STATE OF MICHIGAN

COURT OF APPEALS

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellant,

v

JOYCE ANDERSON, JACK DILLON, CINDI GALE, Conservator of the Estate of KAYSE GALE, a Minor and ANDORA GALE, Personal Representative of the Estate of ROBERT LEE GALE, Deceased,

Defendants-Appellees.

FOR PUBLICATION
July 6, 1994
9:30 a.m.

No. 156079
LC No. E91-2489-CK

Before: Michael J. Kelly, P.J., and Hood and S. B. Miller*, JJ.

PER CURIAM.

This case arises from a motor vehicle accident in which Robert Gale was killed after his vehicle collided with a vehicle driven by defendant Dillon. The automobile driven by Dillon was owned and insured by Dillon's mother, Joyce Anderson. Plaintiff, Farmers Insurance Exchange, claimed that Anderson procured the policy by fraud and that it therefore should not have to provide coverage. The trial court disagreed and granted summary disposition in favor of defendants pursuant to MCR 2.116(I)(2). Farmers now appeals as of right. We reverse.

Joyce Anderson applied for insurance on the subject vehicle and represented that she would be the primary driver. Anderson did not disclose that Dillon, whose driver's license had been revoked, would be operating the vehicle. In fact, as a person with a revoked license, Dillon was ineligible for motor vehicle insurance. The policy provided liability limits of $100,00 per person with a $300,000 limit in any one accident. Dillon was not only unlicensed and uninsured, but also driving while intoxicated in the collision which resulted in Gale's death.

The Gale family initiated a wrongful death action against Dillon and Anderson. Farmers then filed a complaint for declaratory judgment arguing that it had no duty to defend Dillon or to provide coverage because Dillon used the vehicle without Anderson's permission. Farmers further argued that it had no duty to defend or indemnify Anderson because Anderson had made fraudulent and material misrepresentations in procuring the insurance policy. More specifically, Farmers asserted that Anderson had represented that she would be the primary driver of the vehicle when she knew that Dillon would be the primary driver.

Therefore, Farmers argued, the policy should be declared void ab initio and rescinded. Alternatively, Farmers argued that if it was precluded from declaring the entire policy void ab initio, then the policy should be reformed to provide only the statutorily required minimum limits of $20,000/$40,000 rather than the stated policy limits of $100,000/$300,000.

Competing motions for summary disposition were filed. The trial court, relying on Ohio Farmers Ins Co v Michigan Mutual Ins Co, 179 Mich App 355; 445 NW2d 228 (1989), lv den 434 Mich 909 (1990), denied Farmers' motion for summary disposition and granted the same in favor of defendants. This appeal followed.

*Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff has now conceded liability for the statutory 20,000/40,000 limits. Therefore, the issue we must decide is whether an automobile insurer who, upon discovering that the insured has made fraudulent and material misrepresentations in procuring the policy, may assert rescission as a basis to limit its liability to the statutory minimum even when innocent third parties have been injured.

We first note that when an accident occurs in this state, the scope of liability coverage is determined by the financial responsibility act, MCL 257.501 et seq; MSA 9.2201 et seq. League General Ins Co v Budget Rent-A-Car of Detroit, 172 Mich App 802, 805; 432 NW2d 751, (1988), lv den 433 Mich 871 (1989). §§ 520(f)(1) and (g) of the act provide in relevant part:

> (f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
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> (1) The liability of the insurance carrier with respect to the **insurance required by this chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs**; . . . except as hereinafter provided, **no fraud, misrepresentation, . . . or other act of the insured in obtaining or retaining such policy . . . shall constitute a defense as against such judgment creditor**.
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> (g) **Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter**.

Generally, a material misrepresentation made in an application for no-fault insurance entitles the insurer to retroactively void or cancel the policy. Katinsky v Auto Club Insurance Association, 201 Mich App 167, 170; 505 NW2d 895 (1993). However, this right to rescind a policy altogether ceases to exist once there is a claim involving an innocent third party. Id. As indicated previously, Farmers concedes that the language of § 520(f)(1) necessitates this result. However, Farmers contends that even though an innocent third party was injured, its liability should be limited to the statutory minimum because the policy was fraudulently obtained. We agree.

As stated above, § 529(f)(1) prohibits an insurer from using fraud as a basis to void coverage altogether under an insurance policy once an innocent third party has been injured. Thus, once an accident occurs, innocent third parties may be entitled to recover at least the statutory minimum of $20,000/$40,000, notwithstanding the fact that the policy in question may have been procured by fraud. However, this prohibition is found only in (f)(1), which, again, deals with the statutorily mandated minimum coverage of $20,000/$40,000. By contrast, § 520(g), which addresses excess coverage, does not include such a limitation. In fact, in drafting 520(g), the legislature expressly provided that the additional coverage contemplated in that section "shall not be subject to the provisions of this chapter."

Thus, reading §§ 520((f)(1) and (g) together, it is evident that the legislature did not intend to preclude an insurer from using fraud as a defense to void optional insurance coverage. Had the legislature intended to do so, the same prohibitory language found in (f)(1) would have been included in (g). See Sebewaing Industries, Inc. v Village of Sebewaing, 337 Mich 530, 545; 60 NW2d 444 (1953). Namely, that regarding mandated minimum coverage, fraud on the part of the insured in obtaining/retaining a policy shall not constitute a defense for the insurer against a judgment creditor. By failing to include this prohibitory language in (g) and by specifically exempting (g) from the remaining provisions of the chapter, the legislature made it clear that it did not intend to deprive insurers of this defense when a claim for excess coverage is made.

Despite the holdings in Ohio Farmers and Katinsky, we do not go so far as to say that a validly imposed defense of fraud will absolutely void any optional excess insurance coverage in all cases. To the

contrary, when fraud is used as a defense in situations such as these, the critical issue necessarily becomes whether the fraud could have been readily ascertained by the insurer when the contract of insurance was entered into. We think it unwise to permit an insurer to deny coverage on the basis of fraud after it has collected premiums, when it could have readily ascertained the fraud at the time the contract was formed -- Ohio Farmers was such a case.

We are mindful that the Ohio Farmers panel concluded generally that "once an innocent third party is injured in an accident in which coverage is in effect on the automobile, an insurer will be estopped from asserting rescission as a basis upon which it may limit its liability to the statutory minimum." Id. at 364-365. Again, unlike the present case, Ohio Farmers involved a situation where the fraud relied on by the insurer was readily ascertainable when the contract for insurance was formed. Moreover, neither Ohio Farmers nor Katinsky addressed §§ 520(f)(1) and (g) of the financial responsibility act. Instead, both panels analyzed the respective cases solely in light of public policy considerations.

As stated previously, when an accident occurs in this state, the scope of liability coverage is determined by the financial responsibility act. League General, supra. Since, as we have indicated, the financial responsibility act is controlling as to Farmers' responsibility, Ohio Farmers and its progeny are not controlling in our resolution of this case. To the extent that these cases may be found to be inconsistent, we decline to follow them.

In the present case, Dillon's name was nowhere to be found on the application for insurance which was completed by Anderson. Therefore, the trial court properly concluded that it would have been virtually impossible for Farmers to obtain his driving record since it had no reason to believe that he would be operating the subject vehicle. Additionally, we accept the trial court's assumption that Anderson committed fraud to obtain the policy. Reviewing the issue de novo, we conclude that the trial court erred by granting summary disposition in favor of defendants because Farmers was entitled to use fraud as a defense to limit coverage under the policy to the statutory minimum. Therefore, defendants were not entitled to judgment as a matter of law. §§ 520(f)(1) and (g); Borman v State Farm Fire & Casualty Co, 198 Mich App 675, 678; 499 NW2d 419 (1993). Rather, plaintiff was entitled to entry of judgment in its favor.

Reversed and remanded, for entry of judgment in favor of plaintiff.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Stephen B. Miller