STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL ZEER,

Plaintiff-Appellant,

v

LAKE STATES INSURANCE COMPANY,

Defendant-Third Party Plaintiff-Appellee,

and

D.J. McCLUSKEY, INC. and GARY W. BAKER,

Third-Party Defendants.

UNPUBLISHED
August 2, 1996

No. 182102
LC No. 93-465033

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

In this automobile no-fault case, plaintiff appeals as of right from an order granting summary disposition pursuant to MCR 2.116(C)(10). We affirm.

In 1992, plaintiff was injured in an automobile accident while a passenger in a vehicle driven by his friend. On the day before the accident, plaintiff's father, Hikmat Zeer, obtained a certificate of no-fault insurance from defendant which covered the Zeers' vehicle. Although an actual policy was not issued before the accident, plaintiff brought a declaratory judgment action seeking uninsured motorist benefits, which defendant denied. Plaintiff then filed suit claiming entitlement under the certificate's uninsured motorist provision. Defendant moved for summary disposition and argued in part that plaintiff was not entitled to coverage since Hikmat Zeer had made material misrepresentations in the application for insurance with respect to his driving record, his children, and their driving records. The trial court

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* Circuit judge, sitting on the Court of Appeals by assignment.

granted summary disposition on the ground that the policy was void ab initio because of the misrepresentations. Plaintiff appeals from this determination.

We review a trial court's grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995). A motion brought under MCR 2.116(C)(10) tests the factual support of the plaintiff's claims. A court must consider the pleadings, affidavits, depositions and other documentary evidence and grant the motion if there is no genuine issue as to any material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995).

It is the well-settled law of this state that where an insured makes a material misrepresentation in the application for no-fault insurance the insurer is entitled to rescind the policy and declare it void ab initio. *Lash*, *supra* at 103. Furthermore, rescission is justified without regard to the intentional nature of the misrepresentation so along as it is relied upon by the insurer. Reliance may exist when the misrepresentation relates to the insurer's guidelines for determining eligibility for coverage. *Id*. Nevertheless, there is an exception to this general rule. Once an innocent third party is injured in an accident in which coverage was in effect with respect to the relevant vehicle, the insurer is estopped from asserting fraud to rescind the insurance contract. *Auto-Owners Ins Co v Johnson*, 209 Mich App 61, 64; 530 NW2d 485 (1995). However, an insurer is not precluded from rescinding the policy to void any "optional" insurance coverage, unless the fraud or misrepresentation could have been "ascertained easily" by the insurer. *Farmers Ins Exchange v Anderson*, 206 Mich App 214, 219; 520 NW2d 686 (1994).

Our review of the record reveals that the trial court properly granted summary disposition for defendant. First, we note that the type of coverage plaintiff claims entitlement under is "optional," since MCL 257.520(2); MSA 9.2220(2) does not require carriers in this state to provide the insured with uninsured motorist coverage. See *Bianchi v Auto Club of Michigan*, 437 Mich 65, 68; 467 NW2d 17 (1991). Secondly, the record reveals that Hikmat Zeer's application for no-fault insurance contained a directive that he list each driver residing in his household and whether he or any driver had incurred moving violations within the last three years. In reply, Hikmat Zeer listed only himself and his wife as household drivers and checked the "no" box regarding moving violations. Moreover, his signature indicated that he warranted the answers to be true and complete in every respect. We note, however, that the record reveals that there were other drivers, such as plaintiff and his siblings, residing in the Zeer household all of whom, except one, had incurred moving violations within the last three years. Of particular concern to defendant was plaintiff's twenty-seven insurance eligibility points, as well as Hikmat Zeer's numerous traffic violations.

Since it is clear that Hikmat Zeer made misrepresentations in the application, the issue we must decide is whether the misrepresentations could have been "ascertained easily" by defendant. We hold that defendant could not have easily ascertained the fact that other Zeer family members had incurred moving violations, notwithstanding allegations that defendant's agent, Gary Baker, was aware that Hikmat Zeer had children of driving age residing in the household. The accident in this case occurred

one day after the misrepresentations in the application were made. Thus, it is unlikely that defendant would have been availed of any driving records even if Hikmat Zeer had properly listed his children on the application. Thus, we conclude that since there is no genuine issue of any material fact regarding plaintiff's entitlement to coverage, the trial court correctly granted summary disposition for defendant.

Having determined that Hikmat Zeer's application for insurance contained misrepresentations, plaintiff's argument that he is entitled to benefits because defendant could not establish fraud is without merit. Pursuant to *Lash, supra* at 103, fraudulent intent on the part of the applicant is not required so long as the insurer relied upon the misrepresentation. In this case, defendant submitted an affidavit from its underwriting supervisor stating that, pursuant to defendant's guidelines, had it known of the other drivers and their records it would not have issued a certificate.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak