

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

MEEMIC INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellant,

v

ESTATE OF BRENDON PEARCE, by LYNN PEARCE, Personal Representative, PATRICIA MUSSER, JOSEPH GRINAGE, ESTATE OF MELISSA MUSSER, by LAWRENCE BENTON, Personal Representative, ANDREW MUSSER, and JOHN MUSSER,

Defendants-Appellees,

and

RYAN HARSTON and SPARROW HOSPITAL,

Defendants/Counterplaintiffs-Third-Party Plaintiffs,

and

MICHIGAN AUTOMOBILE PLACEMENT FACILITY and FARM BUREAU GENERAL INSURANCE COMPANY,

Third-Party Defendants,

and

HOPE NETWORK REHABILITATION SERVICES,

Intervenor.

UNPUBLISHED

November 23, 2021

No. 352724

Eaton Circuit Court

LC No. 15-000934-NF

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

CAVANAGH J. (*dissenting*).

I respectfully dissent. I would affirm the trial court's decision granting summary disposition in favor of all defendants in this declaratory judgment action because Meemic Insurance Company failed to show that it was entitled to rescind the policy on the basis of fraud.

I agree with the majority opinion that Meemic abandoned any claim of preprocurement fraud and instead is basing its claim for rescission on purported postprocurement fraud arising from Patricia's failure to notify Meemic when Melissa moved into the same level of the home where Patricia was living. Postprocurement fraud only entitles an insurer to rescind an insurance policy if the insured's fraud amounts to a "failure to perform a substantial part of the contract or one of its essential terms." *Meemic Ins Co v Fortson*, 506 Mich 287, 308; 954 NW2d 115 (2020).

First, I conclude that any affirmative misrepresentations Patricia may have made after the initial application for insurance could not form the basis for an action for rescission because "the allegedly fraudulent statements were made postprocurement and did not influence or induce the policy's procurement." *Williams v Farm Bureau Mut Ins Co of Mich*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 349903); slip op at 4. The timing of the alleged fraud, i.e., before or after the loss, is relevant only when the policy is obtained fraudulently, and there is no substantively admissible evidence supporting such a finding in this case.

Second, I conclude that any fraud or innocent misrepresentation in this case could have occurred only at the time of Patricia's initial application because she did not make any affirmative statements after that point. Although § 14 of the insurance policy provides that failure to report a specified change could void coverage as provided in the antifraud clause, that is not dispositive. Michigan courts have held that, in some circumstances, silence can constitute fraud. However, to the extent that this would apply to postprocurement fraud, which Meemic does not discuss, this exception is narrow. In *Ainscough v O'Shaughnessey*, 346 Mich 307, 316; 78 NW2d 209 (1956), our Supreme Court observed that "[w]hen the circumstances surrounding a particular transaction are such as to require the giving of information, a deliberate and intentional failure to do so may properly be regarded as fraudulent in character." However, Meemic presented no evidence that Patricia deliberately or intentionally failed to provide information about changes to her household. The only evidence concerning Patricia's intent was her statement that she did not think she needed to notify Meemic about these changes. Patricia also maintained that when she added the Silhouette vehicle to the policy, she told the Meemic representative that Melissa was staying at her home and would be driving the car occasionally—because Patricia wanted to make sure that Melissa was covered. Patricia testified that the representative told her that Melissa would be covered, as would anyone else she gave permission to drive the car. This might provide evidence that Patricia may have breached the terms of the contract, but Meemic has not shown that she intentionally or deliberately committed continuing or repeated fraud. "Generally, fraud is not to be presumed lightly, but must be clearly proved, and must be proved by clear, satisfactory and convincing evidence." *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63 n 40; 852 NW2d 103

(2014) (quotation marks and citations omitted). Meemic has not satisfied this burden with respect to any claim of silent fraud.¹

And the result is the same whether this Court views the entirety of the initial contract and the various renewals as one contract or a series of separate contracts. See, e.g., *Maurer v Fremont Ins Co*, 325 Mich App 685, 696 n 6; 926 NW2d 848 (2018), citing *Russell v State Farm Mut Auto Ins Co*, 47 Mich App 677, 680; 209 NW2d 815 (1973). In either scenario, any fraud or innocent misrepresentation would have occurred, if at all, at the inception of the contract, which is when Patricia made affirmative statements about the members of her household.

Meemic also argues that because it makes decisions whether to renew a policy and what to charge on the basis of members of the insured’s household, any failure by Patricia to provide accurate information during the life of the policy constitutes a postprocurement fraud that amounts to a “substantial breach” for which rescission should be granted. This argument is not persuasive. First, as discussed earlier, the only fraud or innocent misrepresentation that could have occurred in this case would have occurred at the time of Patricia’s initial application. More significantly, however, is this Court’s holding in *Williams* concerning substantial breach. In *Williams*, to determine whether a misrepresentation amounted to a substantial breach of the insurance contract, this Court did not look to the type or extent of the fraud or misrepresentations, or any monetary damage to the insurer caused by the misrepresentations. Rather, this Court looked at whether the fraud provision itself was a “material” part of an insurance contract such that the postprocurement breach of it could trigger a valid claim for rescission. In *Williams*, this Court stated:

Meemic also allowed that a fraud exclusion may be “valid as applied to a party’s failure to perform a substantial part of the contract or one of its essential terms.” *Meemic*, 506 Mich at 308. Here, however, as *Meemic* demonstrates, there is no basis to conclude that a PIP policy’s fraud provision is an essential term as the contract would be binding and fully consistent with the no-fault act without the provision. The terms that are essential to a PIP policy are those defined in the Act. “As a general rule, Michigan’s no-fault insurance system is a comprehensive scheme of compensation designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents.” *Bazzi v Sentinel Ins Co*, 502 Mich 390, 396; 919 NW2d 20 (2018) (quotation marks and citations omitted). [*Williams*, ___ Mich App at ___; slip op at 7 n 5.]

Williams, as a published opinion, is binding under MCR 7.215(C)(2) and (J)(1). Therefore, Meemic’s argument, that Patricia’s failure to perform her duty of updating Meemic with changes in her household constituted a failure to perform a substantial part of the contract or one of its essential terms, is unpersuasive under *Williams*. The policy’s antifraud provision is not an essential term of the policy.

¹ Although Meemic does discuss silent fraud generally, it provides no discussion of how Patricia’s purported fraud would fit within the definition in *Ainscough*.

In summary, I would affirm the trial court's order granting summary disposition to defendants.

/s/ Mark J. Cavanagh