STATE OF MICHIGAN

COURT OF APPEALS

JOSHUA POWELL,

Plaintiff-Appellant,

and

PHOENIX PHYSICAL THERAPY,

Intervening Plaintiff,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 21, 2021

No. 352850
Wayne Circuit Court
LC No. 19-008929-NF

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

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant on plaintiff's claims seeking payment of personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*, and seeking damages for fraudulent misrepresentation. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On October 15, 2017, plaintiff was a passenger in a Ford Edge driven by his brother when it collided with another vehicle. Plaintiff suffered injuries to his shoulder, back, knee, elbow, and head and was taken to a hospital by ambulance. Because plaintiff was not covered by his own no-fault insurance policy on the day of the accident, a claim for PIP benefits was filed with defendant, the insurer of the vehicle driven by plaintiff's brother.

The policy covering the Edge was first issued by defendant in August 2016 to plaintiff's brother and sister-in-law as the insureds, covering the Edge and another vehicle, and listing an address in Inkster, Michigan. Defendant's investigation of plaintiff's claim revealed that the Edge

was registered to plaintiff's brother, who lived in Detroit, and was not garaged in Inkster, as stated on the policy application.

In a letter dated December 13, 2017, defendant notified plaintiff's sister-in-law that it had discovered a material misrepresentation on the original application for insurance and that an investigation had revealed that "the 2016 Ford Edge listed on the policy was not garaged at the policy address at the time of inception." Five days later, defendant mailed three rescission notices to plaintiff's brother and sister-in-law, stating that the policy was "rescinded and considered null and void as of 12:01a.m. on the date your policy started, August 18, 2016" because "[y]ou or an insured person concealed, misrepresented or made incorrect statements or representations regarding a material fact or circumstance; or engaged in fraudulent conduct in connection with your application." Defendant subsequently refunded past premium payments in the amount of $11,338.82.

On January 2, 2018, defendant's adjuster called the office of plaintiff's counsel and left a message advising that the policy had been rescinded and that plaintiff's injuries were not covered by the policy. On January 4, 2018, the adjuster sent a letter addressed to plaintiff at his counsel's office, informing plaintiff that there was no valid coverage for the October 15, 2017 accident and that defendant would not pay plaintiff's claim.

After defendant denied coverage, plaintiff sought PIP benefits through the Michigan Assigned Claims Plan (MACP). In a letter dated January 25, 2018, the MACP informed plaintiff's counsel that plaintiff's claim had been assigned to another insurer. Between March 16, 2018 and July 25, 2018, plaintiff executed several assignments of his right to seek payment of PIP benefits to various providers of medical services.

On April 2, 2018, plaintiff filed a first-party action for PIP benefits against Farmers Insurance Exchange (Farmers), the insurer assigned to plaintiff's claim by the MACP, in the Wayne Circuit Court. On May 7, 2018, plaintiff filed a second first-party action against Farmers in Wayne Circuit Court, assigned to a different judge. On July 2, 2018, plaintiff's first action against Farmers was dismissed, but the second action remained pending.[1]

[1] Several lawsuits stemming from the October 15, 2017 accident were filed in various circuit courts by various parties. On September 18, 2018, one of plaintiff's service providers filed an action against defendant in the Macomb Circuit Court, seeking payment for medical treatment of plaintiff in the amount of $660,829.84, pursuant to an assignment of rights from plaintiff. That action was closed on March 22, 2019 when the court granted summary disposition in favor of defendant on the ground that the provider's claim to payment for services provided to plaintiff had been settled in a prior lawsuit. On October 15, 2018, three other service providers filed suit against both defendant and Farmers in the Oakland Circuit Court, also seeking payment of no-fault benefits pursuant to assignments from plaintiff.

At a facilitation session between plaintiff and Farmers on June 27, 2019, plaintiff settled his second action against Farmers. On June 28, 2019, Farmers' counsel informed defendant's counsel that the claims of six healthcare providers had been settled.

On June 27, 2019, the same day that he settled his first action against Farmers, plaintiff filed his complaint against defendant in this case in the Wayne Circuit Court. Plaintiff alleged that he had suffered serious and permanent bodily injury in the October 15, 2017 accident, and that defendant was obligated to pay PIP benefits under the policy. Plaintiff further alleged that defendant had failed to pay benefits, in violation of MCL 500.3142, and sought payment of past and future benefits under the no-fault act.

Defendant answered the complaint on July 31, 2019, asserting that the no-fault policy covering the Edge had been "rescinded *ab initio* for material misrepresentations made on the policy application." Defendant also contended that plaintiff was not entitled to any no-fault benefits because he had settled (with Farmers) any claim to PIP benefits through June 27, 2019 and had "received valuable consideration to resolve any claims incurred through June 29, 2019."[2] Defendant also filed a demand for a jury trial.[3]

On August 23, 2019, plaintiff filed an amended complaint. In Count I, plaintiff restated his claim for payment of PIP benefits. In Count II, plaintiff alleged fraudulent misrepresentation by defendant, asserting that defendant had not rescinded the policy at the time of the accident, had misrepresented that the policy had been rescinded, had known that this representation was false when it was made, and had made this misrepresentation with the intention that plaintiff would act on it. Plaintiff claimed that he had acted in reliance upon the misrepresentation, and had suffered damage as a result.

In lieu of answering plaintiff's amended complaint, defendant filed a motion for summary disposition, arguing that the policy had been rescinded. Further, defendant stated that plaintiff and his counsel had been notified of the policy's rescission, and argued that this action was an attempt by plaintiff's counsel to obtain a windfall. Defendant recounted the history of the previous litigation arising from the accident, asserting that defendant had only become aware of plaintiff's action against Farmers on June 26, 2019, that plaintiff and Farmers had reached a full settlement for all past, present, and future PIP benefits on June 27, 2019, and that plaintiff had filed his complaint in this case on the same day that he reached the settlement with Farmers. Defendant attached to its motion two documents it had received from Farmers, described as a facilitation

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[2] The genesis of the 2-day discrepancy between these dates is both unclear and immaterial to our decision on appeal.

[3] On August 15, 2019, Phoenix Physical Therapy (Phoenix) filed a motion to intervene in this action, seeking payment for medical services provided to plaintiff. On September 2, 2019, the court granted Phoenix's motion, and Phoenix filed its own complaint the following day, seeking payment, pursuant to an assignment from plaintiff, in the amount of $7,280 for services provided to plaintiff. Phoenix is not a party to this appeal.

agreement indicating that plaintiff and Farmers had settled all claims arising from the October 15, 2017 accident, and a release signed by plaintiff on July 3, 2019.

Defendant argued that summary disposition was proper under MCR 2.116(C)(7) (claim barred by prior release or other disposition). Defendant also argued, under MCR 2.116(C)(10), that there was no genuine issue of material fact that plaintiff's claims had already been settled and released; further, defendant argued that plaintiff's claim for PIP benefits for services incurred before June 27, 2018 was barred by the one-year-back rule stated in MCL 500.3145. Addressing plaintiff's fraudulent misrepresentation claim, defendant asserted that plaintiff had failed to state a claim on which relief can be granted and that dismissal was therefore proper under MCR 2.116(C)(8). Defendant also argued that plaintiff's lawsuit was precluded by the doctrine of judicial estoppel, citing *Paschke v Retool Indus*, 445 Mich 502; 519 NW2d 441 (1994), and *Spohn v Van Dyke Pub Sch*, 296 Mich App 470; 822 NW2d 239 (2012).

In response to defendant's motion for summary disposition, plaintiff admitted that defendant had denied his claims for PIP benefits on the basis of defendant's rescission of the policy, that he was aware of that denial, and that he retained counsel after being notified of the denial. He also admitted filing the first-party action against Farmers, but stated that he did so in reliance on the veracity of defendant's denial. Plaintiff also admitted to filing his complaint in this case on the same day that he settled his claims for all past, present, and future PIP benefits with Farmers, but asserted that defendant was not a party to that settlement agreement or release and could not benefit from it. Plaintiff argued that defendant was not entitled to summary disposition under MCR 2.116(C)(7) or (10) because defendant had committed fraud, and that his amended complaint had alleged fraud with sufficient particularity. Plaintiff also argued that judicial estoppel should not apply in this case because plaintiff was not successful in the prior proceeding, and that he was compelled to settle his claims for less than their true value because of defendant's misconduct. Similarly, plaintiff argued that any release was ineffective as to defendant because it was procured through fraudulent conduct.

On November 22, 2019, the trial court held a hearing on defendant's motion. Plaintiff's counsel informed the trial court that he wished to obtain defendant's claim file and take the deposition of defendant's adjuster because "the judge is looking for evidence that I was told wrongly and dishonestly that the policy was rescinded as to Joshua Powell . . . ." The trial court granted plaintiff 45 days to take the deposition of the adjuster and obtain other information, limited to the rescission issue only, and scheduled the next hearing for January 10, 2020. Because the deposition transcript was not available in time for a hearing on that date, the court adjourned the hearing, once again, to January 31, 2020.

On January 27, 2020, plaintiff filed a supplemental response to defendant's motion for summary disposition. Citing the adjuster's deposition, defendant's claim file, and correspondence from defendant, plaintiff explained the basis of his fraud claim, asserting that defendant had committed fraud when it failed to inform plaintiff that it had rescinded the policy, but simply informed plaintiff that it could find no valid coverage and would not pay his claim. Plaintiff argued that in *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018) (*Bazzi II*), our Supreme Court held that the rescission of an insurance policy as to the insured is not automatically effective as to a third party; rather, rescission is an equitable remedy and is not effective as to a third party absent a court order before rescission. According to plaintiff, the defendant was aware that the policy

had not been rescinded as to plaintiff, but did not seek a court order rescinding the policy, instead simply proceeding as if the rescission automatically applied to plaintiff. Plaintiff contended that he had relied on defendant's misrepresentation and thus settled his claims with Farmers for less than their true worth.

Defendant filed a supplemental reply on January 30, 2020, presenting a detailed timeline of events following the October 15, 2017 accident. Defendant also contended that plaintiff was seeking PIP benefits for claims already assigned to various providers and that this action was merely an attempt to revive the case previously settled with Farmers. Defendant argued that plaintiff could not satisfy the elements of a fraud claim because defendant's statement that the policy was rescinded was true at the time it was made, citing this Court's then-binding decision in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016) (*Bazzi I*), aff'd in part and rev'd in part 502 Mich 390; 919 NW2d 20 (2018), as holding that insurers had a unilateral right to rescind a policy on the basis of fraud by the policyholder. Moreover, defendant argued, plaintiff could not prove that any reliance on the statements made by defendant was reasonable. Finally, defendant argued that plaintiff could not prove that he had suffered any damages that had not been remedied by the settlement with Farmers.

At the continued hearing on January 31, 2020, the court clarified that plaintiff's fraudulent misrepresentation claim rested on a statement made by defendant to plaintiff's counsel and stated its belief that it was not reasonable for a lawyer to rely on such a statement. After plaintiff's counsel stated that he had discovered defendant's possible liability on the day he settled the Farmers litigation, the court questioned his decision to settle the case with Farmers when he knew that another insurer was potentially liable. Plaintiff's counsel responded that defendant had never informed him that the policy was rescinded on the basis of fraud by the insured, but had simply stated that there was no valid coverage.

Defendant's counsel responded that plaintiff's counsel had failed to disclose the Farmers litigation, that more than $800,000 of plaintiff's claims are claims that were assigned to providers, and that Farmers would not have settled for the amount it did if it had known that defendant was potentially liable for additional PIP benefits. He also noted that plaintiff did not file his fraud claim until after defendant answered the original complaint by asserting that a settlement had been reached with Farmers.

After hearing argument from counsel, the court then announced its decision: "I'm not ruling on (7), (C)(7). I don't think under (C)(10) I don't think that there was a misrepresentation at the -- made, a fraudulent one at the time by the adjuster, and for that reason I'm, I'm granting the motion for summary disposition." Defendant's counsel then stated that he would "submit an order dismissing the case." On February 3, 2020, the court entered an order granting defendant's motion for summary disposition "for the reasons stated on the record" and dismissing the action "in its entirety with prejudice."

This appeal followed.

II. IMPROPER FINDING OF FACT

Plaintiff argues that the trial court erred by making an improper finding of fact and granting summary disposition under MCR 2.116(C)(10), despite plaintiff's reliance on defendant's demand for a jury trial. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013); *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019).

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *Id.* On appeal, a reviewing court must consider the pleadings, admissions, and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

We note at the outset that plaintiff's amended complaint alleged two counts: violation of the no-fault act, MCL 500.3101 *et seq.* (Count I) and fraudulent misrepresentation (Count II). Defendant sought dismissal of Count I under MCR 2.116(C)(7) and (10), alleging that plaintiff was judicially estopped by a prior settlement and release, and that claims for benefits incurred before June 27, 2018, were barred by the one-year-back rule of MCL 500.3145. Defendant sought dismissal of Count II under MCR 2.116(C)(8), asserting that there is no requirement that a policy be rescinded prior to an accident for the rescission to be effective; thus, defendant argued that Count II had failed to state a claim on which relief could be granted. Defendant did not seek dismissal of Count I on the ground that the policy had been rescinded; instead, the effectiveness of the rescission was addressed primarily in the context of plaintiff's fraudulent misrepresentation claim (Count II). Rather, defendant argued that plaintiff's claim for PIP benefits was barred by his prior settlement and release with Farmers, as well as by the one-year-back rule.

Plaintiff's response to defendant's motion for summary disposition relied entirely on the argument that defendant fraudulently misrepresented that the policy had been rescinded. Plaintiff's response to defendant's motion stated that plaintiff "filed the lawsuit only against Farmers and not [defendant] because he simply relied on the truth and veracity of Progressive's denial of their policy insured [sic] under India Powell which ending [sic] up being false." Plaintiff's brief in support of his response was entirely devoted to the argument that defendant had fraudulently misrepresented that the policy had been rescinded. At the motion hearing, plaintiff's counsel referred to the case as "this fraud case" and stated that he had amended the complaint to make the claim for fraud clear, rather than rely on an "inartfully drafted" complaint that appeared to be a claim for PIP benefits.

The trial court granted summary disposition under (C)(10), finding no fraudulent misrepresentation by defendant's adjuster. The court did not explicitly find that defendant's rescission of the policy was effective as to plaintiff, or that the one-year-back rule had barred plaintiff's claim for PIP benefits, and did not explicitly state that summary disposition was granted as to both counts. However, plaintiff had made no argument concerning the application of the one-year-back rule or the effect of the settlement with Farmers, other than to argue that the one-year-back rule did not apply due to defendant's alleged fraud, and that the Farmers settlement arose

from that same alleged fraud. Further, after the trial court's ruling, defendant's counsel volunteered to "submit an order dismissing the case," and the order signed by the court provides that the action is dismissed "in its entirety with prejudice . . . ." Because "a court speaks through its orders," *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999), we will address the issues as they relate to both counts.

Plaintiff's assertion that the trial court's order granting summary disposition violated his right to a jury trial has no merit. Plaintiff did not raise this issue in the trial court and has failed to cite any caselaw supporting his premise that summary disposition pursuant to MCR 2.116(C)(10) violates a party's constitutional right to a jury trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Plaintiff suggests that a demand for a jury trial immunizes a party from summary disposition. However, this Court has held that "although a jury determines the amount of damages, it is the court's job to determine whether a plaintiff is legally entitled to the damages." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 55; 698 NW2d 900 (2005). Our Supreme Court similarly explained that "[i]f there are not issues of fact to be determined, one is not entitled in a civil case to trial by jury." *People's Wayne Co Bank v Wolverine Box Co*, 250 Mich 273, 281; 230 NW 170 (1930). Our Supreme Court also held that "[w]here the facts of a case are uncontroverted and the only question left is what legal conclusions can be drawn from the facts, the question is for the court and not the jury." *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993), abrogated on other grounds by *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 389; 738 NW2d 664 (2007).

A party seeking summary disposition under MCR 2.116(C)(10) must either submit evidence that negates an essential element of the opposing party's claim or demonstrate that the opposing party's evidence is insufficient to establish an essential element of the claim. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The court must consider the evidence in the light most favorable to the nonmoving party. The nonmoving party may not merely rest on allegations or denials in the pleadings, but must present documentary evidence supporting the existence of a material factual dispute. If such evidence is not presented, summary disposition is properly granted. *Id.* at 362-363.

As explained in *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009), a plaintiff asserting a claim of fraudulent misrepresentation must establish six elements:

> (1) the defendant made a material representation;
>
> (2) the representation was false;
>
> (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion;
>
> (4) the defendant made it with the intention that the plaintiff should act upon it;
>
> (5) the plaintiff acted in reliance upon the representation; and

(6) the plaintiff thereby suffered injury.

In this case, plaintiff's fraudulent misrepresentation claim centered on his allegations that defendant denied him coverage through its rescission of the no-fault policy for fraud by the insured, that the policy was not rescinded at the time of the accident, and that defendant knew that the policy had not been rescinded, but misrepresented that the policy had been rescinded in order to induce plaintiff to act on that misrepresentation. In response to the motion for summary disposition, plaintiff asserted that defendant "specifically committed fraud by deceptively stating that the policy had been rescinded."

Although the transcript indicates some confusion on the part of the trial court, it is clear that the court granted summary disposition in favor of defendant under MCR 2.116(C)(10) because plaintiff had not convinced the court that there was a genuine issue of material fact regarding whether defendant had made any fraudulent misrepresentation to plaintiff: "I don't think under (C)(10) I don't think that there was a misrepresentation at the -- made, a fraudulent one at the time by the adjuster, and for that reason I'm, I'm granting the motion for summary disposition." This finding is supported by the record.

Defendant submitted documentary evidence establishing that on December 18, 2017, defendant mailed three rescission notices to plaintiff's brother and sister-in-law, that defendant subsequently refunded premium payments in the amount of $11,338.82, and that on January 4, 2018, defendant's adjuster sent a letter, addressed to plaintiff at his counsel's office, stating that there was no valid coverage for the October 15, 2017 accident and that defendant would not pay plaintiff's claim. Additional evidence submitted by plaintiff established that, on January 2, 2018, an adjuster called the office of plaintiff's counsel and left a message advising that the policy had been rescinded and that plaintiff's injuries were not covered.

Plaintiff did not dispute any of this evidence in the trial court. Instead, plaintiff argued that the defendant's rescission of the policy was not effective as to plaintiff under *Bazzi II*, 502 Mich 390, noting that our Supreme Court had held that the rescission of an insurance policy as to the insured is not automatically effective as to a third party absent a court order. Plaintiff contended that the defendant was aware that the policy had not been automatically rescinded as to plaintiff, but instead proceeded as if the rescission automatically applied to plaintiff. Moreover, plaintiff argued that defendant did not inform him of the rescission, but simply stated that no coverage was available; thus, relying on defendant's misrepresentation, plaintiff settled his claims with Farmers for less than their true worth.

On appeal, plaintiff argues that the record does not support defendant's assertion that plaintiff's counsel was informed of the rescission on January 2, 2018, because "the letter does not appear in this record." However, defendant did not claim that such a letter was sent, only that plaintiff's counsel's office was informed by phone that the policy had been rescinded. The record supports defendant's position: defendant's claim notes and the adjuster's deposition testimony indicate that the adjuster called plaintiff's counsel's office on January 2, 2018, and advised that the policy covering plaintiff had been rescinded and plaintiff was not covered. Plaintiff provided no evidence refuting the evidence presented by defendant.

Further, defendant's representations regarding rescission were not a misrepresentation. *Bazzi II* was decided on July 18, 2018, seven months after defendant informed plaintiff that the policy had been rescinded. At the time defendant rescinded the policy and informed plaintiff's counsel of the lack of coverage for plaintiff, this Court's decision in *Bazzi I*, 315 Mich App 763, was binding precedent. MCR 7.215(C)(2). In *Bazzi I*, this Court held that "if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void *ab initio* and rescind it, including denying the payment of PIP benefits to innocent third parties." *Bazzi I*, 315 Mich App at 781-782. *Bazzi I* did not require a judicial determination to support rescission.

At the time defendant rescinded the policy and denied coverage to plaintiff, defendant was entitled under Michigan law to do so. Even accepting as true plaintiff's assertion that defendant did not inform him of the rescission, defendant's January 4, 2018 letter informing plaintiff that no coverage was available was neither fraudulent nor a misrepresentation. Thus, plaintiff is unable to satisfy an essential element of his claim. This determination was a matter of law that was properly decided by the trial court. See *Meemic Ins Co v Fortson*, 324 Mich App 467, 473; 922 NW2d 154 (2018).

In the absence of any fraudulent misrepresentation by defendant, the trial court correctly granted summary disposition to defendant under MCR 2.116(C)(10). The one-year-back-rule of MCL 500.3145(2) provides, in that a "claimant may not recover benefits for any portion of the loss Plaintiff's initial complaint was filed on June 27, 2019. Plaintiff did not present any evidence of services rendered or cost incurred on or after June 27, 2018. In the absence of fraud or a valid reason to forgo its application, the one-year-back rule alone barred plaintiff's claim for PIP benefits, even without considering the effect of the Farmers settlement. See *Henry Ford Health Sys v Titan Ins Co*, 275 Mich App 643, 647; 741 NW2d 393 (2007).

Because plaintiff failed to submit evidence that defendant had made any fraudulent misrepresentation to plaintiff, and failed to otherwise rebut defendant's argument that the one-year-back rule applied to bar his claims, the trial court properly granted summary disposition of plaintiff's fraudulent misrepresentation claim under MCR 2.116(C)(10).

III. FAILURE TO BALANCE EQUITIES

Plaintiff also argues that the trial court abused its discretion when it failed to exercise its discretion to balance the equities as required under *Bazzi II*. We disagree. We review for an abuse of discretion a claim that the trial court failed to exercise its discretion in applying an equitable remedy. *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). A court, by definition, abuses its discretion when it makes an error of law. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

Citing *Rieth*, 230 Mich App at 348, plaintiff contends that a trial court abuses its discretion by failing to exercise that discretion when called upon to do so. Specifically, plaintiff argues that the trial court failed to exercise its discretion when it failed to balance the equities regarding rescission, as required by *Bazzi II*, asserting that the "court based its judgment on the law at the

time of the rescission notice, not the law at the time of the ruling." However, a trial court does not abuse its discretion by failing to exercise that discretion in the absence of an affirmative obligation to do so. *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 353; 711 NW2d 801 (2005). In this case, if defendant had sought dismissal of Count I, violation of the no-fault act, on the ground that the policy had been rescinded, the trial court would have been required to apply *Bazzi II* to determine whether the rescission was effective as to plaintiff. However, defendant sought dismissal of Count I under MCR 2.116(C)(7) and (10), alleging that plaintiff was judicially estopped by a prior settlement and release and that claims for benefits incurred before June 27, 2018 were barred by the one-year-back rule of MCL 500.3145. Because defendant did not seek dismissal of Count I on the ground that the policy had been rescinded, the court was not called upon to exercise its discretion in this regard and did not abuse its discretion by failing to do so.

The trial court was also not required to balance the equities regarding Count II, fraudulent misrepresentation, because as stated, defendant made no misrepresentation, fraudulent or otherwise, when it rescinded the policy. In January 2018, when defendant informed plaintiff that it found no valid coverage, *Bazzi I* was still binding precedent under MCR 7.215(C)(2), which provides: "The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." Because *Bazzi I* was still binding precedent, defendant was entitled to declare the policy void *ab initio* and rescind it, defendant did not fraudulently misrepresent that the policy had been rescinded, and the trial court did not fail to exercise its discretion when it declined to balance the equities regarding rescission in granting summary disposition on plaintiff's claim of fraudulent misrepresentation. *Rieth*, 230 Mich App at 348.

IV. JUDICIAL ESTOPPEL

Plaintiff also argues that the trial court improperly applied the equitable doctrine of judicial estoppel to bar plaintiff's claims in this case. We disagree. We review de novo the applicability of equitable doctrines such as judicial estoppel. *Estes v Titus*, 481 Mich 573, 579; 751 NW2d 493 (2008).

In general, the equitable doctrine of judicial estoppel precludes a party who has successfully and unequivocally asserted a position in a legal proceeding from asserting an inconsistent position in a subsequent proceeding. *Spohn*, 296 Mich App at 479-480. In this case, defendant raised the defense of judicial estoppel in the motion for summary disposition, contending that in his previous action against Farmers plaintiff had successfully asserted that Farmers was the insurer responsible for payment of PIP benefits. Plaintiff responded that he was not successful in his litigation against Farmers, but was forced to settle his claims for substantially less than they were worth.

Plaintiff contends that "the trial court failed to provide any rationale or reasoning for its conclusion that the companion case barred [plaintiff's] claim in this case." However, the record is devoid of any indication that the trial court ever reached such a conclusion; this issue was neither addressed nor decided by the trial court. In other words, plaintiff seeks reversal of a decision that the trial court never made. "Appellate review is limited to issues actually decided by the trial

court." *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994). Plaintiff is not entitled to any relief on this issue.

Affirmed.

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