STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED December 19, 2019
v	No. 347155 Wayne Circuit Court
AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellant.	LC No. 15-015944-NF

Before: BECKERING, P.J., and BORRELLO and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Auto Club Insurance Association, appeals as of right the trial court's order entering a stipulated judgment in the amount of $2,168,299 in favor of plaintiff, Allstate Insurance Company. On appeal, Auto Club challenges the court's June 2017 order denying Auto Club's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. BASIC FACTS

On July 11, 2003, Kevin Williams, a pedestrian, was injured when he was struck by a vehicle driven by Marquise Harris. Because no one in Williams's family had a no-fault insurance policy, an application was submitted to the Michigan Assigned Claims Facility, which assigned the claim to Allstate on July 30, 2003. Thereafter, Williams's lawyer discovered that Harris had a no-fault automobile insurance policy with Auto Club that was issued on June 30, 2003, and was in effect at the time of the crash.

Following an investigation, however, Auto Club determined that Harris had made a material misrepresentation on her insurance application when she stated that she resided in Shelby Township as opposed to Detroit. As part of its investigation, Auto Club requested Harris to give a statement on September 12, 2003, but she did not appear as directed. On September 15, 2003, Auto Club sent a second letter requesting that Harris appear for an examination under oath, but Harris was again absent. On November 6, 2003, Williams's lawyer sent a letter to Auto Club that memorialized an October 29, 2003 conversation with Auto Club where he was informed that based on Harris's lack of cooperation Auto Club was not going to pay any of the bills submitted on behalf of Williams in connection with his claim. The letter was cc'd to Allstate.

On November 10, 2003, Auto Club sent Harris another letter, this one rescinding her policy based on her purported misrepresentation of where she was "living" when she applied for the insurance. The letter stated:

> the policy for this vehicle is rescinded; that is, it is void as of June 30, 2003. You will receive a refund or credit of premium for this policy."

According to an affidavit from the director of processing services for Auto Club, a refund in the "incorrect amount of $733.44" was issued on November 11, 2003; however, on November 19, 2003, "a final refund check for the correct amount of $786.00 was issued to Marquise D. Harris with check request number 000339." By 2016, when she was deposed, Harris did not recall whether she received a copy of the rescission letter, nor did she recall whether she received the refund check. On further questioning, Harris equivocated, indicating first that she could not say one way or another whether she received the rescission letter and then stating firmly that she "never got it." Regardless, she contended that after the accident she obtained insurance through a different insurer because she "got a cheaper rate."

Auto Club attempted to produce a hard copy of the underwriting file pertaining to Harris's no-fault policy—including a copy of the premium refund check—but the hard copies of the executed rescission letter, premium refund check, and all supporting documents were destroyed because Auto Club only has a 10-year document retention policy. However, the director of enterprise software solutions for Auto Club stated in an affidavit that by searching People Soft IT archived tables she "was able to confirm the refund transaction" to Harris had taken place on November 20, 2003. She added that a copy of the refund check was only retained by the bank for seven years, so it was no longer available. Similarly, an accountant with Auto Club averred that she searched the archived tables and was able to confirm that a refund transaction occurred on November 20, 2003. The accountant confirmed that the refund check "was not escheated or returned to Auto Club after it was sent to Marquise D. Harris," and she explained that if the check had been escheated, "that would mean it had not been cashed."

Approximately twelve years after Auto Club sent the rescission letter to Harris, Allstate filed suit against Auto Club, seeking reimbursement under MCL 500.3175 for the money that it had paid on Williams's claim. Auto Club filed a motion for summary disposition under MCR 2.116(C)(10), asserting that Harris's policy was rescinded by mutual consent when she cashed the refund check. Alternatively, Auto Club argued that its rescission of Harris's policy was proper because Harris had materially misrepresented her domicile when she filed her application for insurance. Finally, Auto Club asserted that Allstate's claim was barred by the doctrine of latches. In response, Allstate argued that Auto Club had improperly and unilaterally rescinded the no-fault policy; Allstate noted that Auto Club's evidence did not show that that Harris cashed the refund check, so Auto Club could not establish that the policy was rescinded by mutual consent. Allstate additionally stated that there was a factual dispute with regard to whether Harris lied on her application for insurance. Finally, Allstate contended that even if latches were applicable, Auto Club could not avail itself of an equitable remedy because it had unclean hands based on its wrongful rescission of Harris's policy and its spoliation of the evidence by destroying its claims file after rescinding Harris's policy.

The trial court denied Auto Club's motion for summary disposition, finding that there was no evidence that the refund check had been cashed and rejecting Auto Club's latches argument.

On June 21, 2017, Auto Club sought leave to appeal the court's denial of summary disposition in this Court, which denied leave to appeal.[1] On November 16, 2017, Auto Club filed an application for leave to appeal in our Supreme Court, but it denied leave to appeal.[2] The Supreme Court also denied Auto Club's motion for reconsideration.[3] Thereafter, on December 18, 2018, Auto Club agreed to a stipulated judgment ordering Auto Club to pay Allstate $2,168,299, but reserving Auto Club's right to challenge the court's June 2017 order denying summary disposition.

This appeal by right follows.

II. RESCISSION

A. STANDARD OF REVIEW

Auto Club argues that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(10). Challenges to a court's decision on a motion for summary disposition are reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). As explained in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013):

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). [Quotation marks and citations omitted).]

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[1] *Allstate Ins Co v Auto Club Ins Ass'n*, unpublished order of the Court of Appeals, entered October 26, 2017 (Docket No. 338895).

[2] *Allstate Ins Co v Auto Club Ins Ass'n*, 502 Mich 901 (2018).

[3] *Allstate Ins Co v Auto Club Ins Ass'n*, 503 Mich 862 (2018).

We review de novo equitable issues, including arguments for rescission or reformation. *Kaftan v Kaftan*, 300 Mich App 661, 665; 834 NW2d 657 (2013).

B. ANALYSIS

An assigned-claims insurer "has both the authority and the duty to enforce any available rights to indemnity or reimbursement that could have been pursued by claimants against third parties." *Auto-Owners Ins Co v Mich Mut Ins Co*, 223 Mich App 205, 210; 565 NW2d 907 (1997). The term "third parties," as used in MCL 500.3175, includes insurers that were liable for no-fault benefits that were paid by an assigned insurer. *Id*. Thus, as explained in *Spencer v Citizens Ins Co*, 239 Mich App 291, 305; 608 NW2d 113 (2000), if an assigned-claims insurer "discovers a higher priority insurer," then under MCL 500.3175, it may seek reimbursement from the higher priority insurer. At all times relevant to this case,[4] MCL 500.3115 provided:

> Except as provided in subsection (1) of [MCL 500.3114[5]], a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) Insurers of owners or registrants of motor vehicles involved in the accident.
>
> (b) Insurers of operators of motor vehicles involved in the accident.

Accordingly, if Harris—the operator, owner, and registrant of the motor vehicle involved in the accident—had a valid no-fault policy issued by Auto Club at the time of the accident, then Auto Club would be a higher priority insurer than Allstate, the assigned-claims insurer. And, as a result, it would be obligated to reimburse Allstate under MCL 500.3175.

Auto Club first asserts that Harris's no-fault policy was rescinded by mutual consent. In support, it directs this Court to *Enriquez v Rios-Carranza*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2018 (Docket No. 336128). In *Enriquez*, this Court determined that the insured's no-fault policy was rescinded by mutual consent because her insurer mailed notice of rescission and a premium refund check to the insured's lawyer and the insured cashed the check. *Id*. at 4. In doing so, this Court explained:

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[4] The no-fault act, MCL 500.3101 *et seq*., was substantially amended by 2019 PA 21, effective June 11, 2019. This case was commenced before the amendment and, therefore, it is controlled by the former provisions of the no-fault act. See *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012) (stating that as a general rule amendments to statutes are presumed to operate prospectively only). All references to the no-fault act are to the version in effect at the time this action was commenced.

[5] It is undisputed that MCL 500.3114(1) is inapplicable under the facts of this case.

In *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938), the Michigan Supreme Court adopted the description of rescission provided by 1 Black, Rescission and Cancellation (2d ed), § 1:

> "To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the status quo."

The other party's acceptance of the return of the consideration it paid toward the contract creates a "mutual agreement" or mutual "assent" to rescind the contract and excuses all the duties rights flowing from that contract. 13 Corbin, Contracts (rev ed), § 67.8, pp 47-49; 29 Williston, Contracts (4th ed), § 69:50, pp 119-121, § 73:15, pp 48-49. The endorsement and cashing of a check represents one party's acceptance of the other party's terms. See *Puffer v State Mut Rodded Fire Ins Co of Mich*, 259 Mich 698, 702; 244 NW 206 (1932) ("The failure of the parties to make a verbal agreement of settlement, separate from the indorsement on the check, is not of consequence."); *DMI Design & Mfg, Inc v ADAC Plastics, Inc*, 165 Mich App 205, 210; 418 NW2d 386 (1987) ("In this case, plaintiff's action in negotiating the check speaks louder than plaintiff's words."); *Fuller v Integrated Metal Tech, Inc*, 154 Mich App 601, 614; 397 NW2d 846 (1986) (in which the plaintiff's claims were precluded because he endorsed and cashed a check tendered by the defendant in settlement of the parties' disagreement). [*Id*. at 3-4.]

Although nonbinding, see MCR 7.215(C)(1), we find *Enriquez* to be instructive and persuasive, see *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010), so we adopt its reasoning as our own.[6] Applying *Enriquez*, in order to establish rescission by

[6] At the time *Enriquez* was issued by this Court, *Bazzi v Sentinel Ins*. Co, 315 Mich App 763, 770; 891 NW2d 13 (2016), aff'd in part and rev'd in part, 502 Mich 390; 919 NW2d (2018) was in effect and held that "if an insurer is entitled to rescind a no-fault insurance policy because of fraud, it is not obligated to pay any benefits under that policy, including PIP benefits to a third party innocent of the fraud." In 2018, our Supreme Court affirmed in part and reversed in part this Court's majority opinion, concluding that the presence of an innocent third party does not preclude an insurer from seeking rescission for fraud, but that fraud does not give an insurer an absolute right to rescission; rather, the trial court must consider, whether, in its discretion, rescission is available as an equitable remedy in the face of competing equitable interests. *Bazzi*, 502 Mich at 400, 410-412. Because the only issues before us pertain to whether the trial court

mutual consent, Auto Club must show that (1) it sent Harris unequivocal notice that it was rescinding her policy, (2) it sent Harris a refund of her premium, and (3) Harris accepted the offer of rescission by cashing the refund check.

Auto Club sent notice of the rescission to Harris on November 10, 2003, and it presented evidence showing that on November 20, 2003, it sent her a premium refund check. Although Auto Club did not have a copy of the check because its bank only kept records for 7 years and Auto Club only retained its file for 10 years, one of its accountants confirmed that the check had not been returned or escheated. The accountant added that a check that escheated to the state would be a check that was not cashed. On appeal, Auto Club posits that the only reasonable inference is that because the check was not returned or escheated, it must have been cashed. However, despite Harris's general testimony that she did not recall receiving the rescission notice, she also firmly stated that she "never got it." Additionally, Harris testified that the reason she changed insurers after the crash was because she "got a cheaper rate." Harris's testimony permits a reasonable inference that she did not receive notice of the rescission. Moreover, although Auto Club argues on appeal that only three things could have happened to the check—i.e., it was returned, it was escheated, or it was cashed—there is no documentary evidence indicating that those are the only options. In particular, its accountant did not state that all uncashed checks from Auto Club are escheated, nor is there evidence showing that the amount of the check was actually withdrawn from Auto Club's account. In sum, reasonable minds could differ on whether Harris received unequivocal notice of the rescission and then cashed a premium refund check. Because reasonable minds might differ, there is a genuine issue of material fact and summary disposition under MCR 2.116(C)(1) is not permissible. See *Pioneer State Mut Ins Co*, 301 Mich App at 377.

Auto Club next argues that it was entitled to rescind Harris's policy on the basis of the fraud-exclusion clause in Harris's no-fault policy. A copy of Harris's policy is not in the record (and has likely been destroyed pursuant to Auto Club's document retention policy); however, the fraud-exclusion language is recited in its rescission letter. It provides:

> The 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.

Auto Club claimed in the rescission letter that Harris represented that she "lived" in Shelby Township in her insurance application, but that its investigation revealed that she really "lived" in Detroit. It then noted Harris's contractual obligation to notify Auto Club of a change of address or rating conditions:

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erred in its June 2017 order, we have not been asked to address and we need not address the state of the innocent third party doctrine in 2003 when Auto Club sent its rescission letter to Harris.

> If the information used to develop the policy premium changes, **we** may adjust **your** premium during the policy term. The **Principal Named Insured** must inform **us** with 30 days of any changes related to the following:
>
> (a) **YOUR** address;
>
> (b) where **YOUR CAR** is principally garaged . . . .

On appeal, Auto Club argues that Harris misrepresented her address because she had not established the Shelby address as her new *domicile*. Domicile is usually relevant under MCL 500.3114(1), which mandates coverage for a resident relative *domiciled* with a policyholder. However, the question of domicile is irrelevant in this case because there is no evidence indicating that the insurance application required Harris to disclose her domicile as opposed to where she was residing and where her vehicle was principally garaged. See *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 494-495; 835 NW2d 363 (2013) (distinguishing a person's domicile from his residence and holding that a person may have more than one residence, but only one domicile at a time). Therefore, to the extent that Auto Club is arguing that there is no question of fact with regard to where Harris was domiciled, even if there were a disputed question of fact, there is nothing on this record to indicate that it is a *material* fact.

Furthermore, we note that there is a question of fact with regard to where Harris was living at the time of the accident. Harris testified that she was not living at the Detroit address in 2003, and that the last time she had stayed there had been approximately four months before the motor-vehicle crash. She explained that she had previously lived at the Detroit address with her husband, but that they separated and she was living with her sister-in-law at an apartment in Shelby Township. She recalled that she kept her belongings at the Shelby address and that she paid rent. Furthermore, she stated that *before* the accident she changed her address at the Secretary of State and the post office to reflect the Shelby address. Similarly, Harris's mother and Harris's husband testified that Harris was living at the Shelby address at the time of the accident. Harris's husband believed Harris only stayed overnight at the Detroit address once or twice between 2001 and July 11, 2003. Although Auto Club relies on aspects of Harris's testimony—such as the fact that she did not have a key or a bedroom at the Shelby address—and documentary evidence—such as the police report listing Harris's address as being in Detroit—that evidence is contradicted by the testimony from Harris, her mother, and her husband that she was living at the Shelby address. Moreover, although Harris testified that she did not intend to stay at the Shelby address indefinitely, she also testified that she did not have any set period of time that she was intending to stay at the address. An indefinite period of time, by definition, is one that lacks a set start and end date. Consequently, her testimony, viewed in the light most favorable to Allstate is that she was living at the Shelby address for an indefinite period of time, i.e., one without a defined end date. Therefore, given the testimony provided by Harris, her mother, and her husband, there is a question of fact with regard to where Harris was living at the time she applied for no-fault insurance.

The trial court properly denied summary disposition under MCR 2.116(C)(10) because there were genuine questions of material fact with regard to whether Auto Club properly rescinded Harris's no-fault policy.

III. EQUITABLE ESTOPPEL

A. STANDARD OF REVIEW

Auto Club next asserts that Allstate's claim is barred by the doctrine of equitable estoppel. Auto Club did not raise equitable estoppel as a defense in the proceedings below and the trial court made no ruling on that basis. Michigan follows a "raise or waive" rule of appellate review in civil matters. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [*Id*. at 388.]

Generally, a litigant who fails to timely raise an issue waives appellate review of that issue unless appellate review is necessary to prevent a miscarriage of justice. *Id*. at 387; *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192-193; 920 NW2d 148 (2018). Because the applicability equitable estoppel was not raised in the trial court, we conclude that the issue is waived.

However, even if it was not waived, Auto Club's claim is without merit. Our Supreme Court has explained:

> for equitable estoppel to apply, plaintiff must establish (1) that the defendant's acts or representations induced plaintiff to believe that the policy was in effect at the time of the accident, (2) that the plaintiff justifiably relied on this belief, and (3) that plaintiff was prejudiced as a result of his belief that the policy was still in effect. [*Morales v Auto-Owners Ins Co*, 458 Mich 288, 296-297; 582 NW2d 776 (1998).]

In support of its argument, Auto Club relies on a letter from Williams's lawyer to Auto Club. That letter provides, in full,

> Please allow this letter to confirm our discussion of October 29, 2003, during which you indicated that [Auto Club] would not be taking any further action on this claim due primarily to a lack of cooperation on behalf of your insured. Accordingly, [Auto Club] will not pay any of the bills submitted on behalf of Kevin Williams pursuant to his claim. If this letter does not accurately reflect our discussion please send me correspondence indicating the same.

> Otherwise, I would assume that this letter does accurately confirm the contents of our discussions of October 29, 2003.

The letter was cc'd to Allstate and is dated November 6, 2003. The rescission letter was not sent until November 10, 2003. Critically, the above letter does not constitute notice to Allstate that Auto Club was rescinding its policy with Harris. Nor does it contain information alleging or proving that Harris made a material misrepresentation on her application for insurance. Thus, the only evidence in the record is that Allstate was aware that Auto Club was refusing to pay no-fault benefits to Williams and that Auto Club was Harris's insurer. To the extent that Auto Club relied on this secondhand notice to Allstate as a confirmation that Allstate would not seek reimbursement under MCL 500.3175, its reliance cannot be construed as reasonable. Consequently, Allstate's claim is not barred by the doctrine of equitable estoppel.[7]

III. CONCLUSION

The trial court did not err by denying summary disposition under MCR 2.116(C)(10). There was a genuine question of material fact with regard to whether Harris's no-fault policy had been rescinded by mutual consent. Further, Auto Club cannot establish that Harris was asked to disclose her *domicile* on her application for insurance, so its arguments relating to domicile are misplaced. And, on this record, there is plainly a question of fact with regard to whether Harris misrepresented where she was living when she applied for insurance. Finally, although Auto Club contends that summary disposition should have been granted because Allstate's claim was barred by the doctrine of equitable estoppel, it waived that challenge before it failed to raise it before the trial court. Accordingly, we affirm the trial court's June 2017 order denying summary disposition. Furthermore, we affirm the December 2018 stipulated judgment.[8]

Affirmed. As the prevailing party Allstate may tax costs. MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Michael J. Kelly

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[7] In the proceedings before the trial court, Auto Club asserted that the doctrine of latches barred Allstate's claim. The trial court held that latches was inapplicable under the facts of this case, and Auto Club has not appealed that decision. Accordingly, we need not review that aspect of the trial court's ruling.

[8] Auto Club has raised no challenge to the validity of the judgment, and we have discerned no errors in the judgment that warrant reversal.