STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

DIANA L. FERENCE as Guardian-Conservator of the Estate of JASON FERENCE,

Defendant, Counterplaintiff, Third-Party Plaintiff,

and

AUTO CLUB INSURANCE ASSOCIATION,

Third-Party Defendant-Appellee.

UNPUBLISHED
February 3, 1998

No. 190910
Livingston Circuit
LC No. 95-014066 CK

Before: White, P.J, and Bandstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting Auto Club Insurance Association's (Auto Club) motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

Plaintiff issued a no-fault automobile insurance policy to Diana L. Ference. After the policy was issued, Diana's son, Jason Ference, was injured as a passenger in an automobile accident. The driver of the automobile in which Jason was riding was insured by Auto Club. Diana informed plaintiff of the accident. Subsequently, plaintiff filed a complaint for rescission of the insurance policy it had issued to Diana on the basis that Diana had made material misrepresentations in her application for insurance. The application for insurance did not reveal that Jason was a resident of Diana's home, was over fourteen-years-old, and had a suspended drivers' license. Diana then filed a complaint, naming plaintiff and Auto Club as defendants, demanding payment of no-fault insurance benefits under the Michigan no-fault insurance act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq*, for expenses resulting from Jason's injuries.

Auto Club moved for summary disposition pursuant to MCR 2.116(C)(8), asserting that plaintiff is estopped from rescinding its insurance contract with Diana because Jason is an "innocent third party" and has made a claim under the policy. Because plaintiff is first in line of priority for paying Jason's no-fault benefits, MCL 500.3114(1)(4)(a); MSA 24.13114(1)(4)(a), Auto Club is entitled to summary disposition if plaintiff is estopped from rescinding its insurance contract.[1] The trial court granted Auto Club's motion for summary disposition on the grounds that the innocent-party rule applies.

I

Plaintiff first argues that the innocent-third-party rule is not applicable. We disagree. Generally, a material misrepresentation made in an application for no-fault insurance entitles the insurer to void or to cancel retroactively the policy. *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993). However, this right to rescind a policy ceases once there is a claim involving an innocent third party. *Id.* This Court has stated that public policy considerations require that an insurer be estopped from asserting rescission when an innocent third party has been injured. *Katinsky, supra*, at 171; *Ohio Farmers v Michigan Mutual*, 179 Mich App 355, 364-365; 445 NW2d 228 (1989).[2]

In *Darnell v Auto-Owners Ins Co*, 142 Mich App 1; 369 NW2d 243 (1985), this Court addressed the issue of an insurance company's right to rescind an insurance policy where an insured, other than the claimant, is alleged to have misrepresented facts on the application for insurance. In *Darnell*, the defendant insurance company sought to rescind a no-fault insurance policy on the basis of misrepresentations made by the claimant's wife in applying for insurance coverage. *Id.* at 10. This Court held that an insurance policy may not be rescinded, denying coverage to an insured claiming no-fault benefits under the policy, on the basis of misrepresentations made by the claimant's spouse, who is also insured under the policy. *Id.* Paraphrasing *Morgan v Cincinnati Ins*, 411 Mich 267, 277; 307 NW2d 53 (1981), this Court stated that "only the claim of an insured who has committed the fraud will be barred, leaving unaffected the claim of any insured under the policy who is innocent of fraud." *Id.* Because Mr. Darnell made no misrepresentation, the *Darnell* Court held that coverage could not be denied him on the basis of Mrs. Darnell's improper actions. *Id.* at 10-11.

In the present case, it was Jason's mother, not Jason, who is alleged to have misrepresented facts on the application for insurance. Like the insurance provider in *Darnell*, plaintiff argues that but for Diana's misrepresentations, Jason would have been denied coverage. However, since the record reveals that Jason made no misrepresentation to plaintiff, he is an innocent third party and coverage may not be denied him on the basis of his mother's misrepresentations.[3]

Lastly, we observe that Jason will have PIP coverage under either decision. The No Fault Act treats Jason as an innocent person not disqualified from benefits. See MCL 500.3113; MSA 24.13113. The question is whether the coverage will be provided by his mother's insurer, or the driver's insurer.[4] Thus, our decision to follow, rather than reject, *Darnell* is consistent with the

statutory no-fault scheme, which, in the context of a failure to obtain insurance, disqualifies only the person charged with obtaining the insurance and not innocent family members. *Id.*

II

Next, plaintiff argues that Jason is a third-party beneficiary of the insurance contract between plaintiff and Diana and therefore Jason was bound by the condition in Diana's insurance policy that states that no coverage would be afforded in the event of false or inaccurate representations. Plaintiff cites no authority except the third-party beneficiary statute, MCL 600.1405; MSA 27A.1405, in support of this proposition. We conclude, however, that the public policy considerations that have lead this Court to consistently apply the innocent third party doctrine are unaffected by this argument.

Affirmed.

/s/ Helene N. White
/s/ Michael R. Smolenski

[1] MCL 500.3114(1); MSA 24.13114(1) establishes the general rule that accident victims must look first to their own insurance coverage or that of a spouse or resident relative. Logeman, Michigan No-Fault Automobile Cases, § 3.2, p 3-3. If the injured occupant has no coverage of his own, cannot claim under the policy of a spouse or resident relative, and cannot claim from the insurer of a commercial carrier or employer vehicle, the insurer of the owner or registrant of the vehicle occupied is next in line of priority for paying no-fault benefits. MCL 500.3114(4); MSA 24.13114(4). Thus, if plaintiff is entitled to rescind its contract with Diana, Auto Club, as the insurer of the occupied vehicle, is next in line of priority for paying Jason's no-fault benefits.

[2] We do not disagree with the dissent's observation that *Katinsky* and *Ohio Farmers* are factually distinguishable. These cases are cited for the general proposition asserted.

[3] *Hammoud v Metropolitan Ins Co*, 222 Mich App 485; 563 NW2d 716 (1997), relied on by plaintiff, is distinguishable. The *Hammoud* Court recognized the innocent-third-party rule relied on here, but rejected application of the rule based on the conclusion that "plaintiff was actively involved in defrauding defendant and was not an innocent third party. *Id.* at 489. No such assertion has been made in the instant case with respect to Jason.

[4] Jason would have PIP coverage even if he had been injured while a passenger in his mother's vehicle or while driving the vehicle with permission. If he had been injured while occupying his mother's vehicle, the question would be whether plaintiff's insurer or the assigned claims plan would be responsible for benefits.

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BANDSTRA, J. (dissenting).

I respectfully dissent. The "innocent third party" doctrine relied upon by the majority found its genesis in *Morgan v Cincinnati Ins Co*, 411 Mich 267; 307 NW2d 53 (1981). However, *Morgan* involved a standard fire insurance policy prescribed by statute. *Id.* at 276. Our Supreme Court construed the statutory language as meaning that "the claim of any insured under the policy who is innocent of fraud" cannot be barred. *Id.* at 277. This holding, required by the statute,[1] was specifically limited to apply only "whenever the statutory clause limiting the insurer's liability in case of fraud by the insured is used." *Id.* at 277.

This limiting clause from *Morgan* was not quoted or considered when a panel of our Court extrapolated the innocent third party rule into the no-fault context in *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 10; 369 NW2d 243 (1985). Accordingly, I consider *Darnell* to be wrongly decided.[2] Further, I agree with appellant that there is no good public policy reason to prevent rescission of the insurance policy issued as a result of Diana Ference's misrepresentations regarding her son.

I would reverse the decision granting summary disposition in favor of Auto Club.

/s/ Richard A. Bandstra

[1] The statute interpreted in *Morgan* has since been amended. See *Williams v Auto Club Group Ins Co (On Remand)*, 224 Mich App 313, 320-321; 569 NW2d 403 (1997) (Bandstra, P.J., dissenting).

[2] The majority also cites *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167; 505 NW2d 895 (1993), and *Ohio Farmers v Michigan Mutual Ins Co*, 179 Mich App 355; 445 NW2d 228 (1989). However, these cases are factually distinguishable. Both involved a claim by a person who was not a member of the household of the insurance applicant and who was, thus, truly an "innocent third party."