STATE OF MICHIGAN

COURT OF APPEALS

PIERE BURTON and PAULA BURTON,

Plaintiffs-Appellees,

v

WOLVERINE MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

FOR PUBLICATION
September 22, 1995
9:05 a.m.

No. 164094
LC No. 92-076543-AV

Before: Griffin, P.J., and Sawyer and C.D. Corwin,* JJ.

SAWYER, J.

Defendant appeals by leave granted from a judgment of the district court entered in favor of plaintiffs on their collision claim under an insurance policy issued by defendant. We affirm.

This case concerns an insurer's right to rescind an insurance policy for a misrepresentation in the application for insurance following a loss by the insured and following the notice of cancellation by the insurer. This case was tried to the bench in district court and submitted on stipulated facts. According to the stipulation, on October 14, 1986, plaintiff Piere Burton executed an application for automobile insurance with defendant. On that application, he misrepresented his driving record. This was discovered by defendant and, on October 27, 1986, defendant sent plaintiffs a notice of cancellation which indicated that coverage would be cancelled as of 12:01 a.m. on November 17, 1986. On November 8, 1986, however, plaintiff Paula Burton was involved in an automobile accident resulting in a collision loss to her vehicle, which was covered under the policy. On November 10, plaintiffs notified their agent of the loss who in turn notified defendant. Thereafter, on November 24, 1986, defendant notified plaintiffs that, on the basis of the misrepresentation on the insurance application form, it was rescinding the policy as of its effective date of October 14, 1986. That letter also returned the remainder of the premium.[1]

The district court originally granted summary disposition in favor of defendant. However, that decision was reversed on appeal to the circuit court. An application for leave to appeal to this Court was denied for failure to persuade the Court of a need for immediate appellate review. Thereafter, as noted above, the matter was submitted to the district court on stipulated facts, resulting in judgment in favor of plaintiffs, due at least in part to the prior circuit court decision. The appeal to circuit court resulted in an affirmance, the circuit court indicating that it was obligated to do so under the law-of-the-case doctrine. Defendant then pursued this appeal.

Defendant's only argument on appeal is that the courts below erred in entering judgment in favor of plaintiffs because defendant was entitled as a matter of law to rescind coverage ab initio for material misrepresentations of fact in the application for insurance. We have no dispute with the general proposition that an insurer may rescind a policy ab initio because of a material misrepresentation in the application for insurance. Katinsky v Auto Club Ins Ass'n, 201 Mich App 167, 170; 505 NW2d 895 (1993); United Security Ins Co v Comm'r of Ins, 133 Mich App 38; 348 NW2d 34 (1984).[2]

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

However, the case at bar does not simply present a case of an insurer exercising its right of rescission. Rather, after discovery of the material misrepresentation in the application, defendant chose, rather than issuing a letter of rescission, to issue a notice of cancellation, effective at some date in the future. Thus, prior to the accident in the case at bar, defendant discovered the material misrepresentation, chose to cancel (rather than rescind) plaintiffs' policy, sent a notice of that cancellation prior to the accident with an effective date which happened to fall after the accident. As noted above, defendant also apparently retained a pro-rata share of the premium to cover the policy period from the onset of the policy until the effective date of cancellation, tendering that portion of the premium only after it chose to exercise rescission following the accident.

In light of defendant's actions in the case at bar, we are persuaded that it has waived its right of rescission in this case. While we certainly do not wish to reward plaintiffs for the misrepresentation in the application for insurance, it was defendant who chose the remedy. We would not interfere with defendant's right to rescind the policy ab initio had it chosen to do so upon discovery of the material misrepresentation, regardless whether that discovery occurred before or after the loss.[3] However, in the case at bar, defendant did discover the misrepresentation prior to the loss and chose to issue a cancellation rather than a rescission.

In drawing this distinction, it is important to consider the effects of defendant's choice to issue a cancellation. First, defendant induced plaintiffs to believe that they would have insurance until the effective date of the cancellation. Indeed, the cancellation notice specifically informed plaintiffs that their insurance would cease at the hour and date mentioned at the top of the notice, namely 12:01 a.m. on November 17, 1986, a date approximately three weeks in the future. Thus, plaintiffs had no reason to immediately act to replace their insurance coverage, to cease driving until coverage could be obtained, or to do anything else immediately, so long as they eventually obtained coverage before November 17. Simply put, plaintiffs had no reason to have necessarily obtained replacement coverage at the time of the accident in the case at bar, the notice of cancellation having specifically told them that they would have coverage for more than an additional week after the accident occurred.

Second, defendant proposed to earn and keep a premium for the time period in question. The notice of cancellation specifically stated that if a premium had been paid, a premium adjustment would be made after the cancellation became effective. It then states that if the premium had not been paid, plaintiffs would be billed for the premium earned to the time of cancellation.[4]

Indeed, even had plaintiffs acted promptly to obtain coverage, it is unlikely that either they or their insurance agent would have requested that the coverage become effective before November 17. That is the date the cancellation notice said their existing coverage would cease and the date through which they had apparently paid a premium.

Clearly, defendant's intent upon learning of plaintiffs' misrepresentation on the application for insurance was, while to decline the risk over the long term, to cover the risk until November 17, 1986, and to retain a premium earned for that period of time. That is, there is nothing in the record to suggest that had this accident never occurred defendant would not have allowed the policy to remain in effect until November 17, 1986, and retained a premium for the period from the effective date of the policy of October 14 until the effective date of cancellation, November 17.

The remedy which defendant seeks to be entitled to is untenable. Defendant wishes to, upon the discovery of a misrepresentation in the application, have the right to collect a premium and provide coverage so long as there are no losses, wherein they are entitled to choose rescission instead and deny coverage. In short, defendant wishes to be able to earn a premium without having to provide coverage. That, however desirable it may be to defendant, is not an available option. Rather, it must either rescind

the policy upon discovery of the misrepresentation and refund the premium or cancel the policy, retaining the premium earned until the effective date of the cancellation and provide coverage until the effective date of the cancellation. But it cannot have its premium and deny coverage too.

In sum, defendant was entitled upon discovery of the misrepresentation to rescind the policy issued to plaintiffs. Instead, it chose to continue coverage for approximately three weeks longer and retain a premium for that period of time. Having chosen to do so, defendant is obligated to provide coverage for that period of time and to pay the loss which happened to have occurred.

Affirmed. Plaintiffs may tax costs.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Charles D. Corwin

[1] Although it is not entirely clear from the stipulated facts, it appears that the letter of rescission sent by defendant's vice-president on November 24, indicated that most, but not all, of the previously paid premium had been returned with or shortly after the notice of cancellation. However, $93.26 had been retained and was returned with the notice of rescission. That amount would approximate the pro-rata share of the premium for the period from October 14, when the policy went into effect, until November 17, the effective date of the prior cancellation notice.

[2] It should be noted that insurers are estopped from asserting rescission with respect to claims by innocent third parties where the policy was in force at the time of the accident and prior to the exercise of the right of rescission. See Katinsky, supra at 171.

[3] Generally in the rescission cases, the discovery of the misrepresentation has occurred after the accident at issue. For example, in Katinsky, supra, the rescission was based upon a dishonored check, which had been returned approximately a week and a half after the accident. Similarly, in United Security, supra, the accident occurred one hour after the issuance of the binder. In Cunningham v Citizens Ins Co of America, 133 Mich App 471; 350 NW2d 283 (1984), the plaintiff's misrepresentation of his driving record was discovered the day after the accident. Likewise, in the remaining cases cited by defendant, the discovery of the grounds for rescission occurred after the insurer learned of the loss.

[4] As noted above, apparently plaintiffs had made at least a partial payment on the premium and while a portion of the payment had been refunded, defendant apparently retained the earned portion of the premium for the period from the effective date of the policy to the effective date of the cancellation notice, tendering the remainder of that premium only after they chose to exercise the rescission option following the notice of loss.