STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellee,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

and

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 19, 2019

No. 346360
Macomb Circuit Court
LC No. 2017-003224-NF

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

This is a reimbursement action for no-fault benefits by an assigned claims insurer, plaintiff Citizens Insurance Company of America. On appeal, defendant Pioneer Mutual Insurance Company challenges the trial court's decision to deny its motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) and grant defendant Allstate Insurance Company's motion for summary disposition under MCR 2.116(I)(2) (nonmoving party entitled to judgment). For the reasons stated in this opinion, we affirm.[1]

[1] We review de novo a circuit court's decision to grant summary disposition. See *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). "A motion made under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and when the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of

I. BACKGROUND

The material facts are not in dispute. In November 2015, Brittany Baumgart was injured in a pedestrian-motor vehicle accident while she was crossing a road. She was taken to McLaren Macomb Hospital for treatment. At the time of the accident, Brittany was living with her father, Jeffry Baumgart, who was insured under a no-fault policy issued by Pioneer. The motor vehicle involved in the accident was insured by Allstate. The two insurers disputed coverage.

Under MCL 500.3114(1), Pioneer is in the highest order of priority because it insured Brittany's resident relative, Jeffry, at the time of the accident. However, in November 2017 Pioneer rescinded Jeffry's policy on the basis of alleged material misrepresentations made in his insurance application. Specifically, in his October 2013 application Jeffry effectively represented that he was the only resident in his household.[2] Jeffry explained at deposition that he did not identify Brittany as a household resident because at the time she was incarcerated. He explained that even though Brittany had a room in his house and received mail there, she stayed there only sporadically between her frequent incarcerations. Testifying in 2017, Jeffry estimated that Brittany had been incarcerated for at least 8 out of the past 10 years.

Following the accident, Brittany made a claim under Jeffry's policy. After an investigation, Pioneer sent Jeffry a rescission notification stating that, given Brittany's "driving history," it would have denied Jeffry's application had it "been notified that Brittany Baumgart was a resident in your household at the time the application was filed or anytime thereafter . . . ." Jeffry cashed the premium refund check sent by Pioneer.

II. PROCEDURAL HISTORY

Initially, McLaren brought an action against the Michigan Assigned Claims Plan (MACP), Allstate, and Pioneer for payment of services rendered to Brittany. The MACP assigned the claim to Citizens who then reached a settlement with McLaren. In August 2017,

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law." *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

[2] Jeffry answered "No" to the following questions:

> 1. Any household resident not listed as a driver?
>
> * * *
>
> 8. Have you, any person living with or any other drivers using insured vehicles, been convicted of driving under the influence of intoxicants, driver while impaired, or reckless driving the past five years?
>
> 9. Have you, any person living with you, or any other drivers using insured vehicles, had a license to operate a motor vehicle suspended, restricted, limited or revoked in the past five years?

Citizens brought the instant suit seeking a declaratory judgment that either Pioneer or Allstate was in the highest order of priority to pay Brittany personal protection insurance (PIP) benefits and seeking reimbursement for all benefits already paid to her.

In May 2018, Pioneer moved for summary disposition, arguing that it was not responsible to pay Brittany PIP benefits because it had rescinded Jeffry's insurance policy on the basis of material misrepresentations in the insurance application. Pioneer asserted that Jeffry made false statements in his insurance application because his deposition testimony established that Brittany was domiciled with him and a household resident in October 2013 despite her incarceration. In response, Allstate argued that Jeffry did not make a false statement because the insurance application did not ask whether anyone was domiciled with him. Allstate also contended that Jeffry did not act with fraudulent intent, to which Pioneer responded that it was entitled to rescind the policy on the basis of an innocent misrepresentation. Citizens filed a brief in which it took no position on Pioneer's motion for summary disposition.

Before the trial court issued its decision, the Supreme Court decided *Bazzi v Sentinel Ins Co*, 502 Mich 390, 396; 919 NW2d 20 (2018), which held that the "innocent-third-party rule," which precluded an insurer from rescinding an insurance policy procured by fraud when there was a claim involving an innocent third party, had been abrogated. However, the Court clarified that rescission was an equitable remedy, and that insurers did not have an "automatic" right to rescind an insurance policy with respect to third parties. *Id*. at 411-412. The trial court ordered and received supplemental briefing on *Bazzi* as applied to this case.

The court then issued an opinion and order granting Allstate summary disposition. The court first determined that Jeffry did not make a false statement in his insurance application. The court noted Pioneer's position that Brittany was domiciled with Jeffry even when she was incarcerated, but it was unpersuaded "that 'domicile' is the same as 'household resident' or 'living with' especially as it relates to a layperson filling out an application for insurance." For similar reasons, the court also found a lack of evidence that Jeffry intended to defraud Pioneer. Finally, the court determined that equity did not favor rescission with respect to Brittany.

Citizens and Pioneer later stipulated to the amount of reimbursement, which closed the case. This appeal followed.

III. ANALYSIS

A. STANDING

Pioneer first argues that Allstate does not have standing to contest rescission of the insurance policy.[3] The thrust of Pioneer's argument is that Allstate should not be able to contest

[3] Whether a party has standing is a question of law reviewed de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (quotation marks and

Pioneer's decision to rescind the policy because Jeffry, the insured, has not done so. However, *Bazzi*, 502 Mich 390, makes clear that even when an insurance policy is declared void *ab initio*, the trial court must determine whether rescission is equitable as to third parties claiming benefits under the policy.

In *Bazzi*, the claimant was injured while driving a vehicle owned by his mother, and insured by a corporate entity. *Id*. at 396-397. The insurer successfully argued that the policy was procured by fraud and obtained a default judgment rescinding the policy. *Id*. at 397. On appeal, the sole issue was the viability of the innocent third-party rule. As noted, the Supreme held that the doctrine had been abrogated but clarified that the equitable remedy of rescission "does not function by automatic operation of the law." *Id*. at 411. Thus, even though the policy between the insurer and the insured was "void *ab initio* due to the fraudulent manner in which it was acquired, the trial court must now determine whether, in its discretion, rescission of the insurance policy is available as between [the insurer] and [the claimant]." *Id*. at 412.

Following *Bazzi*, in *Mendelson Orthopedics PC v Everest Nat'l Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 341013); slip op at 6, this Court reversed the trial court's decision not to evaluate the equities of rescission as to a third party even though the policy was properly voided between the insurer and the insured because of fraud in the application.

Accordingly, the fact the policy has been rescinded with respect to the insured is not dispositive of whether rescission is warranted as to a third party's claim for benefits. So, it is immaterial that Jeffry has not contested rescission of the policy because the trial court was required to determine whether rescission was warranted as to Brittany, i.e., an innocent third party.

Pioneer also argues that Allstate lacks standing to contest rescission given that Brittany has not done so herself. However, a review of the no-fault act, MCL 500.3101 *et seq*., shows that a disputing insurer may make arguments relevant to the coverage dispute, which in this case turns on Pioneer's request for rescission. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (explaining that when a cause of action is not provided at law, courts should examine whether a litigant has standing "in the context of a statutory scheme . . . .").

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citation omitted). "When a party's standing is contested, the issue becomes whether the proper party is seeking adjudication, not whether the issue is justiciable." *Tennine Corp v Boardwalk Commercial, LLC*, 315 Mich App 1, 7; 888 NW2d 267 (2016). Pioneer's standing argument is preserved because it was raised before, although not decided by, the trial court. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 182-183; 521 NW2d 499 (1994).

This action is governed MCL 500.3172(6). If the insurer responsible for paying PIP benefits cannot be identified because a coverage dispute, MCL 500.3172(6) requires the assigned claims insurer to commence an action to resolve the dispute. It provides in pertinent part:

> (c) The insurer assigned the claim by the Michigan automobile insurance placement facility shall immediately commence an action on behalf of the Michigan automobile insurance placement facility in circuit court to declare the rights and duties of any interested party.
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> (d) The insurer to whom the claim is assigned shall join as parties defendant to the action commenced under subdivision (c) each insurer disputing either the obligation to provide personal protection insurance benefits or the equitable distribution of the loss among the insurers.
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> (e) The circuit court shall declare the rights and duties of any interested party whether or not other relief is sought or could be granted.
>
> (f) After hearing the action, the circuit court shall determine the insurer or insurers, if any, obligated to provide the applicable personal protection insurance benefits and the equitable distribution, if any, among the insurers obligated, and shall order reimbursement to the Michigan automobile insurance placement facility from the insurer or insurers to the extent of the responsibility as determined by the court. [MCL 500.3172(6).]

Because the statute directs the circuit court to resolve the coverage dispute, the disputing insurers, who are mandatory parties to the action, plainly have standing to make arguments relevant to that dispute. Here, priority turns on whether Pioneer may rescind the policy as to Brittany, and so Allstate has standing under MCL 500.3172(6) to make arguments on that matter. Allstate also has standing in the traditional sense because it has a substantial interest "that will be detrimentally affected in a manner different from the citizenry at large . . . ." *Lansing Sch Ed Ass'n*, 487 Mich at 372. Further, MCL 500.3172(6) requires the circuit court to determine the rights and duties of an "interested party," but does not mandate that interested parties be joined as parties to the action. The implication is that the insurers may make arguments regarding an interested party's rights and duties. The no-fault act does not define the term "interested party," but clearly the injured person qualifies. For those reasons, we conclude that Allstate had standing to argue against Pioneer's request for rescission with respect to Brittany.

B. RESCISSION

Pioneer also argues that the trial court was not required to consider the equities of rescission in this case or, alternatively, that the equities weigh in its favor. We conclude that the trial court did not abuse its discretion in declining to grant Pioneer rescission as to Brittany.[4]

[4] The Supreme Court has directed that rescission is an equitable remedy granted in the sound discretion of the trial court. *Bazzi*, 502 Mich at 409-410; *Lenawee Co Bd of Health v Messerly*,

To begin, Pioneer's argument that the trial court was not required to weigh the equities of rescission as to Brittany is without merit. See *Bazzi*, 502 Mich at 412; *Mendelson Orthopedics PC*, ___ Mich App at ___; slip op at 6. Pioneer asserts that an equities analysis is not required because Brittany "has never made a claim for no-fault benefits." This argument is unclear because Pioneer's own rescission notification informs that Brittany made a claim under Jeffry's policy. To the extent that Pioneer is referring to the fact that the claim to the MACP resulted from McLaren's pre-*Covenant*[5] action to recover payment for services, we fail to see how that has any bearing on the trial court's duty to balance the equities of rescission as to Brittany. Regardless of who initiated the claim, this action concerned who would be responsible for reimbursement to Citizens for payments made on her behalf and who would have priority over any future claim for PIP benefits that she might make.

Setting that aside, *Bazzi* provided the following guidance in determining whether rescission is warranted:

> When a plaintiff is seeking rescission, "the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks." Accordingly, courts are not required to grant rescission in all cases. For example, "rescission should not be granted in cases where the result thus obtained would be unjust or inequitable," or "where the circumstances of the challenged transaction make rescission infeasible." Moreover, when two equally innocent parties are affected, the court is "required, in the exercise of [its] equitable powers, to determine which blameless party should assume the loss. . . ." "[W]here one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong." "The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked."
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> . . . . Equitable remedies are adaptive to the circumstances of each case, and an absolute approach would unduly hamper and constrain the proper functioning of such remedies. This Court has recognized that "[e]quity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life" and that "[e]quity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case." [*Bazzi*, 502 Mich at 410-411 (citations omitted).]

Here, the trial court determined that rescission would be unjust and inequitable given the lack of evidence showing that Jeffry made false statements in the application or that he intended

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417 Mich 17, 31; 331 NW2d 203 (1982). Accordingly, we will review the trial court's decision to deny rescission for an abuse of discretion. "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Ypsilanti Charter Twp v Kircher,* 281 Mich App 251, 273; 761 NW2d 761 (2008).

[5] *Covenant Med Ctr Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017).

to defraud Pioneer. Pioneer argues that Jeffry made false statements and that it was not required to show an intent to defraud in order to rescind the policy.[6] Whether Jeffry made a misrepresentation seemingly depends on whether one considers the legal or ordinary meaning of the term "household resident."[7] But even assuming both that Jeffry made an innocent misrepresentation, and that Pioneer was entitled to rescind the policy on that basis, the trial court was still required to weigh the equities of rescission at it pertained to Brittany. To the degree an innocent misrepresentation may be considered grounds to rescind as to the policyholder, making an innocent misrepresentation is less culpable behavior than actual fraud and so weighs against rescission as to a third party. Indeed, the statements in the insurance application may be viewed as a mutual mistake given Brittany's incarceration and Pioneer's decision not to include a definition of "household resident" in the application. And *Bazzi* expressly recognized that rescission on the basis of a mutual mistake must be decided on a case-by-case basis. *Bazzi*, 502 Mich at 411.

There are additional factors supporting the trial court's decision. For instance, the trial court noted that Brittany's accident did not involve Jeffry's vehicle. Allstate also points out that Brittany was not involved in the alleged misrepresentations. Weighing in Pioneer's favor in is the undisputed evidence that it would not have issued the policy had it known that Brittany stayed at the home. But a material misrepresentation or concealment is inherent to a claim for rescission, yet courts "are not required to grant rescission in all cases." *Id*. at 410. So, the materiality of the alleged misrepresentations is not dispositive.

We find Pioneer's other arguments unpersuasive. It emphasizes that this case does not concern whether Brittany will receive no-fault benefits but rather which insurer is responsible for reimbursement. However, Pioneer fails to adequately explain why Allstate should bear the loss. Even assuming that Pioneer made reasonable investigation efforts, it was still in a better position than Allstate to investigate Jeffry's application.

In its reply brief, Pioneer relies on Justice MARKMAN'S concurring opinion in *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 503 Mich 903, 904-907 (2018), in which he outlined factors to consider in determining whether an insurer carried its burden of showing that rescission is warranted. Justice MARKMAN's concurring opinion is not binding precedent. See *People v Tanner*, 496 Mich 199, 214 n 6; 853 NW2d 653 (2014). In any event, many of the

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[6] We need not decide whether Pioneer is correct on those matters because even if rescission of the policy was warranted with respect to Jeffry, the question remained whether rescission was equitable as to Brittany. See *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004) ("Generally, this Court need not reach moot issues or declare legal principles that have no practical effect on the case . . . .").

[7] Corpus Juris Secundum informs that a representation should be judged by its ordinary meaning in determining whether fraud occurred. 37 CJS, Fraud, § 27, p 237. That is consistent with the more general rule that "[a]n insurance policy's terms are given their commonly used meaning if not defined in the policy." *Matouk v Mich Municipal League Liability and Prop Pool*, 320 Mich App 402, 409; 907 NW2d 853 (2017) (quotations marks and citation omitted).

factors identified by Justice MARKMAN are encompassed by our preceding discussion, and therefore consideration of his opinion does not change our view that the trial court acted within its discretion in denying Pioneer's request for rescission.

In sum, the trial court considered the nature of the alleged misrepresentations and determined that rescission would not be just or equitable. We see no basis to reverse that ruling when there is no evidence that the insured acted with fraudulent intent and the third party was not involved in the alleged misrepresentations. Accordingly, on the record before us, the trial court did not abuse its discretion in determining that rescission was not warranted.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro