STATE OF MICHIGAN

COURT OF APPEALS

MUNSON MEDICAL CENTER and MUNSON HEALTHCARE OTSEGO MEMORIAL HOSPITAL doing business as MUNSON HEALTHCARE OMH MEDICAL GROUP,

Plaintiffs-Appellants,

v

FALLS LAKE NATIONAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 14, 2021

No. 356702
Grand Traverse Circuit Court
LC No. 2020-035280-NF

Before: REDFORD, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's renewed motion for summary disposition. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Dawn Drum moved to Michigan from Florida and lived in the basement of the home occupied by her best friend, Marcella Dever, and her best friend's husband, Tom Dever. Drum testified that Marcella owned "a lot" of vehicles, including a Ford Mustang that she drove in the summer and a Cadillac Escalade that she drove in the winter. Tom drove a work truck and maybe had more than one truck. Additionally, the married couple had motorcycles. When Drum moved to Michigan, she acquired insurance for her 1998 Chrysler Sebring from defendant. However, she transferred title to the Sebring to her sister. At the time of her accident, Drum was driving a 2000 Chevy Silverado truck. Additionally, Drum owned a 1987 Jeep Wrangler, but it was not drivable.

On October 16, 2019, Drum was driving her truck when she was injured, but she could not recall the exact circumstances of her accident. She was unaware if she consumed any alcohol before the accident. She believed that she tried to avoid hitting a deer, but was unsure if this recollection was a dream. She only recalled attempting to start her truck and someone trying to

stop her. For the injuries sustained in the motor vehicle accident, Drum received medical treatment from plaintiffs, totaling $187,190.10.

Defendant, Drum's automobile insurer, refused to pay her personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., citing material misrepresentations in the application for insurance. Specifically, when Drum applied for insurance on May 16, 2018, she was required to identify all household members age 14 and older as well as any insured or uninsured vehicles garaged at her address, regardless of the registrant. However, she did not disclose that she lived with the Devers and any vehicles owned by them that were garaged at the home. The application for insurance apprised Drum of the consequences of concealment or misrepresentation. It provided, in relevant part:

> **I hereby apply to the Company for a policy of insurance, as set forth in this application, on the basis of statements contained herein. I agree that if I conceal or misrepresent a material fact or circumstance relating to the insurance, the policy shall be null and void.** I certify that all household members (age 14 or older) including, but not limited to, spouse(s), roommate(s), children, family members and wards have been listed as potential drivers. In addition, all individuals outside the household and any drivers to whom the insured auto(s) is furnished or available for his or her use, even occasionally and/or infrequently, have been identified and listed. I understand that my total policy premium could be affected by this information, and I have disclosed all business and commercial use of my vehicle(s) in this application.
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> *** * ***
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> **The Company reserves the right to void policies and deny claims when insureds misrepresent themselves and/or their risks at the time of applicant [sic] for insurance. Common occurrences of misrepresentation include, but are not limited to, false driver license status, false vehicle use, false garaging addresses, unlisted vehicles and unlisted drivers. Misrepresentation will be declared, if the Company would not have accepted the risk, or charged higher premiums, had the facts been known at the time of the application. If the Company determines through investigation that there was material misrepresentation, the policy may be voided and all claims denied.** [Emphasis in original.]

Following the accident, defendant's third-party administrator notified Drum by letter that the policy was rescinded for material misrepresentations. The letter provided, in pertinent part:

> [The administrator] received this claim indicating that you were injured in an accident on October 16, 2019. The issue is that you did not list all household residents and all vehicles garaged at the policy address on the policy application. When the company spoke with you, at your Examination Under Oath, you confirmed that you lived with Marcella Dever and Tom Dever when you purchased the policy and signed the application. The listing of all individuals age 14 or older is a condition precedent to binding coverage. As a result of the failure to list

> Marcella Dever and Tom Dever as household residents on the policy application, the application would not have been accepted by the carrier and a policy would not have been written without the disclosure of all household residents and an evaluation of the risk. Regardless, adding Tom Dever to the policy, as an additional driver, would have increased the premium by $49.00. You also confirmed that Marcella Dever owned a Cadillac Escalade that was garaged at the policy address when your purchased the policy and signed the application. As a result of the failure to list Marcella Dever's Cadillac Escalade as a vehicle garaged at the policy address, on the policy application, the application would not have been accepted by the carrier and a policy would not have been written without disclosure and/or evaluation of the risk. Adding Ms. Dever's Cadillac to the policy would have increased the premium by $1,078.00.

The letter apprised that Drum's completion of the application and failure to make the requested disclosures constituted material misrepresentations, the policy was rescinded, and the policy premium was returned.

Additionally, underwriter Paul Serota explained that, under defendant's underwriting guidelines, had Drum represented on her application that she had not listed all household members age 14 or older, the application would have been rejected, and the policy would not have been written. Serota confirmed he would not have "written the policy knowing there are unlisted household members who were 14 years or older that were not disclosed on the policy application." And, significantly, Serota testified as follows:

> *Q*. I've got Dawn Drum's policy application. And we kept asking about this question about household members. I just want to read this off the application. Question is . . . "Have you identified on this application all members of your household who are age 14 or older?" And then in parentheses it says,
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> "(It is unacceptable not to list all members of your household who are age 14 or older, as they may cause a premium increase or declaration [declination] of coverage. The listing of all individuals 14 or older is a condition precedent to bi[n]ding coverage).["] Is this the question you were talking about earlier?
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> *A*. Yes, sir.
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> *Q*. Okay. . . . [S]he answered "yes" on her application, but if someone answers "no" what happens?
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> *A*. The application would not proceed.
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> *Q*. It would be rejected?
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> *A*. Correct. It would never . . . allow them to purchase the policy.

Plaintiffs filed a direct action to recover allegedly overdue PIP benefits, MCL 500.3112. In light of the circumstances and the completion of the application, defendant filed a renewed

motion for summary disposition, claiming that it was entitled to rescission of the subject policy. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that defendant was entitled to rescind the insurance policy because Drum made material misrepresentations on the insurance application by failing to list her roommates as potential drivers in her household or to disclose that other vehicles were garaged on the premises. The trial court also denied plaintiffs' motion for reconsideration. Plaintiffs now appeal.

II. STANDARD OF REVIEW

In *Webb v Progressive Marathon Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351048), slip op at 3, lv app pending (Docket No. 162928), this Court set forth the applicable standards of review as follows:

> "Appellate review of the grant or denial of a summary-disposition motion is de novo . . . ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "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." *Id.*
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> The interpretation of a contract, such as an insurance policy, is also reviewed de novo. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005); see also *Meemic Ins Co v Fortson*, 324 Mich App 467, 481; 922 NW2d 154 (2018) (insurance policies are reviewed under standard principles of contractual interpretation), aff'd on other grounds [506 Mich 287; 954 NW2d 115] (2020) (Docket No. 158302). "When interpreting a contract, such as an insurance policy, the primary goal is to honor the intent of the parties." *Fortson*, 324 Mich App at 481 (quotation marks and citation omitted).
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> Rescission is "granted only in the sound discretion of the court." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26; 331 NW2d 203 (1982). "The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes" *Berryman v Mackey*, 327 Mich App 711, 717; 935 NW2d 94 (2019).

III. ANALYSIS

Plaintiffs contend that the trial court erred in granting summary disposition in favor of defendant because it failed to establish that Drum's misrepresentations were material as a matter of law and that defendant was entitled to rescind the policy. We disagree.

"[A]utomobile insurance contracts are governed by a combination of statutory provisions and the common law of contracts." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 399; 919 NW2d 20

(2018). "Insurance policies are contracts subject to the same contract construction principles that apply to any other species of contract." *Id*. (quotations marks and citations omitted). "[U]nless clearly prohibited by statute, an insurer may continue to avail itself of any common-law defenses, such as fraud in the procurement of the policy." *Id*. at 400, citing *Titan Ins Co v Hyten*, 491 Mich 547, 554-555; 817 NW2d 562 (2012). Pertinent here, "the no-fault act does not preclude or otherwise limit an insurer's ability to rescind a policy on the basis of fraud." *Bazzi*, 502 Mich at 401. That is, "an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable[.]" *Titan*, 491 Mich at 571.

"[A]n insurer has a reasonable right to expect honesty in the application for insurance . . . ." *Bazzi*, 502 Mich at 407. "It is well-settled law of this state that where an insured makes a material misrepresentation in the application for insurance, including no-fault insurance, the insurer is entitled to rescind the policy and declare it void ab initio." *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998). Generally, "an insurance policy procured by fraud may be declared void *ab initio* at the option of the insurer." *Bazzi*, 502 Mich at 408. "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. "In effect, the insurance policy is considered never to have existed." *Id*. at 408.

Fraud in the inducement occurs " 'when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved.' " *Meemic Ins Co v Fortson*, 506 Mich 287, 306 n 13; 954 NW2d 115 (2020), quoting *Black's Law Dictionary* (10th ed). A party asserting fraudulent misrepresentation must establish the following elements: (1) a material representation was made; (2) the representation was false; (3) the maker of the representation knew it was false, or made it recklessly, without any knowledge of its truth; (4) the misrepresentation was made with the intention that it should be acted upon by the other party; (5) the other party acted in reliance upon it; and (6) the other party thereby suffered injury. See *Meemic*, 506 Mich at 305 n 12; *Titan*, 491 Mich at 555, 567-568.

The following test is applied to determine materiality in cases seeking rescission on the basis of an insured's material misrepresentations in procuring insurance:

> "The generally accepted test for determining the materiality of a fact or matter as to which a representation is made to the insurer by an applicant for insurance is to be found in the answer to the question whether reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as *substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium*." [*Keys v Pace*, 358 Mich 74, 82; 99 NW2d 547 (1959), quoting with emphasis 29 Am Jur, Insurance, § 525.]

See also *Oade v Jackson Nat'l Life Ins Co of Mich*, 465 Mich 244, 253-255; 632 NW2d 126 (2001) (adopting the same test in determining whether a misrepresentation is material in the context of life insurance under MCL 500.2218). Therefore, the focus of the materiality inquiry "is whether a reasonable underwriter would have regarded [the applicant's] updated answers . . . as sufficient grounds for rejecting the risk or charging an increased premium[.]" *Oade*, 465 Mich at 255. That

is, whether " 'the' contract issued, at the specific premium rate agreed upon, would have been issued notwithstanding the misrepresented facts." *Id.* at 254.

We conclude that the decision in *Lash v Allstate Ins Co*, 210 Mich App 98, 100; 532 NW2d 869 (1995), is instructive regarding the resolution of this matter. In *Lash*, the plaintiff met with an agent for the defendant Allstate and submitted an application for no-fault insurance. When the plaintiff was asked if he had any traffic citations within the last three years, he answered, "no." The plaintiff paid the premium and was issued a temporary certificate of insurance. However, when the agent received the plaintiff's driving record, she learned of a traffic citation within the three-year period. When contacted, the plaintiff said that he was mistaken about the date of the citation and honestly believed that it did not occur within the applicable timeframe. The plaintiff was advised that his policy was void, and his premium was returned. The agent prepared a quote for insurance through the assigned claims facility, but the plaintiff declined this insurance. When the plaintiff was injured in an accident ten days later, his request for PIP benefits from Allstate was denied, and he challenged the denial on appeal. *Id.*

This Court concluded that summary disposition in favor of Allstate was appropriate because the contract was rescinded, and it was immaterial whether any misrepresentation was intentional or innocent:

> Moreover, the contract at issue was rescinded, and for this reason also the trial court should have granted summary disposition. This Court has outlined the nature of rescission:
>
> 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*. [*Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479; 350 NW2d 283 (1984).]
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> It is well-settled that a material misrepresentation made in an application for no-fault insurance entitles the insurer to rescind the policy. *Auto-Owners Ins Co v Johnson*, 209 Mich App 61; 530 NW2d 485 (1995), *Farmers Ins Exchange v Anderson*, 206 Mich App 214, 218; 520 NW2d 686 (1994); *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993); *Auto-Owners Ins Co v Comm'r of Ins*, 141 Mich App 776, 779-780; 369 NW2d 896 (1985). Plaintiff, pointing to dicta in *Cunningham, supra*, argues that this rule only applies when the insured makes an intentional misrepresentation in the application for insurance. In *Cunningham*, we noted the distinction between situations involving intentional misrepresentations and other "mistakes or ministerial errors" but specifically declined to address whether the general rule would apply to situations of innocent misrepresentations. *Cunningham, supra* at

476, n 1, 477. We now hold that rescission was appropriate under the facts of this case.

> Rescission is justified in cases of innocent misrepresentation if a party relies upon the misstatement, because otherwise the party responsible for the misstatement would be unjustly enriched if he were not held accountable for his misrepresentation. *Britton v Parkin*, 176 Mich App 395, 398-399; 438 NW2d 919 (1989). This is true, even as in this case, if it was a mutual mistake of fact. *Id*. In this case, the belief that plaintiff had no traffic citations related to a basic assumption of the parties upon which the contract was made and materially affected the parties' performances. Allstate would not have issued the policy had it known about plaintiff's citation because plaintiff would have been ineligible under its guidelines. Plaintiff should not be unjustly enriched at Allstate's expense because of his misrepresentation, even accepting that it was innocent. *Id*. Accordingly, rescission was appropriate and the trial court erred in denying Allstate's motion for summary disposition. [*Id*. at 102-104.]

Thus, the *Lash* Court concluded that Allstate was entitled to rescission because if it had known of the plaintiff's citation, it would not have issued a policy of insurance because the plaintiff was not eligible according to the insurer's guidelines. *Id*. at 104.

Applying the *Lash* decision to the present case, the trial court properly granted summary disposition to defendant. After her accident, Drum was examined under oath. At that time, she disclosed that she had roommates at her residence and there were multiple garaged vehicles there. However, this information was omitted from Drum's application, and she expressly answered "no" to the question addressing whether there were other residents age 14 or older at her home. In her examination under oath, Drum did not proffer a reason for failing to truthfully answer the disclosures required by defendant, but as the *Lash* Court instructs, the nature of the misrepresentation, whether intentional or innocent, did not alter defendant's entitlement to rescission. *Id*. at 104. Further, underwriter Serota testified that if Drum had truly disclosed the other occupants, the policy at issue would not have issued according to defendant's guidelines. Where an insurer would not have issued the policy of insurance under its guidelines if it had known of the true circumstances underlying the driver's application for insurance, the insurer is entitled to the remedy of rescission. *Id*.

Additionally, the insurance application completed by Drum advised that the policy of insurance was premised on the statements made in the application, and the concealment or misrepresentation of a material fact or circumstance rendered the policy null and void. Moreover, the insurance contract expressly provided examples of what constituted misrepresentation and advised that misrepresentation may result in the policy being voided. Indeed, the insurance contract clearly stated that "unlisted vehicles and unlisted drivers" was a common form of misrepresentation. Thus, Drum was not required to speculate regarding what constituted a misrepresentation in light of the plain language on the application. Further, the express terms of the insurance contract apprised Drum, as the applicant, that disclosure of other residents was a condition precedent to the issuance of the policy. In light of Drum's misrepresentations and the testimony that the policy would not have issued pursuant to defendant's underwriting guidelines,

the trial court properly concluded that false representations in the insurance application warranted rescission.

Affirmed. Defendant, as the prevailing party, may tax costs.

/s/ James Robert Redford
/s/ Kirsten Frank Kelly
/s/ Anica Letica