STATE OF MICHIGAN

COURT OF APPEALS

AMY G. LOSINSKI,

Plaintiff-Appellant,

v

TERRENCE T. CARTER, JR.,

Defendant,

and

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 29, 2021

No. 355047
Macomb Circuit Court
LC No. 2019-003837-NI

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

GLEICHER, J. (*concurring in in part and dissenting in part*)

Amy Losinski was injured in an automobile accident. She sought first-party no-fault benefits from her insurer, Progressive Marathon Insurance Company. Progressive Marathon invoked a "fraud" provision in the insurance policy, denied benefits, and cancelled Losinski's coverage. The majority endorses Progressive Marathon's fraud defense, holding that Losinski's failure to update her home address when her policy automatically renewed warranted rescission. The alleged misrepresentation did not induce the formation of Losinski's no-fault contract and therefore does not support rescission. I would reverse the circuit court's grant of summary disposition in favor of Progressive Marathon, and respectfully dissent.

I. PERTINENT FACTS

Losinski applied for no-fault coverage with Progressive Marathon in 2011, and a policy was issued that year. In May 2018, Losinski added a Chevy Tahoe to her long-standing Progressive Marathon no-fault insurance policy. According to Progressive Marathon, Losinski represented that the Tahoe was garaged in Macomb. More accurately, however, Losinski made

no affirmative representation regarding her address; she simply failed to inform Progressive Marathon that she had moved to Harper Woods in the fall of 2017.[1] Progressive Marathon relied on Losinski's failure to provide an updated address when she added the Tahoe to her policy as the basis for rescission. At the time of the December 2018 accident, Losinski was driving a 2014 Lincoln sedan, which had been added to the policy years before.[2]

Janeen Copic, an underwriting specialist employed by the Progressive Casualty Insurance Company, averred that Progressive Marathon "would not have issued the policy *at the current premium rate* in this instance had all of the risk variables been known." (Emphasis added.) Copic alleged that "had the proper disclosures been made to [Progressive Marathon] the premium would have increased 35.7% from $2,246 to $3,047 at the time . . . the Tahoe was added to the policy on May 24, 2018." Progressive Marathon presented no evidence that it would have declined to issue the policy in 2011 had Losinski lived in Harper Woods at that time, or that it would have cancelled the policy based on Losinski's move to Harper Woods.

II. ANALYSIS

In determining whether Progressive Marathon's contract-based fraud defense is valid, we are guided by *Meemic Ins Co v Fortson*, 506 Mich 287; 954 NW2d 115 (2020). Under *Meemic*, the first question a court must consider is whether the alleged "fraud" was committed to induce procurement of the contract, or occurred later. This distinction is critically important. Contractual antifraud provisions regarding misrepresentations made *after* a no-fault policy has been procured are invalid. *Id.* at 310 ("Meemic's contract-based fraud defense fails because it is not the type of common-law fraud that would allow for rescission."). But an insurance company may be entitled to pursue a legal or equitable remedy "if a contract is obtained as a result of fraud or misrepresentation." *Id*. at 305. The Supreme Court emphasized in *Meemic*: "The key phrase is 'if a contract is *obtained* as a result of fraud or misrepresentation.' " *Id*. (emphasis in original). Under the common law, the Supreme Court explained, a "defrauded party could only seek rescission, or avoidance of the transaction, if the fraud related *to the inducement to or inception of the contract*." *Id*. (emphasis added). The Supreme Court quoted approvingly this statement from a leading treatise: "facts which will ordinarily warrant the recission of a contract must have existed at the time the contract was made." *Id*. at 308.

The majority affirms summary disposition in favor of Progressive Marathon, holding that Losinski "made a misrepresentation in the inducement of the insurance contract." But that could not possibly be true, as Losinski applied for and purchased her Progressive Marathon policy in

[1] Progressive Marathon presented no evidence in the circuit court that Losinski made any affirmative representations regarding her address when she added the Tahoe. Although Progressive Marathon makes a vague allegation to this effect in its briefing in this Court, it has not supported the allegation with documentary or other evidence.

[2] The majority asserts that an accident "allegedly occurred." Progressive Marathon has never disputed that Losinski was involved in an accident, or that her significant injuries were caused by the accident. Viewing the evidence in the light most favorable to Losinski under MCR 2.116(C)(10) requires that we accept that an accident occurred, and that no-fault benefits were due.

2011 and the alleged misrepresentation was made in 2018. Nevertheless, the majority holds, the misrepresentation "induced" the formation of the contract because "renewal contracts constituted separate and distinct contracts." An automatic renewal, however, is not equivalent to the formation of a contract, and Losinski's failure to update her vehicles did not "induce" Progressive Marathon to insure her.

A. THE CONTRACTUAL PROVISIONS

In support of its motion for summary disposition, Progressive Marathon invoked the policy's fraud provisions. The policy contains three relevant paragraphs regarding fraud. The first relates to pre-procurement fraud, and permits the company to rescind the policy if an insured made "incorrect statements or representations . . . with regard to any material fact or circumstance," "concealed or misrepresented any material fact or circumstance," or "engaged in fraudulent conduct" "*at the time of the application*." (Emphasis added.) Progressive Marathon has not identified any misstatements or false representations made at the time Losinski *applied* for coverage in 2011. This policy provision does not apply, and in my view should end the case. The policy specifies that "incorrect statements" "at the time of the application" allow for voiding the coverage, which aligns with *Meemic*. But the policy's provisions regarding statements made afterwards—on which Progressive Marathon and the majority rely—conflict with *Meemic* and therefore cannot be enforced.

After the "inception" of the policy, the contract states that "[a]ny changes we make at your request to this policy after inception will be made in reliance upon information you provide." The policy language continues:

> If you:
>
> > 1. make incorrect statements or representations to us with regard to any material fact or circumstance;
> >
> > 2. conceal or misrepresent any material fact or circumstance; or
> >
> > 3. engage in fraudulent conduct;
>
> in connection with a requested change we may void the policy or reform it as it existed immediately prior to the requested change. We may do this at any time, including after the occurrence of an accident or loss.

Progressive Marathon relies on this section of the policy.

By its plain terms, this provision relates to post-procurement fraud. *Meemic* holds that Progressive Marathon may not avoid its statutory obligation to pay first-party benefits by enforcing an anti-fraud provision related to post-procurement fraud. *Meemic*, 506 Mich at 308-309. The policy may have changed when cars were added or subtracted, but it was procured in 2011, and the application was completed at that time. The policy standing alone should have doomed Progressive Marathon's summary disposition motion.

B. "FRAUD"

The majority correctly holds that fact questions precluded summary disposition regarding whether Losinski committed fraud, fraudulent misrepresentation, or silent fraud. Fraud requires an intent to deceive. Losinski claims that she simply forgot to tell Progressive Marathon that she had moved.

Summary disposition of defendant's fraud claims was improper for two reasons. First, a legal determination of Losinski's mental state depends on her credibility, which cannot be assessed on summary disposition. *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991). As our Supreme Court has repeatedly emphasized, "[t]he granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial." *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994). Mistakenly or forgetfully neglecting to report an address change is not a species of fraud.

Second, as discussed in greater detail below, Losinski's failure to update her address was a *post-procurement* event. As such, it did not permit Progressive Marathon to cancel the policy or to deny her claim.

C. INNOCENT MISREPRESENTATION

The majority holds that summary disposition was proper under the theory of innocent misrepresentation because Losinski "renewed her policy several times after moving out of Macomb Township" and failed to update her address. I am unconvinced that an innocent misrepresentation—a mistake, in other words—can support a policy rescission without evidence that the withheld information was material to a decision to undertake a risk. Progressive Marathon has presented zero evidence on this score. To the contrary, Progressive Marathon admits that the address information was relevant only to the rate charged, not to Losinski's eligibility for no-fault coverage.

But even assuming that Losinski innocently misrepresented her address and that her address was material to the risk, Losinski's innocent misrepresentation "did not occur in the procurement of the policy—it did not, in other words, induce [Progressive Marathon] to enter into the contract . . . ." See *Meemic*, 506 Mich at 296. For this reason alone, summary disposition was improperly granted to Progressive Marathon.

D. NO FRAUD IN THE INDUCEMENT

According to the majority, Michigan law considers a renewal policy to be a new contract, and therefore Losinski's innocent misrepresentation induced Progressive Marathon to consent to the renewals. This reasoning, however, conflicts with the law and the policy itself.

This Court has stated that renewals are "new," "separate," and "distinct" contracts. But in the same sentence, this Court carved out an exception for situations in which the parties to a policy have agreed that the parties intended "one continuous contract":

> "A renewal contract has been stated by many jurisdictions to be a new, and a separate and distinct contract, *unless the intention of the parties is shown clearly*

> *that the original and renewal agreements shall constitute one continuous contract*. It has thus been stated to be a new or separate contract which is based upon and subject to the same terms and conditions as were contained in the original policy. Unless otherwise provided, the rights of the parties are controlled by the terms of the original contract, and the insured is entitled to assume, unless he has notice to the contrary, that the terms of the renewal policy are the same as those of the original contract." [*21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 443-444, quoting *Russell v State Farm Mut Auto Ins Co*, 47 Mich App 677, 680; 209 NW2d 815 (1973) (cleaned up, emphasis added).]

Like most, if not all auto insurance companies in Michigan, Progressive Marathon allows policyholders to pay their year-long insurance policies in six-month increments, with routine and automatic renewals. Losinski took advantage of this option. Losinski did not fill out a new application when the renewal payment came due. The record does not supply any indication that she was asked any questions at all when her policy automatically renewed in November 2018, or that she made any affirmative representations when arranging for her payment to be electronically transmitted. This was one continuous contract, not "new" one.[3]

Furthermore, labeling the renewal a "new contract" should not allow Progressive Marathon to sidestep *Meemic*'s central message: contractual language does not overcome the no-fault statute except when it concerns fraud at a policy's inception. The majority's holding permits insurers to refuse to pay mandatory benefits based on "fraud" (or merely a negligent oversight) long after the contract was obtained. Yet *Meemic* instructs that only fraud accompanying the procurement of the policy is actionable. And *Meemic* repeatedly reinforces what that means. In footnote 13, *Meemic* offers up a slew of citations supporting that "[a]t common law, the defrauded party could only seek rescission, or avoidance of the transaction, if the fraud related to the inducement or the inception of the contract." *Meemic*, 506 Mich at 305 n 13, citing Dobbs, Remedies (2d ed), §9.5, p 716. Here is a sampling of the quotations and cited language in the footnote:

> *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 538 n 15; 872 NW2d 412 (2015) ("When a party fraudulently induces another party to enter into a contract, that contract is voidable at the option of the defrauded party. . . ."); . . . Geisler, *Proof of Fraudulent Inducement of a Contract and Entitlement to Remedies*, 48 Am Jur Proof of Facts 3d 329 (Mar 2020 update), § 1 ("Essentially, 'fraudulent inducement' occurs when a party to a contract was induced to enter into that contract by fraud of the other party. . . . 'Fraudulent inducement' relates to the

[3] *Zufelt* itself supplies little help to Progressive Marathon. In *Zufelt*, 315 Mich App at 444, this Court observed that "although [the insured's] policy was renewed, because there was no indication that the original terms changed in any significant manner, the terms and conditions that governed the original policy applied to the renewal." The same is true here. Indeed, Losinski's policy states: "The coverage provided in your policy may be changed only by the issuance of a new policy or an endorsement by us." No changes are apparent. See also 2 Couch, Insurance § 29:35 ("Where the policy of insurance is in a sense 'automatically' renewed when the insured pays an additional premium, the parties are deemed bound by the original contract of insurance.").

> accuracy and truthfulness of the discussions and negotiations of the parties prior to the contractual agreement and does not necessarily imply that a party has failed to perform its contractual duties.") (paragraph structure omitted) . . . .
>
> Both of the two relevant forms of common-law fraud focus on conduct or circumstances at the contract's inception. "Fraudulent inducement" generally requires misrepresentations that induce a party to enter a contract, Geisler, § 1[.]

Meemic stressed that when a no-fault insurer raises a fraud defense to mandated coverage, the issue turns on whether the alleged fraud related to the contract's initial formation. *Meemic*, 506 Mich at 310, n 17. By permitting Progressive Marathon to avoid its statutory obligations to Losinski, the majority invites no-fault insurers to play the renewal card whenever a misrepresentation is alleged. This is a dangerous precedent. It disregards the letter and the spirit of *Meemic*, and it deprives insureds of benefits they paid for—in this case, for seven years. I respectfully dissent.

/s/ Elizabeth L. Gleicher