STATE OF MICHIGAN

COURT OF APPEALS

RHONDA COOK, Personal Representative of the Estate of ALBERT COOK, JR., and ETTA COOK,

Plaintiffs-Appellants,

v

AUTO OWNERS INSURANCE COMPANY and GOMPERS COUILLARD & WOLFE, INC.,

Defendants-Appellees.

UNPUBLISHED
June 9, 1995

No. 168780
LC No. 92-213363-NI

Before: Hood, P.J., and Marilyn Kelly and Saad, JJ.

PER CURIAM.

The trial court granted summary disposition to defendants pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) in this action to recover under an insurance policy. The trial court based its decision on its finding that plaintiff Etta Cook (Cook) made material misrepresentations on her insurance application with defendant insurers and that plaintiffs failed to plead that an insurance representative was negligent in questioning Cook when she completed the application. Plaintiffs appeal as of right.

Cook's son, decedent Albert Cook, was a pedestrian who was killed when struck by a vehicle that had been struck by an uninsured motorist. Approximately five months prior to this accident, Cook had applied for automobile insurance with Auto Owners Insurance, through its agent Gompers, Couillard & Wolfe (Gompers). Gompers refused plaintiffs' claim and this action followed.

While defendants asserted that Cook was mailed a notice of cancellation of her policy approximately one month before Albert's death, the arguments on defendants' motion for summary disposition centered on their affirmative defense that Cook made a material misrepresentation upon which coverage was properly denied.

This Court reviews a grant of summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. Stehlik v Johnson (On Reh), 206 Mich App 83, 85; 520 NW2d 633 (1994). Under MCR 2.116(C)(8), summary disposition is proper where the opposing party failed to state a claim upon which relief can be granted. All well-pleaded facts must be accepted as true, and only if no legal claim is alleged is summary disposition valid. Id.; Radtke v Everett, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the claim. The reviewing court must consider all the pleadings, affidavits, depositions, admissions and documentary evidence in a light most favorable to the opposing party and if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, then summary disposition should be granted. Stehlik, supra at 85; Radtke, supra at 374.

Defendants moved for summary disposition under MCR 2.116(C)(10) on the basis that Cook made a material misrepresentation on her application for insurance because she failed to indicate that her son was a driver in her household and had a suspended license. Therefore, according to defendants,

Cook's policy was void ab initio. Where an insured procures an insurance policy through an intentional misrepresentation of a material fact and the person seeking to collect the no-fault benefits is the person who committed the fraud, the insurer may rescind the policy and declare it void ab initio. Darnell v Auto-Owners Ins Co, 142 Mich App 1, 9; 369 NW2d 243 (1985). The misrepresentation must "substantially increase[] the risk of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." Id. at 9.

It was established that had Cook indicated on her insurance application that her son, as a driver who lived in her household, had a suspended license, she would have been denied coverage. At the time that she completed the application, Albert Cook, Jr., resided with Etta Cook, and it is undisputed that Albert's license had been suspended three times during the three years previous and in fact was suspended when the application was completed. Therefore, the failure to provide this information was a misrepresentation of a material fact. However, the question remains as to whether this misrepresentation was intentional.

Cook claims (1) that the form itself was ambiguous; and (2) that the agent who filled out the form asked her only for information regarding any other persons that would drive her vehicle. Plaintiff told the agent that she was the only person that would be driving her vehicle. The agent who filled out the insurance application indicated that she asked each question on the insurance application. According to the agent, she specifically asked plaintiff to identify any other drivers in her household and whether any driver had a license suspension or revocation in the previous three years.

The application contained a section headed "DRIVER INFORMATION," which was followed by a heading "PROVIDE APPLICABLE INFORMATION FOR ALL HOUSEHOLD MEMBERS." Under these headings are columns asking for the state in which the driver is licensed, the driver license number, the person's name as it appears on the license, and whether the driver is a principal or occasional driver of the insured vehicle. The application also asks whether "any driver had a license suspension or revocation during the past 3 years."

Ambiguities in insurance contracts must be construed in favor of the insured and against the insurer, the drafter. Michigan Mutual Ins Co v Dowell, 204 Mich App 81, 87; 514 NW2d 185 (1994). Where the provision is clear and unambiguous, its terms must be construed according to their plain, ordinary, and popular meaning. When the terms may reasonably be understood in different ways, the contract is deemed ambiguous. Id.

We find the form to be ambiguous. The form can be read so as to lead an applicant to understand that it requests information only as to household members that will drive the insured vehicle. That the form specifically asks for an indication as to whether a household member is either a principal or occasional driver of an insured vehicle creates a question as to whether a person who will not be driving an insured vehicle must be listed. Moreover, the form includes questions pertaining to "drivers", such as whether a driver has had a license suspended within the past three years, and separate questions referring to "any household member[s]."

Because the application is ambiguous, there is a question of fact as to whether Cook made intentional misrepresentations on the application. Therefore, summary disposition pursuant to MCR 2.116(C)(10) was improperly granted on this issue.

While it was not addressed by the trial court, we find that even if there was a material misrepresentation on plaintiff's application for insurance, which would ordinarily entitle defendants to retroactively void or cancel the policy, public policy requires that once there is a claim that involves an innocent third party the insurer is estopped from asserting this right to rescind. Katinsky v Auto Club

Ins Ass'n, 201 Mich App 167, 170-171; 505 NW2d 895 (1993). There was a question of fact as to whether Cook had received a notice of cancellation of her policy, for failure to make premium payments, before Albert was fatally injured. If it were determined that the policy had not been cancelled prior to plaintiffs filing their claim based on Albert's death, then defendants would be estopped from asserting the right to rescind the policy based on any misrepresentations made by Cook.

Reversed.

/s/ Harold Hood
/s/ Marilyn J. Kelly
/s/ Henry W. Saad