STATE OF MICHIGAN

COURT OF APPEALS

TONY PRICE, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 307045 Wayne Circuit Court
GEORGE MCCULLOUGH, JR., and AUTOMOBILE CLUB INSURANCE ASSOCIATION, Defendants-Appellants.	LC No. 09-027816-NI

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Defendants appeal as of right from judgments in favor of plaintiff entered after the trial court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). The grant of summary disposition only resolved the issue of liability; the parties stipulated to damages and reserved defendants' right to appeal the contested liability. We reverse and remand for further proceedings.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

On March 29, 2009, plaintiff was driving a 1996 Ford Contour that collided with a vehicle driven by defendant McCullough. The Contour was insured by defendant Auto Club through a policy procured by plaintiff's mother, Bobbie Shaw. The Contour was titled and registered to Shaw, who lived in Clinton Township. Plaintiff lived in Detroit. Shaw was the only driver listed on the policy. Plaintiff and Shaw both claimed that plaintiff's use of the vehicle was limited and that the vehicle was garaged at Shaw's residence. However, these claims conflicted with records from an interlock device that plaintiff had installed on the car because of restrictions on his license as a result of "drinking and driving." The interlock device was installed on the vehicle on June 30, 2008, and remained there until after the accident. In order to operate the vehicle, plaintiff had to blow into the device periodically. Shaw testified in her deposition that she operated the vehicle only when plaintiff was a passenger. Ultimately, in response to defendants' motion for summary disposition, plaintiff admitted that his and his

mother's deposition testimony "establish[ed] that Plaintiff was the only one whom [sic] drove the vehicle while the interlock device was on the vehicle[.]" The records from the interlock device showed an average of more than ten engine starts a day.

Plaintiff brought this action for first-party benefits against Auto Club and a third-party negligence claim against McCullough. The sole issue on appeal concerns whether fraud or misrepresentation in the application process may serve as a defense to plaintiff's claims. The trial court agreed with plaintiff that because any misrepresentations were made by plaintiff's mother and not by plaintiff personally, plaintiff was an "innocent" party and Auto Club could not use the misrepresentations as a basis for rescinding the policy. There is no dispute that plaintiff did not personally make any misrepresentations to Auto Club. However, a party is not necessarily "innocent" as to a misrepresentation solely because he or she did not personally and directly utter it.

Defendants primarily rely on *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485; 563 NW2d 716 (1997). In that case, this Court summarized the relevant law, noting that an insurance policy may be rescinded and declared void *ab initio* if it was procured through the insured's intentional misrepresentation of material fact in the insurance application and the same person is the one seeking to collect benefits. *Id*. at 488. "However, this right to rescind ceases to exist once there is a claim involving an innocent third party." *Id*. The plaintiff was injured in a collision involving a vehicle that was titled in his name only. He testified that his brother helped pay for it, and they both drove it. *Id*. at 487. The application for no-fault insurance was made by the plaintiff's brother, who was the only listed driver for the vehicle. *Id*. Although the plaintiff lived with his brother, the plaintiff was not disclosed on the application as a resident. *Id*. The insurer sought to rescind the policy *ab initio* because of the misrepresentations in the application. The plaintiff argued that because he did not make the misrepresentations in the application, he was an innocent third party such that the insurer was precluded from rescinding the policy. *Id*. at 488. This Court concluded that the plaintiff:

> was not an innocent third party with respect to the misrepresentations made to defendant in the application for no-fault insurance. Plaintiff was the owner of the insured vehicle, with the responsibility to maintain a policy of no-fault insurance. To save money, he allowed his older brother to obtain the necessary insurance by misrepresenting plaintiff's status as a driver of the vehicle. Under these circumstances, plaintiff was actively involved in defrauding defendant and was not an innocent third party. Accordingly, the trial court did not err in finding that defendant was entitled to *ab initio* rescission of its policy covering the Thunderbird. [*Id*. at 488-489.]

In contrast, in *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 360-361; 764 NW2d 304 (2009), overruled in part on other grounds, *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), this Court considered whether the insurer could void a policy to deny first-party no-fault benefits to a 12-year-old child because of his mother's material misrepresentation regarding her ownership of the subject vehicle. This Court applied the "innocent third party doctrine" and, citing *Hammoud*, 222 Mich App 488-489, and *Darnell*, 142 Mich App at 10, stated that the "relevant inquiry is whether the injured third party was innocent with respect to the misrepresentation made to the insurance

company or was actively involved in defrauding the insurer." *Roberts*, 282 Mich App at 361. This Court found that the insurer could not deny coverage to the 12-year-old—who had played no role in the misrepresentation—on the basis of his mother's impropriety. *Id.*

Therefore, applying the law as stated in *Hammoud* and *Roberts*,[1] a party's "innocence" does not depend on whether the party directly made misrepresentations to the insurer. *Hammoud* indicates that a party may be deemed "actively involved in defrauding" the insurer absent direct communication. *Roberts* does not contradict this point. In *Roberts*, there was no evidence that the 12-year-old son was complicit in his mother's acquisition of insurance. In the instant case, Auto Club's adjuster testified that plaintiff stated that his mother purchased the car for him and insured it for him. Plaintiff stated that his mother was helping him out because he was a student and he could not afford his own vehicle. A trier of fact could conclude that plaintiff was complicit in his mother's misrepresentations to obtain insurance coverage at a favorable rate and, therefore, was actively involved in defrauding Auto Club. Because there are genuine questions of material fact, the trial court erred in granting summary disposition to plaintiff.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra

[1] *Titan Ins Co v Hyten*, 491 Mich 547, 564; 817 NW2d 562 (2012), which involved a claim by a third party against an insured who committed fraud, was decided after the trial court entered the judgment for plaintiff. Because the parties do not argue that *Hyten* changed the framework for analyzing this case, we express no opinion on the matter.