STATE OF MICHIGAN

COURT OF APPEALS

TED J. BLUNDY,

Plaintiff-Appellee,

and

JASON BLUNDY,

Plaintiff/Cross-Defendant-Appellee,

v

SECURA INSURANCE,

Defendant-Appellant,

and

SPECTRUM HEALTH and MARY FREE BED HOSPITAL AND REHABILITATION CENTER,

Plaintiffs/Cross-Plaintiffs-Appellees.

UNPUBLISHED
July 1, 2008

No. 275462
Ingham Circuit Court
LC No. 04-001234-NF

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

In this no-fault policy dispute action for personal injury protection (PIP) benefits, defendant appeals as of right from the order denying its motion for summary disposition and granting summary disposition for plaintiffs under MCR 2.116(I)(2). We affirm.

Defendant first argues that the trial court erred because plaintiff Ted Blundy, the sole named insured under the policy, lacked an insurable interest in the Dodge Dakota titled and registered solely to his son plaintiff Jason Blundy. To that end, defendant contends that a named insured must actually own or be the registrant of an insured vehicle to support PIP benefits coverage. However, this argument was rejected in *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 725; 635 NW2d 52 (2001). Thus, in reviewing the trial court's decision on the motion for summary disposition de novo, we conclude that no error occurred with regard to this issue. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

Defendant next argues that it should have been allowed to rescind the policy and declare it void *ab initio* based on a material misrepresentation made on the insurance application. We disagree. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

An insurance company has the burden of proving a claim of material misrepresentation. *Szlapa v Nat'l Travelers Life Co*, 62 Mich App 320, 325; 233 NW2d 270 (1975). "[W]here an insured makes a material misrepresentation in the application for insurance, including no-fault insurance, the insurer is entitled to rescind the policy and declare it void ab initio." *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998). Rescission is justified if the misrepresentation was relied on by the insurer and was material. *Id.* "[A] fact or representation in an application is 'material' where communication of it would have had the effect of 'substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium.'" *Oade v Jackson Nat'l Life Ins Co of Michigan*, 465 Mich 244, 253-254; 632 NW2d 126 (2001), quoting *Keys v Pace*, 358 Mich 74, 82; 99 NW2d 547 (1959). In other words, "[t]he proper materiality question . . . is whether 'the' contract issued, at the specific premium rate agreed upon, would have been issued notwithstanding the misrepresented facts." *Id.* at 254. Defendant argues that, because Ted represented that he owned the Dodge Dakota, a lower multi-vehicle discount applied.

Even if that were the case, the policy in issue here allowed defendant to void the entire policy only if the named insured intentionally misrepresented any material fact on the application. The elements of intentional or fraudulent misrepresentation are as follows: (1) the individual made a material representation, (2) the representation was false, (3) when making the representation, the individual knew that it was false or made it recklessly, without knowledge of its truth as a positive assertion, (4) the individual made the representation with the intention that the party would act upon it, (5) the party acted in reliance on the representation, and (6) that party suffered damages. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004).

After reviewing the evidence in a light most favorable to defendant, we find, as a matter of law, that Ted did not make the representation in issue with the intent that defendant would rely upon it and suffer damages. The record evidences that Ted was entirely straightforward as to who would be driving the Dodge Dakota. Jason was available at all times during the application process, and he was paying the premiums on the policy. The premium paid for the Dodge Dakota clearly reflected the risk posed by Jason being the principal driver, as the Blundys had represented that fact and there is nothing in the record to reasonably support a conclusion that the Blundys were attempting to take advantage of a multi-vehicle discount or were even aware that they were receiving one.

Moreover, defendant was also precluded from voiding the policy because Jason, an innocent third party, was injured. *Lake States Ins*, *supra*. As observed in *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997):

> Where a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void *ab initio.* However, this right to rescind ceases to exist once there is a claim involving an innocent third party. [Citations omitted.]

In reviewing the evidence here in a light most favorable to defendant, there is nothing to suggest that Jason was anything other than forthright and honest when inquiring about insurance and when he went with his father Ted to obtain insurance on the Dodge Dakota. Jason did not sign the application, nor is there evidence to suggest any collusion to misrepresent his ownership of the Dodge Dakota to obtain a discounted premium. Thus, defendant was also precluded from voiding the policy because Jason was an injured, innocent third party who stood to benefit from the policy.

Defendant finally argues that Jason was barred from obtaining no-fault benefits under MCL 500.3101 and 500.3113(b) because he failed to obtain a separate insurance policy. This issue has been waived because defendant's correspondence attempting to void the policy did not set forth this reason. See *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999) ("[O]nce an insurance company has denied coverage to an insured and stated its defenses, the insurance company has waived or is estopped from raising new defenses."). Further, defendant's argument would also fail on its merits; even though Jason was an owner for purposes of MCL 500.3113(b), he was entitled to PIP benefits because the Dodge Dakota was insured even though he did not personally obtain that insurance. *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 39-40; 748 NW2d 574.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette