STATE OF MICHIGAN

COURT OF APPEALS

ERIC RUSH,

Plaintiff/Counterdefendant-Appellant,

v

ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY,

Defendant/Counterplaintiff/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY, JOHN DOE INSURANCE COMPANY, also known as FARM BUREAU INSURANCE COMPANY, and DEVAUGHN MARQUIS HARRELL,

Defendants/Cross-Defendants,

and

TORON BROWNLEE, DESHALON BROWNLEE, SILVER PINE IMAGING, LLC, BREAKTHROUGH TRANSPORTATION, LLC and TOTAL TOXICOLOGY LABS, INC,

Third-Party Defendants.

BREAKTHROUGH TRANSPORTATION, LLC,

Plaintiff-Appellant,

UNPUBLISHED
December 21, 2021

No. 355242
Wayne Circuit Court
LC No. 18-016032-NI

v

No. 355956
Wayne Circuit Court
LC No. 19-011823-NF

ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY,

Defendant-Appellee.

ERIC RUSH,

Plaintiff/Counterdefendant,

v

No. 355960
Wayne Circuit Court
LC No. 18-016032-NI

ALLSTATE FIRE & CASUALTY INSURANCE COMPANY,

Defendant/Counterplaintiff/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY, JOHN DOE INSURANCE COMPANY, also known as FARM BUREAU INSURANCE COMPANY, and DEVAUGHN MARQUIS HARRELL,

Defendants/Cross-Defendants,

and

TORON BROWNLEE, DESHALON BROWNLEE, SILVER PINE IMAGING, LLC, and TOTAL TOXICOLOGY LABS, INC,

Third-Party Defendants,

and

BREAKTHROUGH TRANSPORTATION, LLC,

Third-Party Defendant-Appellant.

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

PER CURIAM.

These consolidated cases arise from an accident between a Ford Focus listed as an insured vehicle in an Allstate Fire and Casualty Insurance policy issued to Toron and Deshalon Brownlee (the Brownlees), and a pedestrian, Eric Rush, who had no other source of no-fault coverage. The Focus was driven by and titled and registered in the name of the Brownlees' son, Devaughn Harrell. The Brownlees assisted in making car payments and paid for the insurance coverage.

The circuit court summarily dismissed claims by Rush and a service provider for personal protection insurance (PIP) benefits from Allstate, declaring that Harrell was the sole owner of the vehicle and therefore was required to personally secure no-fault coverage. Because questions of fact precluded summary disposition, we vacate and remand for continued proceedings consistent with this opinion.

I. BACKGROUND

In late December 2017, Rush was struck by a 2012 Ford Focus driven by Harrell, who was the owner and registrant of the vehicle. Rush suffered injuries and sought medical care and services from various providers, including Breakthrough Transportation, LLC. Rush did not have a no-fault insurance policy and, therefore, filed a claim with Allstate under a policy issued to Harrell's parents, the Brownlees.

Harrell purchased the Focus in September 2016. He made the down payment with help from his parents and secured a loan in his own name to pay the remaining balance. Harrell titled and registered the vehicle in his own name. When the Brownlees renewed their Allstate policy, they added Harrell's vehicle. However, the Brownlees allegedly did not disclose that Harrell had obtained his driver's license in July 2016, did not add Harrell as an insured or additional driver, and failed to notify Allstate that Harrell was the registered owner of the vehicle. Deshalon stated that Allstate never asked for additional information regarding Harrell, even when she told an Allstate representative that the Focus had been purchased for him.

Before the accident, the Brownlees and Harrell resided together and shared regular access to the vehicle. However, in September 2017, a house fire forced the Brownlees to relocate to a hotel. Allstate had issued the Brownlees' home owners' insurance policy, and was fully aware of the Brownlees' move. The Brownlees renewed their no-fault policy in October 2017, and again did not add Harrell as an insured or additional driver. About the same time, Harrell decamped from the hotel and moved in with his uncle, taking the vehicle with him. Only after the accident was the Brownlees' home ready for habitation. Harrell did not move back in with his parents and instead stayed with his uncle.

Rush sought no-fault benefits from Allstate after the accident. Allstate denied claims filed by Rush and his service providers because at the time of the accident, Harrell did not reside with the Brownlees, the vehicle was not garaged at the address listed in the Allstate policy, and Harrell was not included as an insured or additional driver.

Rush filed a complaint against Allstate alleging that the insurer unreasonably and unlawfully refused to pay no-fault benefits on his behalf.[1] Breakthrough also filed suit against Allstate seeking recompense for the services provided to Rush. Allstate responded that it was not in the chain of priority because the Brownlees' policy was void *ab initio* based on material misrepresentations regarding ownership of the vehicle and Harrell's status as an additional driver. Allstate further argued that the policy did not provide coverage because the Brownlees failed to update the vehicle's garaging address. Allstate also filed a countercomplaint seeking a declaratory judgment regarding its duty to provide coverage and benefits. The parties filed various other counter and cross-complaints in these consolidated actions, but all involved the same allegations, claims, and defenses.

Allstate moved for summary disposition on issues of priority and coverage. Allstate continued to contend that it was not within the order of priority for no-fault coverage under MCL 500.3115 because it did not insure Harrell and the Brownlees had not properly insured the vehicle. Allstate further contended that as the owner and registrant of the vehicle, Harrell was required to maintain his own insurance policy.[2] Breakthrough and Rush responded that the no-fault act did not require Harrell to secure his own no-fault policy, only that no-fault insurance be maintained for the vehicle; it was irrelevant that the policy was secured by the Brownlees. They further argued that it would be inequitable to rescind the policy because the Brownlees were "dual owners" of the vehicle. Moreover, Rush contended that he was an innocent third party to any potential misrepresentations by the Brownlees. Allstate retorted that the Brownlees could no longer claim dual ownership of the Focus as they did not have access to shared use of the vehicle for at least 60 days prior to the accident.

Without a hearing, the circuit court granted Allstate's motion for summary disposition related to the priority and coverage issues. The court determined that Allstate was not within the order of priority and therefore there was no coverage of the vehicle or Harrell. The court reasoned that the statute assigned first-party liability to the owner or registrant of the vehicle rather than to the insurer. As a result, Harrell's failure to obtain insurance made him uninsured, requiring Rush to seek no-fault benefits from the Michigan Automobile Insurance Placement Facility (MAIPF) or the assigned insurer.

Rush and Breakthrough moved for reconsideration, arguing that the Brownlees retained the right to use the vehicle at the time of accident because they continued to possess a key. They maintained that the Brownlees kept insurance on the vehicle and simply allowed Harrell to take the vehicle with him to his uncle's home after the family home was damaged by a fire. The Brownlees were constructive owners of the vehicle and retained an insurable interest at all relevant

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[1] We note that this appeal involves three consolidated lower court cases in which many parties filed various claims against each other. Most of this complicated procedural history is irrelevant to the issues now before us on appeal. Accordingly, we limit our discussion of the facts to the issues raised between Rush, Breakthrough, and Allstate.

[2] In a separate motion, Allstate moved for summary disposition of Rush's claims, asserting that Rush made fraudulent misrepresentations regarding his attendant care expenses. The circuit court denied that motion.

times, Rush and Breakthrough asserted. The circuit court denied the motions but a issued a new order partially granting summary disposition in Allstate's favor regarding the declaratory judgment claims.

Breakthrough again moved for reconsideration, making a nearly identical argument that the Brownlees were constructive owners of the vehicle and retained an insurable interest that permitted no-fault coverage for the accident. The court again denied the motion, reiterating that the Brownlees did not have constructive ownership of the Focus because "for the 60 days prior to the accident, [Harrell] had exclusive possession of the car, did not reside with his parents and other than a remnant key, the [Brownlees] had no possession or use of the vehicle."

Rush and Breakthrough both appeal.

II. ANALYSIS

We review de novo a circuit court's grant of summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). Summary disposition is warranted under MCR 2.116(C)(10) if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*. We review the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine if there is a genuine issue of material fact for trial. *Id*. at 139-140.

We also review de novo a circuit court's interpretation of statutes and contracts. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018). When interpreting a statute, we look to its plain language to determine the Legislature's intent. *Dye v Esurance Prop & Cas Ins Co*, 504 Mich 167, 180; 934 NW2d 674 (2019). "Where the statutory language is clear and unambiguous, the statute must be applied as written." *Id*. (cleaned up).

A. OWNERSHIP OF THE FOCUS

The circuit court erred in determining as a matter of law that Allstate was not in the line of priority to provide no-fault benefits to Rush. "The purpose of the Michigan no-fault act is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 37; 748 NW2d 574 (2008) (cleaned up). In general, "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under [PIP] and property protection insurance[.]" MCL 500.3101(1).[3] "Under [PIP] an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1). When the person seeking no-fault benefits was not an occupant of the vehicle

[3] The no-fault act, MCL 500.3101 *et seq*., underwent substantial revisions when it was amended by 2019 PA 21 effective June 11, 2019. Even though the orders relevant to this appeal were recorded on June 23, 2020 and October 6, 2020, the complaints were filed on December 19, 2018, and December 28, 2018. The version of the no-fault act in effect in 2018 controls in this case. See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 333 Mich App 457, 465 n 4; 960 NW2d 186 (2020). All references to the statutes in this opinion are to the 2018 version.

involved in the accident, the trial court must look to MCL 500.3115(1) to determine how coverage will be provided. The relevant statute stated:

> Except as provided in [MCL 500.3114(1)], a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim [PIP] 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. . . .

Whether the Brownlees were "owners" of the Focus involved in this accident remains a question of fact. Accordingly, the trial court erred by determining as a matter of law that the Brownlees' act of securing insurance did not satisfy MCL 500.3101(1) or that Allstate was not an insurer of an owner of a motor vehicle involved in this accident under MCL 500.3115(1)(a).

Some evidence of record supported that the Brownlees shared ownership of the Focus with Harrell. MCL 500.3101(3)(*l*)(*i*) defined an "owner" as "[a] person renting a motor vehicle or having the use of a motor vehicle, under a lease or otherwise, for a period that is greater than 30 days." "There may be multiple owners of a vehicle for purposes of the no-fault act." *Iqbal*, 278 Mich App at 38 (cleaned up). A constructive owner need not have actually used the vehicle during the 30-day period contemplated in MCL 500.3101(3)(*l*)(*i*); "[r]ather, the focus must be on the nature of the person's *right* to use the vehicle." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 530; 676 NW2d 616 (2004) (emphasis added). "[H]aving the use of a motor vehicle" for ownership purposes "follows from *proprietary* or *possessory* usage, as opposed to merely incidental usage under the direction or with the permission of another." *Ardt v Titan Ins Co*, 233 Mich App 685, 691-692; 593 NW2d 215 (1999). That a person has to ask permission to use a vehicle suggests that he or she does not have an ownership interest. *Id.*; *Detroit Med Ctr v Titan Ins Co*, 284 Mich App 490, 493-494; 775 NW2d 151 (2009).

Viewing the evidence in the light most favorable to Rush and Breakthrough, a factual question regarding the Brownlees' ownership interest precluded summary disposition. Before the September 2017 house fire, Harrell resided with the Brownlees and the vehicle was garaged at the family home. Although Harrell was the titled owner and secured a loan for the vehicle in his name, Deshalon used the vehicle without seeking Harrell's permission. She had her own car key, paid the full amount of the insurance coverage, helped financially with the down payment, and paid all or part of each monthly payment. The Brownlees also placed restrictions on Harrell's use of the vehicle because he was a young, new driver. At the time of the accident, the Brownlees were living in a hotel and Harrell was living with a relative. Living apart was intended to be a temporary situation while their home was repaired; Deshalon believed that Harrell would move back into the family home with them. During this temporary situation, the Brownlees did not have easy access to the Focus. Yet even after their separation, the Brownlees continued to pay the insurance and made most or all of the vehicle payments. Deshalon kept her own key to the vehicle until it was repossessed in 2018.

Allstate contends that the Brownlees were not constructive owners of the vehicle because they were not the titled owners or registrants of the vehicle and did not have use of the vehicle for

more than 30 days before the accident. The first argument is legally incorrect. A person need not be a titled owner to have an interest in property, such a car, that can be protected by insurance. See *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 258; 819 NW2d 68 (2012); *Morrison v Secura Ins*, 286 Mich App 569, 572; 781 NW2d 151 (2009). The Brownlees' financial investment gave them such an insurable interest.

And there remain questions of fact as to the second argument. As stated, the focus when determining whether a person is a constructive owner, under MCL 500.3101(3)(*l*)(*i*), "must be on the nature of the person's right to use the vehicle." *Twichel*, 469 Mich at 530. Specifically, our Supreme Court explained:

> [I]f the lease or other arrangement under which the person has use of the vehicle is such that the right of use will extend beyond thirty days, that person is the "owner" from the inception of the arrangement, regardless of whether a thirty-day period has expired. For example, in the case of a lease running longer than thirty days, the plain language of the statute would make that person an "owner" from the inception of the lease; the person's status would not change simply because of the passage of time. [*Id.* at 531.]

The Brownlees heavily subsidized the purchase and maintenance of the vehicle not only for Harrell's use, but also for use as a "household vehicle." This did not end when Harrell temporarily moved in with his uncle. Even though the Brownlees did not actually use the vehicle after October 2017, they intended to and did retain the *right* to use the vehicle as an owner at the time of the accident. This was enough to create a triable issue of fact. Although there is evidence to the contrary, we must not weigh factual and credibility issues at the summary disposition phase. *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 512; 892 NW2d 467 (2016). Summary disposition based on an absence of constructive ownership was improper.

B. MATERIAL MISREPRESENTATIONS

Allstate contends that alternatively this Court should affirm the summary dismissal because the Brownlees made material misrepresentations of fact supporting that the policy should be rescinded and deemed void *ab initio*. The absence of coverage under the policy would remove Allstate from the priority position to provide benefits to and on behalf of Rush.

Generally, "an insurer is entitled to rescind a policy *ab initio* on the basis of a material misrepresentation made in an application for no-fault insurance." *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 445; 889 NW2d 759 (2016). "This is because the policy would not have been issued had the material misrepresentation not been made." *Meemic Ins Co v Fortson*, 324 Mich App 467, 476 n 1; 922 NW2d 154 (2018), aff'd in part and vacated in part on other grounds 506 Mich 287 (2020). "Rescission is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon by the insurer. Reliance may exist when the misrepresentation relates to the insurer's guidelines for determining eligibility for coverage." *21st Century*, 315 Mich App at 446 (cleaned up). "Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Bazzi*, 502 Mich at 409.

In *Titan Ins Co v Hyten*, 491 Mich 547, 565, 570, 573; 817 NW2d 562 (2012), the Michigan Supreme Court abrogated the innocent-third-party rule that had shielded injured strangers to a policy otherwise subject to rescission. In *Bazzi*, 502 Mich at 408, the Supreme Court clarified that rescission is not an automatic remedy for an insured's misrepresentations even after eradication of innocent-third-party rule. Rather, "an insurance policy procured by fraud *may* be declared void *ab initio* at the option of the insurer." *Id.* (emphasis added). Rescission also lies in the discretion of the court reviewing a coverage challenge. *Id.* at 409. A court "must balance the equities to determine whether" the insurer "is entitled to" rescission. *Id.* at 410 (cleaned up).

> [C]ourts 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. Where 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. [*Id.* at 410-411 (cleaned up).]

The circuit court did not consider Allstate's allegations that the Brownlees made material misrepresentations in their insurance application by specifically failing to notify Allstate of Harrell's status as a licensed driver in the home, his ownership interest in the Focus, and of the new addresses at which the Focus was being garaged after Harrell moved away from his parents. Accordingly, the court never considered whether it would be equitable to rescind the insurance policy. And the circuit court must consider these factors in the first instance.

We provide the following guidance to the circuit court. First, the plain language of the Allstate policy does require its insureds to keep the insurer up-to-date regarding the licensed drivers in the home, the vehicles covered, and where those vehicles are primarily garaged. The policy further warns insureds that the policy will be voided in the event of a misrepresentation or concealed material fact related to "information of vehicles insured on this policy, disclosure of resident operators, and the address where vehicles are principally garaged[.]" Second, any claim by Allstate that it was unaware of the Focus's garage location while Harrell lived in the hotel with his parents cannot be sustained. Allstate insured the Brownlees' home as well as their vehicles, and was fully aware that the family had moved to a hotel while their home was being repaired. Third, we note that although much of this confusion could have been avoided had Allstate asked for a copy of the insured vehicle's title and registration and by following up on Deshalon's statement that the car was purchased for her son, Allstate had no duty to do so. "[A]n insurer has no duty to investigate or verify the representations of a potential insured[,]" even if reasonable diligence in conducting further investigation would have revealed the misrepresentation before the insurer issued the policy. *Titan Ins Co*, 491 Mich at 570. "To hold an insurer to a different and higher standard, one that would require it affirmatively to investigate the veracity of all representations made by its contracting parties . . ., would represent a substantial departure from the well-established understanding of fraud." *Id.* at 571. Finally, we note that an insurer may only rescind an insurance policy if it refunds any premium collected after the effective date of the cancellation. See *Burton v Wolverine Mut Ins Co*, 213 Mich App 514, 520; 540 NW2d 480 (1995).

We vacate the order summarily dismissing Breakthrough and Rush's claims against Allstate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Elizabeth L. Gleicher
/s/ Anica Letica