

STATE OF MICHIGAN
COURT OF APPEALS

CAROL ANNE BRISBOY,

Plaintiff-Appellant,

v

FARM BUREAU MUTUAL INSURANCE
COMPANY,

Defendant-Appellee.

UNPUBLISHED

July 8, 1997

No. 186664

Ingham Circuit Court

LC No. 93-074161-NF

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

In this insurance action, plaintiff appeals by right the judgment for defendant. We affirm.

Plaintiff purchased no-fault insurance coverage from defendant. While her application was pending approval, plaintiff was in a car accident. Defendant's underwriter subsequently received a copy of plaintiff's driving record, which showed her conviction for an alcohol-related offense within thirty-six months of her insurance application. When applying for insurance, plaintiff claimed to have had no such convictions. The underwriter followed defendant's standard procedures and voided the policy *ab initio* because plaintiff had made a material misrepresentation in her application.

Plaintiff claimed that she made no misrepresentation given the phrasing of defendant's questions. She argued that the questions did not apply because her driving offense occurred before the thirty-six month period. Plaintiff, however, was convicted during the pertinent period.

Neither plaintiff nor defendant's agents had specific recollection of the events surrounding plaintiff's application process, but defendant's agents testified that they would have followed their customary business practices, which included asking about such convictions. If so, then plaintiff's answers to the qualification questions were false. Defendant prevailed at trial and the court entered judgment, holding that defendant was not liable to plaintiff to pay no-fault benefits.

Plaintiff first argues that defendant could not rescind its policy because it had limited its remedies to cancellation or a premium adjustment. We disagree. Defendant could rescind the no-fault insurance policy it issued to plaintiff even though it had not reserved the right to do so in the

insurance contract. *Wiedmayer v Midland Mutual Ins*, 414 Mich 369, 374-376; 324 NW2d 752 (1982). The instant case is distinguishable from *Burton v Wolverine Mutual Ins Co*, 213 Mich App 514; 540 NW2d 480 (1995), which plaintiff cites. In *Burton*, the defendant insurance company sent a notice of cancellation to the insured. After the insured had an accident, the defendant voided the policy *ab initio* – even though the accident occurred before the cancellation date. This Court held that the insurer had elected the remedy of cancellation and therefore had waived its right to rescind. *Id.* at 517-518.

As to rescission, this Court noted that, generally, “an insurer may rescind a policy *ab initio* because of a material misrepresentation in the application for insurance.” *Id.* at 517. This Court added that it would not interfere with the insurer’s right to rescind the policy *ab initio* had it so chosen upon its discovery of the material misrepresentation, without regard to whether the discovery occurred before or after the loss. *Id.* at 518. Thus, defendant’s first remedy here was to void the contract, which it elected to do.¹

Additionally, plaintiff contends that the trial court abused its discretion in denying her motion for a new trial. We cannot agree. Although none of the witnesses had independent recollections of the events surrounding plaintiff’s application for insurance, the jury could have found that defendant’s agents or employees acted consistently with their routine habits. *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 560, 564; 493 NW2d 492 (1992).

Also, plaintiff contends that she would have secured other insurance coverage had defendant acted in a more timely fashion in rescinding coverage. The record does not reflect unreasonable delay by defendant in processing and completing plaintiff’s application. *Cunningham v Citizens Ins Co*, 133 Mich App 471, 480; 350 NW2d 283 (1984). The underwriter concluded his investigation within one week. Plaintiff’s argument is without merit.

Nor did the trial court abuse its discretion in refusing to admit as an exhibit plaintiff’s application to another insurance company. The trial court correctly found that the exhibit would have been used to rehabilitate plaintiff, which was unnecessary. The exhibit was relevant only to testimony plaintiff did not give and thus was irrelevant to the testimony on the record. MRE 401 & 402; *Szymanski v Brown*, 221 Mich App 423, 435-546; 562 NW2d 212 (1997).

Next, a review of the instructions in their entirety reflects that they fairly presented to the jury the theories of the parties and the applicable law. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990). The phrase isolated by plaintiff does not persuade us that the court erred. In any event, an innocent misrepresentation may be grounds for rescission. *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995).

Finally, defense counsel committed no misconduct. The brief reference to plaintiff's earlier conviction² was followed immediately by an effective curative instruction. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Also, the court never admitted the yellow pages advertisement and defense counsel's short questions about it did not rise to the level of misconduct.

Affirmed.

/s/ Maura D. Corrigan

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

¹ Plaintiff also relies on a case under New Jersey law, *Fellipello v Allstate Ins Co*, 411 A2d 1137 (NJ 1979). Because *Fellipello* is not controlling precedent, we decline to address it.

² We rely on the passage cited by defendant because plaintiff failed to cite to the transcript.