

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY SHEPHERD,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant,

and

PAUL ROSEZENIA,

Defendant.

UNPUBLISHED

July 21, 1998

No. 198339

Wayne Circuit Court

LC No. 95-515362 NI

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant, State Farm Mutual Automobile Insurance Company, appeals as of right from an order granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition on the same issue. We affirm, but with the same serious concerns about the law as expressed by the trial judge.

A trial court's determination of a motion for summary disposition is reviewed de novo. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Although the trial court did not specify the specific subrule of MCR 2.116(C) upon which it relied in deciding the parties' motions, we will treat the motions as having been decided under MCR 2.116(C)(10) because the trial court referred to materials apart from the pleadings. *Atkinson v Detroit*, 222 Mich App 7, 9; 564 NW2d 473 (1997).

Here, the parties do not disagree over the material facts as they relate to defendant's alleged defense of fraud, but do disagree on the inferences that properly may be drawn from those material facts. Although circumstantial evidence can be used to establish a fraud defense, inferences deducible from known facts or conditions must be reasonable. See *Libralter Plastics, Inc v Chubb Group of Ins Companies*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

We have carefully reviewed this matter and conclude that the trial court did not err. On this record, it cannot be reasonably inferred from the established facts that plaintiff made misrepresentations to defendant, knew or had reason to know of his wife's misrepresentations, actively participated in defrauding defendant, or otherwise engaged in improper conduct relative to his wife's application for insurance. Therefore, under the current law, plaintiff is an innocent third party to his wife's misrepresentations. *Hammoud v Metropolitan Property & Cas Ins Co*, 222 Mich App 485; 563 NW2d 716 (1997); *Darnell v Auto-Owners Ins Co*, 142 Mich App 1; 369 NW2d 243 (1985). We so rule because we are obliged to follow existing law, but in so doing we recognize that existing law allows or perhaps encourages fraud.

Though we share Judge Zahra's reluctance at countenancing the result reached here, we agree with his well-reasoned decision, and we believe the Legislature needs to examine the "innocent third party" rule in the spousal (and perhaps intra-familial) context.

Affirmed.

/s/ Roman S. Gibbs
/s/ Henry William Saad

I concur in result only.

/s/ Mark J. Cavanagh