issue of material fact regarding whether Smith's vehicle had struck FDB.

In granting Meemic's motion for summary disposition in part, the trial court held that Thomas had made a material misrepresentation on her insurance application when she indicated that she was the only resident in her home, and that Meemic was entitled to rescind its policy with Thomas because of that misrepresentation. After additional briefing and arguments, the trial court held that Meemic was also entitled to rescind the policy with respect to FDB, determining that the balancing of the equities as required by *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018), weighed in favor of rescission.[1] Accordingly, the trial court granted the remainder of Meemic's motion for summary disposition. In that latter order, the trial court also partially granted Allstate's motion for summary disposition, holding that there was no genuine issue of material fact regarding whether Smith's vehicle was involved in the collision; the circumstantial evidence indicated that Smith's vehicle had struck FDB. The trial court then held that Geico was the priority insurer for the payment of PIP benefits to FDB as a result of the accident, leaving only the issue of attorney fees and costs for later resolution. The trial court subsequently denied Allstate's request for attorney fees and costs, and entered a judgment against Geico in favor of Allstate as described. This appeal followed.

II. STANDARD OF REVIEW

This Court "reviews de novo a trial court's ruling on a motion for summary disposition." *Zarzyski v Nigrelli*, 337 Mich App 735, 740; 976 NW2d 916 (2021). A party is entitled to summary disposition pursuant to MCR 2.116(C)(10) when the evidence does not present a genuine issue of material fact. *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 470; 957 NW2d 377 (2020). "A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue upon which reasonable minds might differ." *MacDonald v Ottawa Co*, 335 Mich App 618, 622; 967 NW2d 919 (2021) (quotation marks and citation omitted). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Jewett*, 332 Mich App at 470 (quotation marks and citation omitted). This includes pleadings, affidavits, admissions, and depositions, along with other evidence submitted by the parties. *Walega v Walega*, 312 Mich App 259, 265-266; 877 NW2d 910 (2015). "The interpretation of a contract, such as an insurance policy, is also reviewed de novo." *Webb v Progressive Marathon Ins Co*, 335 Mich App 503, 507; 967 NW2d 841 (2021) (citation omitted).

III. RESCISSION OF THOMAS'S POLICY

Geico argues that the trial court erred by holding that Meemic had validly rescinded its policy with Thomas. We disagree.

"[I]t is well settled in Michigan that fraud in the application for an insurance policy may allow the blameless contracting party to avoid its contractual obligations through the application of traditional legal and equitable remedies." *Titan Ins Co v Hyten*, 491 Mich 547, 570; 817 NW2d 562 (2012). "An insurance policy procured by fraud may be declared void *ab initio* [rescinded] at the option of the insurer." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 408; 919 NW2d 20 (2018).

[1] Geico does not specifically challenge this holding on appeal.

"Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Id.* at 409.

To establish actionable fraud with regard to an insurance policy, the insurer must prove the following:

> (1) [the insured] made a material misrepresentation; (2) it was false; (3) when [the insured] made it, [the insured] knew it was false, or else made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) [the insured] made it with the intention that it should be acted on by [the insurer]; (5) [the insurer] acted in reliance on it; and (6) [the insurer] thereby suffered injury. [*Webb*, 335 Mich App at 508.]

Geico's primary argument only concerns the first element of the *Webb* test—whether Thomas made a material misrepresentation.

On the front page of Thomas's insurance application with Meemic, under the "Household Information" section, the form asked for the names of all of the household members, regardless of their ages. Only Thomas was listed in that section. In another part of that section, the number one was written in the space indicating the number of household residents. The third page of the insurance application explained that, by signing the application, the signor certifies that "all information and all answers to all questions provided in this application are true and correct," and that all persons who live with the applicant or reside in the applicant's household were listed in the application. Thomas initialed each page of the four-page application and signed the last page of the application.

Thomas is responsible for the misrepresentation in the application because she signed the form. *Montgomery v Fidelity & Guar Life Ins Co*, 269 Mich App 126, 129-130; 713 NW2d 801 (2005). Even if the IDJ agent failed to ask Thomas about other household residents and erroneously indicated that there were none when filling out the application on Thomas's behalf, that would not insulate Thomas from the consequences of the misrepresentation because she had a duty to know what was in the application before signing it.[2] See *id*. at 130 ("A contracting party has a duty to examine a contract and know what the party has signed, and the other contracting party cannot be made to suffer for neglect of that duty."). It is evident that Thomas was given an opportunity to review the insurance application because she initialed each page and signed it. Even if Thomas in fact failed to read the application before signing it, the failure to read an agreement

[2] Because we conclude that Thomas made a material misrepresentation by affirming that the information on the application was correct and signing it, we need not address whether the IDJ agent was acting as Thomas's agent or Meemic's when he facilitated Thomas's insurance policy application. See *Genesee Food Servs, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008) (noting that an independent insurance agent or broker is "considered an agent of the insured rather than an agent of the insurer") (quotation marks and citation omitted). Thomas's own act of approving and signing the application created the misrepresentation, not any act by the IDJ agent.

is not a valid defense to the enforcement thereof. *Id*. ("It is well established that failure to read an agreement is not a valid defense to enforcement of a contract.") (citation omitted).

This Court's recent decision in *Bradley v Westfield Ins Co*, ___ Mich App ___; ___ NW3d ___ (Docket No. 365828), does not compel a different result. In *Bradley*, this Court held that the defendant insurance company had failed to show that its insured had made a material misrepresentation in her application for insurance by failing to list her daughter as a member of her household. *Id.* at ___; slip op at 6. This Court based its decision on the fact that "[d]efendant's application for insurance did not ask the applicant who lived with her and whether there were other drivers in the household . . . it does not direct or ask the applicant to list the drivers in the household or even who lived in the household." *Id.* Accordingly, this Court held that "[a] failure to provide information that is not requested does not constitute a misrepresentation, let alone fraud." *Id.* In this case, by contrast, the application for insurance clearly requested that Thomas provide the names of drivers and all of her household members. Regardless of who filled out the insurance application form, Thomas had an opportunity to review and correct any errors in the insurance application when she went through it and initialed each page. After failing to correct the erroneous information, Thomas signed the insurance application, certifying that the information therein was accurate. Accordingly, there is no genuine issue of material fact that Thomas made a material misrepresentation on her insurance application with Meemic.[3]

The trial court thus correctly held that Meemic was entitled to rescind the policy with respect to Thomas. Further, as stated, the trial court subsequently held that Meemic's rescission was valid with respect to FDB; that holding has not been challenged on appeal, apart from Geico's argument that Meemic had not established the right to rescind the policy at all. Therefore, we leave undisturbed the trial court's order granting summary disposition in favor of Meemic with respect to its liability for PIP benefits to FDB.

[3] We note additionally that, by accepting and depositing Meemic's check refunding her premium payments, Thomas may have agreed to a mutual rescission of the policy. See *Young v Rice*, 234 Mich 697, 701; 209 NW 43 (1926) ("A mutual rescission may be inferred from the conduct of the parties clearly evidencing their intention to treat the contract as at an end."); but see *Bradley*, ___ Mich App at ___, slip op at 9 (holding that "mutual rescission must be based on proof that the insurer informed the insured that cashing the check would constitute a mutual rescission by which the insured would forfeit any right to dispute the lawfulness of the rescission" rather than based merely on the fact that the insured accepted a refund check). Because we find in any event that Meemic was entitled to unilateral rescission, we need not address the impact of Thomas's acceptance of the refund check on Geico's claim of error. See *Bazzi*, 502 Mich at 411 (noting that equitable remedies such as rescission "are adaptive to the circumstances of each case").

IV. SMITH'S VEHICLE'S INVOLVEMENT IN THE COLLISION

Geico also argues that the trial court erred when it determined that no genuine issue of material fact existed regarding whether Smith's vehicle was involved in the collision. We disagree.

MCL 500.3115(1) provides that PIP benefits can be collected from insurers of the owners, registrants, and operators of motor vehicles involved in a collision. A vehicle must have actively, as opposed to passively, contributed to an accident in order to be considered "involved" in the accident. *Dep't of Transp v Nat'l Interstate Ins Co*, 331 Mich App 112, 121; 951 NW2d 113 (2019).[4]

> Further, a mere but for connection between the operation or use of the motor vehicle and the damage is insufficient to establish that the vehicle was involved in the accident under the statute. Additionally, physical contact is not required to establish that the vehicle was involved in the accident, nor is fault a relevant consideration in the determination. . . . The involved in the accident standard requires the determination that the vehicle made an active contribution to the happening of the accident and liability will not be imposed simply because of a remote association between [the] insureds' vehicles and the accident. [*Id*. (quotation marks and citation omitted).]

Whether an active link exists between the injury and the use of the subject vehicle is relevant to determine whether the subject vehicle was involved in the accident. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995). To be involved in the accident, the subject vehicle must "make an active contribution to the happening of the accident." *Id*.

In this case, FDB could not recall whether he came into contact with Smith's vehicle. Smith could not say for certain that her vehicle struck FDB, but testified that she heard her driver's side mirror strike or be struck by something as she was driving past FDB, but she did not know whether she hit FDB. The mirror was shattered by the collision. Smith turned her vehicle around and observed FDB lying in the middle of the road. Smith testified that she could not think of anything that would have caused her mirror to shatter other than contact with FDB.

Geico argued before the trial court that there was no direct evidence that Smith's vehicle struck FDB. On appeal, Geico argues for the first time that Smith's vehicle could have been struck by a "large beer" that was reportedly found near FDB at the scene of the accident. But no witnesses reported observing any debris or other items that could have struck Smith's car with sufficient force to shatter her driver's side mirror (or push it into the driver's side window hard enough to shatter). Geico speculates that the "large beer" was in FDB's possession before the accident and

[4] Although *Dep't of Transp* dealt with insurance liability for property damage arising from a collision, its interpretation of the phrase "involved in the accident" is applicable to this case. See *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 41; 528 NW2d 681 (1995) (explaining that the meaning of "involved in the accident" in the no-fault act, MCL 500.3101 *et seq*., is consistent throughout the act).

that it is possible that the beer was struck by Smith's vehicle without FDB being struck. This speculation is based on a single line in the medical records submitted to the trial court indicating that FDB was found "with a large beer at the scene."

Geico's speculation concerning the "large beer" is precisely the kind of "mere conjecture and possibilities" that are insufficient to establish a genuine issue of material fact. See *Skinner v Square D Co*, 445 Mich 153, 174; 516 NW2d 475 (1994). And, while there was no direct eyewitness testimony that FDB was struck by Smith's vehicle, Smith's testimony establishes that her vehicle passed FDB at the same time something struck her driver's side mirror, and that she observed nothing else that could have caused the impact. Smith further told police at the time of the accident that she believed her car had struck FDB. There was sufficient evidence presented for the trial court to conclude, absent sufficient contravening evidence, that Smith's vehicle had struck FDB. See *McCart v J Walter Thompson, USA, Inc*, 437 Mich 109; 469 NW2d 284 (1991) (noting that once the moving party has supported a motion for summary disposition with sufficient evidence, the nonmoving party bears the burden of coming forward with evidentiary materials to show the existence of a factual dispute). Additionally, to the extent that Geico argues that FDB was holding the "large beer" when it was struck by Smith's vehicle, such a collision could still be determined to have made an active contribution to the accident. *Turner*, 448 Mich at 39; see also *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991) (noting, in the context of a claim of civil battery, that contact with "any part of [a plaintiff's] body or anything which is attached to it and practically identified with it" is sufficient to establish a battery, and noting that "contact with the car plaintiff occupies is sufficient to establish a battery"). Under these circumstances, the trial court did not err by holding that no genuine issue of material fact existed concerning Smith's vehicle's involvement in the accident. Accordingly, as the insurer of Smith's vehicle, Geico was higher in priority than Allstate with respect to the payment of PIP benefits. See MCL 500.3125; MCL 500.3172; see also *Spencer v Citizens Ins Co.*, 239 Mich App 291, 301; 608 NW2d 113 (2000) ("Under the no-fault act, the Assigned Claims Facility represents the insurer of last priority."). The trial court correctly granted summary disposition in favor of Allstate in that respect.

Affirmed.

/s/ Anica Letica
/s/ Mark T. Boonstra
/s/ Philip P. Mariani