STATE OF MICHIGAN

COURT OF APPEALS

NCMIC INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

BRIAN T. DAILEY and BRIAN T. DAILEY LAW FIRM, P.C.,

Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees,

and

MARK DUDZIK,

Defendant.

UNPUBLISHED
July 20, 2006

No. 267801
Oakland Circuit Court
LC No. 2004-055536-NM

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

In this insurance dispute, the trial court granted summary disposition in favor of plaintiff NCMIC Insurance Company,[1] granting rescission of a legal malpractice insurance policy on the basis of material misrepresentations in the insurance application. The court denied a cross-motion for partial summary disposition brought by defendants Brian T. Dailey and the Brian T. Dailey Law Firm, P.C. (hereinafter "Dailey" and "Dailey Law Firm"), who sought a declaration that the insurance policy was valid and enforceable. The trial court subsequently denied NCMIC's motion for restitution of attorney fees and other pre-rescission costs expended to defend defendants in an underlying legal malpractice action. The trial court also denied defendants' motion for return of the insurance premiums previously paid. Defendants appeal by right and NCMIC cross appeals by right. We affirm in part, reverse in part, and remand for further proceedings.

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[1] Plaintiff NCMIC is 100% reinsurer of the OHIC Insurance Company.

We review de novo the trial court's resolution of the parties' respective motions for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions of law are also reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Finally, whether contract language is ambiguous and the proper interpretation of a contract are reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden, supra* at 120. A court considers affidavits, pleadings, depositions, and other admissible documentary evidence in a light most favorable to the nonmoving party. MCR 2.116(G)(6); *Maiden, supra* at 120-121. If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120. If it appears that the opposing party rather than the moving party is entitled to judgment, the trial court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

We first note that defendants moved for partial summary disposition on the ground that the insurance policy could be voided only for an intentional misrepresentation under the fraud and misrepresentation provision in § J(5) of the policy. However, NCMIC relied on the common law, rather than the § J(5) provision, to argue that rescission would be proper even if an innocent misrepresentation had been made in the insurance application.

Because the trial court determined that reasonable minds could not differ in finding that the Dailey Law Firm's employee, Beth Maupin, made intentional misrepresentations in the insurance application, we will first address defendants' claim that the insurance policy could not be rescinded under § J(5).[2] We conclude that defendants have failed to establish adequate factual support for their position that Maupin committed only an unintentional error or omission by submitting an insurance application with false statements of fact. Although summary disposition is generally not appropriate in cases involving intent, *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988), if reasonable minds could not differ in finding the requisite intent from the record, summary disposition is appropriate, *In re Handelsman*, 266 Mich App 433, 438-439; 702 NW2d 641 (2005). Circumstantial evidence may be evaluated and utilized in determining if there is a genuine issue of material fact on questions of intent. *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004).

Viewed in a light most favorable to defendants, Dailey's own deposition testimony established that he was the sole proprietor of the Dailey Law Firm and that he supervised Maupin as her employer. Although Dailey admitted signing the insurance application, he indicated that after he signed the application he specifically told Maupin, "You can't submit this, and I don't

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[2] We agree with NCMIC that it was not required to include in the insurance policy an affirmative provision for voiding the contract on the basis of misrepresentation. *Wiedmayer v Midland Mut Ins Co*, 414 Mich 369, 375-376; 324 NW2d 752 (1982). However, for purposes of reviewing this issue, we assume without deciding that NCMIC contractually waived the right to void the policy on the basis of innocent misrepresentations by including an "unintentional errors or omissions" exception in § J(5).

want you to do this." Dailey averred in his later affidavit, "I told Maupin that I could not sign those boxes and initial them because such statements would not be accurate [if signed]. To be clear, I never did place my initials in any of the boxes on the Application."

The evidence established that Maupin submitted the inaccurate insurance application despite Dailey's specific instructions not to submit it, and that it was submitted in a form that, on its face, suggested that Dailey had initialed the statements. We agree with the trial court that reasonable minds could not differ in concluding from this evidence that Maupin intentionally submitted the application knowing that it contained misrepresentations of fact.

We are not persuaded that an administrative law judge's findings regarding Maupin's intentions in a matter involving her eligibility for unemployment compensation creates a genuine issue of material fact, inasmuch as defendants have not established that the administrative law judge's findings would be substantively admissible evidence in this case. MCR 2.116(G)(6). Further, defendants have failed to establish any other use of the administrative law judge's findings that would preclude summary disposition. An appellant may not merely announce a position and leave it to this Court to discover and rationalize its basis. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Nor are we persuaded that evidence that Maupin was not authorized to submit the insurance application precluded summary disposition. The insurance application, on its face, indicates that the Dailey Law Firm was the applicant. The Dailey Law Firm could act only through its agents or officers. *In re Kennison Sales & Engineering Co*, 363 Mich 612, 617; 110 NW2d 579 (1961). An agent's unauthorized acts bind the principal if the agent acted with apparent authority or the principal ratifies the unauthorized act. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 430-431; 683 NW2d 171 (2004), rev'd on other grounds 472 Mich 192 (2005). A principal ratifies its agent's unauthorized acts by accepting the benefits of the unauthorized acts with knowledge of the material facts. *Id.* at 432. A principal may not disclaim knowledge of its agent's false statements while attempting to retain the benefits obtained by those false statements. See *In re Payroll Express Corp*, 186 F3d 196, 208 (CA 2, 1999); see also 1 Restatement Agency, 2d, § 282, comment h, pp 615-616 (a principal may not disclaim knowledge of the agent's fraud and yet attempt to retain a benefit obtained by the fraud; this is a restitution principle preventing the unjust enrichment of the principal).

Because the Dailey Law Firm seeks the benefits of Maupin's unauthorized acts by attempting to enforce the insurance policy, we agree with the trial court that the Dailey Law Firm may not disavow her actions. Maupin's intent may be imputed to the Dailey Law Firm, regardless of whether Dailey personally intended to misrepresent facts in the application. See *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 343 (Boyle, J), 368-369 (Brickley, J); 508 NW2d 464 (1993). Thus, the Dailey Law Firm is bound by all conditions in the insurance policy, including the fraud and misrepresentation condition in § J(5). Accordingly, in light of the

intentional misrepresentations of defendants' agent, plaintiff had the right to seek rescission of the policy under the plain language of § J(5).[3]

We reject defendants' cursory claim that the insurance policy should not be voided on the ground that the Dailey Law Firm is an innocent third party to Maupin's intentional misrepresentations in the insurance application. It is true, for public policy reasons, that innocent third parties may be protected in cases involving fraud or misrepresentation with respect to compulsory no-fault insurance. See generally *Cunningham v Citizens Ins Co*, 133 Mich App 471, 477-478; 350 NW2d 283 (1984); see also *United Security Ins Co v Comm'r of Ins*, 133 Mich App 38, 43; 348 NW2d 34 (1984). This case, however, does not involve compulsory no-fault insurance, and Dailey has not established any public policy reason for not enforcing the fraud and misrepresentation condition against him. More importantly, the evidence does not support Dailey's claim that he is an innocent third party. As noted above, the misrepresentations at issue in this case, made by defendants' employee, are imputed to defendants themselves.

Further, the fraud and misrepresentation condition in the policy unambiguously provides that "[t]his policy will be voided if you mislead us, misrepresent yourself or defraud us or attempt to mislead us, attempt to misrepresent yourself or attempt to defraud us on matters concerning this policy. . . ." "[Y]ou" is broadly defined in the policy as "the person(s) and/or organization(s) as shown in the Declarations and those we also provide coverage for in Section F of this policy." In turn, § (F)(1) states that the policy covers "any partner, officer, director, or *employee* of yours" (emphasis added). Given this broad definition of "you," there is no reasonable basis for concluding that Maupin's misrepresentations are not imputable to Dailey and the Dailey Law Firm.

In sum, under the fraud and misrepresentation condition in the insurance policy, NCMIC had a right to seek rescission of the policy. We conclude that the trial court reached the right result in resolving this issue in favor of NCMIC based on the evidence of Maupin's intentional misrepresentations. Although defendants' motion, rather than NCMIC's motion, raised this particular issue, NCMIC was entitled to judgment as a matter of law on this matter.

Turning to defendants' claim that NCMIC waived its right to seek rescission by retaining the insurance premiums, we note that the trial court failed to address this specific issue. In general, our review is limited to issues actually decided by a trial court. *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994). We may overlook preservation requirements if the failure to consider an issue would result in a miscarriage of justice, consideration of the issue is necessary to a proper determination in the case, or the issue involves a question of law and the facts necessary for its resolution have not been presented. *Steward v Panek*, 251 Mich App 546,

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[3] Even in the absence of the § J(5) provision, plaintiff likely could have exercised the common-law right to rescind the policy based on Maupin's intentional misrepresentations. However, in light of our resolution above, we need not decide this issue. Similarly, it is unnecessary to decide whether NCMIC, by including an exception for unintentional errors or omissions in § J(5), contractually waived the common-law right to rescind the policy based on Maupin's innocent misrepresentations.

554; 652 NW2d 232 (2002). Because a resolution of the waiver issue presented by defendants is necessary to a proper resolution of this case, we shall consider it to determine if either party was entitled to judgment as a matter of law with respect to this issue.

In general, a waiver is a mixed question of law and fact. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). The definition of a waiver is a question of law and a determination whether the facts in a case constitute a waiver is a question of fact. *Id*. A waiver is an intentional relinquishment of a known right, which may be shown by express declarations or declarations manifesting the parties' intent and purpose *Id*. at 156-157. A waiver must be established by such conduct as to warrant an inference of the relinquishment of a right. *Marquette Co Savings Bank v Koivisto*, 162 Mich 554, 559; 127 NW 680 (1910); *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997).

Defendants' reliance on *Burton v Wolverine Mut Ins Co*, 213 Mich App 514; 540 NW2d 480 (1995), as controlling authority for their waiver claim is misplaced, because the facts in *Burton* indicate that the insurer elected to cancel the policy by sending a notice of cancellation and retaining the insurance premiums. Cancellation and rescission are distinct remedies. *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938). When an insurance policy is cancelled, it is effective until the date of cancellation. *United Security Ins Co, supra* at 42. When an insurance policy is rescinded, it is considered void ab initio and never to have existed. *Id.* Rescission returns the parties to their status quo. *Lash v Allstate Ins Co*, 210 Mich App 98, 102-103; 532 NW2d 869 (1995).

Although the insurance policy issued to the Dailey Law Firm includes a provision permitting cancellation upon written notice, defendants have not cited any record evidence to support their claim that NCMIC elected to cancel the policy. This Court will not search the record for factual support for a claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see also MCR 7.212(C)(7).

In any event, the evidence offered below at the time of the parties' respective motions for summary disposition provides no factual support for defendants' claim of waiver. Viewed in a light most favorable to defendants, the evidence indicated that NCMIC discovered the misrepresentations after the policy term expired, while providing a defense for defendants in the underlying malpractice lawsuit (hereinafter the "Dudzik litigation"). Bruce Beal, NCMIC's vice president of claims, wrote two letters to Dailey. Neither letter contained language expressing a present intent to rescind or cancel the insurance policy, but rather purported to reserve NCMIC's rights. Both letters specified that no rights were being waived. In fact, the second letter specified, "in light of your failure to truthfully and accurately disclose the information requested on the application, we reserve our right to rescind the policy and disclaim all liability under it for either defense costs or indemnification costs."

In the face of this evidence, it would be unreasonable to infer from NCMIC's retention of the insurance premiums that it was intentionally relinquishing its right to seek rescission. It was appropriate for NCMIC to seek a declaration of its rights in the trial court without returning the insurance premiums. A declaratory judgment is appropriate when a plaintiff is in doubt about its legal rights and wishes to avoid the hazards of taking action in advance of a determination of such rights. *Demorest v DiPentima*, 118 Mich App 299, 303; 324 NW2d 634 (1982). Under MCR 2.605(F), further necessary or proper relief may be granted. Viewing the evidence most

favorably to defendants, NCMIC was entitled to summary disposition with respect to defendants' waiver claim. The evidence did not factually support defendants' argument that NCMIC waived its right to seek rescission.[4]

Next, we consider NCMIC's and defendants' claims concerning the trial court's denial of their motions for restitution relief. In granting equitable relief, the court looks to the whole situation, and grants or withholds relief as dictated by good conscience. *McFerren v B B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). Restitution is among the remedies available to a court in cases of fraud and misrepresentation to achieve a just result. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 134; 313 NW2d 77 (1981). Rescission itself involves restitution because it is based on the idea that parties should be restored to the status quo. *Lash, supra* at 102. To rescind a contract is to undo it from the beginning. *Id.*

In this case, the trial court essentially left the parties where it found them when denying their respective motions for restitution. By granting rescission of the contract but failing to return the parties to their respective pre-contract positions, the trial court was operating within an erroneous legal framework.

When an insurer seeks to rescind a contract of insurance on the basis of fraud or misrepresentation, it must generally return all premiums paid by the insured. See *Burton, supra* at 520; see also *Metropolitan Life Ins Co v Freedman*, 159 Mich 114, 118; 123 NW 547 (1909) (insurer must restore premiums to insured upon rescission because "he who seeks equity must do equity"). Accordingly, the trial court's denial of defendants' motion for a return of the insurance premiums, on the ground that defendants had received a benefit for the premiums, was erroneous because a return of the premiums was essential to restoring defendants to the pre-contract status quo.

Likewise, the trial court erred in denying NCMIC's motion for restitution with respect to its attorney fees and other costs expended to defend defendants in the Dudzik litigation. We reject defendants' claim that it was necessary for NCMIC to issue a reservation-of-rights letter with a specific retention of the right to reimbursement of attorney fees in order to seek reimbursement of defense costs.[5] The evidence offered by NCMIC indicates that its attorney

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[4] The fact that premium payments were accepted without an investigation of the representations in the insurance policy does not aid defendants' position. Michigan law generally does not impose a duty on insurers to investigate or verify an applicant's representations. *Hammoud v Metropolitan Prop & Cas Ins Co*, 222 Mich App 485, 489; 563 NW2d 716 (1997). Further, the tender-back rule of *Stefanac v Cranbrook Ed Community (After Remand)*, 435 Mich 155, 159; 458 NW2d 56 (1990), does not apply because the instant case does not involve a legal claim in contravention of a settlement agreement.

[5] We note that in certain jurisdictions, the specific reservation of rights by an insurer is material to determining whether a contract for reimbursement of defense costs may be implied in fact. See *Walbrook Ins Co, Ltd v Goshgarian & Goshgarian*, 726 F Supp 777, 781-783 (CD Cal, 1989) (under California law, agreement could be implied from the insured's unilateral

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gave Dailey notice that NCMIC would seek restitution, in a letter written after Beal's two reservation-of-rights letters. Contrary to defendants' argument, the fact that the letter also contains a settlement offer does not preclude its admissibility under MRE 408. That evidence is inadmissible for one purpose does not render it inadmissible for other purposes. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

A contract will be implied in law where it would be inequitable for a defendant to retain a benefit received from a plaintiff, absent reasonable consideration. *In re McKim Estate*, 238 Mich App 453, 457; 606 NW2d 30 (1999) (citations omitted). The law implies a contract to prevent unjust enrichment. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327-328; 657 NW2d 759 (2002). Restitution does not require an object capable of being returned in the same form as the original transfer; it is sufficient that the value of the benefit received may be ascertained and returned. *Interstate Automatic Transmission Co, Inc v Harvey*, 134 Mich App 498, 503, 350 NW2d 907 (1984).

In general, attorney fees are not recoverable as costs or damages in a legal action unless expressly authorized by statute, court rule, or recognized common-law exception. *McCausey v Ireland*, 253 Mich App 703, 705; 660 NW2d 337 (2002). But the instant case does not involve damages or costs at law. Instead, it involves the equitable remedy of restitution. A court of equity may award reasonable costs and attorney fees in an effort to reach a fair result when failing to do so would be inequitable. See *Kennedy v Brady*, 43 Mich App 760, 765; 204 NW2d 779 (1972), see also *Walch v Crandall*, 164 Mich App 181, 193; 416 NW2d 375 (1987).

Although we do not agree with NCMIC's claim that it is entitled to restitution of its *actual* defense costs, we hold that NCMIC was entitled to restitution based on its *reasonable* defense costs in the Dudzik litigation. The trial court had the authority to award reasonable attorney fees and other defense costs to NCMIC to restore it to the status quo. While there is no precise formula for determining the reasonableness of an attorney fee, *Morris v Detroit*, 189 Mich App 271, 278-279; 472 NW2d 43 (1991), the factors in MRPC 1.5(a) are a proper consideration, *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 198; 555 NW2d 733 (1996).

Because the trial court was operating under an erroneous legal framework when denying the parties' respective motions for restitution, we reverse its denial of defendants' motion for a return of the insurance premiums and its denial of NCMIC's motion for restitution of attorney

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reservation-of-rights letter regarding defense costs and the insured's acceptance of the defense costs); *Knapp v Commonwealth Land Title Ins Co, Inc*, 932 F Supp 1169, 1172 (D Minn, 1996) (implied agreement found based on insured's clear reservation of right to seek reimbursement and insured's silence in response to reservation); see also *United Nat'l Ins Co v SST Fitness Corp*, 309 F3d 914 (CA 6, 2002) (majority found that implied-in-fact contract required proof that insured accepted defense costs with a reservation of rights condition, while the dissent followed the view that an insurer's unilateral reservation-of-rights letter cannot create an implied-in-fact contract under Ohio law); and see *Gen Agents Ins Co of America v Midwest Sporting Goods Co*, 215 Ill 2d 146; 828 NE2d 1092 (2005) (following minority view that an express reservation of rights does not permit an insurer to recover defense costs, absent an express provision to that effect in the insurance policy).

fees and other defense costs expended in the Dudzik litigation. We direct the trial court on remand to consider the circumstances of each defendant in awarding restitution.[6] The trial court should grant restitution by considering the entirety of the circumstances and fashioning a reasonable and equitable award. *United States Fidelity & Guaranty Co, supra* at 134; *McFerren, supra* at 522.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood

[6] We direct the trial court to return *both* plaintiff and defendants to the pre-contract status quo. Therefore, we need not address plaintiff's argument that in the absence of defense-cost restitution, the clean-hands doctrine would bar return of the insurance premiums to defendants.