STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v

KATRINA BOJAJ,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 185156
Macomb County
LC No. 92-003510-CK

Before: Taylor, P.J., and Markman and P.J. Clulo,* JJ.

PER CURIAM

Defendant appeals as of right from the trial court's order denying her motion for summary disposition pursuant to MCR 2.116(C)(10) and the judgment entered in favor of plaintiff, following a bench trial, rescinding an insurance policy issued by plaintiff to defendant. We affirm.

Defendant owned three cars that were covered under an insurance policy issued by plaintiff: a Honda Prelude, a Toyota Camry and a Dodge Colt. In November 1991, plaintiff renewed defendant's insurance policy. Defendant's son, Sokol Bojaj, was subsequently involved in an accident while driving the Dodge Colt and filed a claim for personal injury protection benefits through defendant's policy from plaintiff. Plaintiff consequently brought an action to rescind defendant's automobile insurance policy based on defendant's failure to disclose that her son was a resident of her household. Defendant subsequently filed a motion for summary disposition, claiming that there was no genuine issue of material fact that Sokol did not live with her at the time she paid the renewal premium. The trial court denied defendant's motion, finding that there was a genuine issue of material fact as to Sokol's residency. The case subsequently proceeded to trial and the court rescinded the insurance policy based on its finding that defendant had made a material misrepresentation to plaintiff.

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

Defendant first argues that the trial court should have granted her motion for summary disposition because there was no genuine issue of material fact that Sokol did not live with her and that he was not a licensed driver at the time she renewed her insurance policy. Therefore, defendant contends that she did not misrepresent that Sokol was not a licensed resident of her household at the time of renewal and plaintiff had no basis to rescind the policy.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except as to damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Skene v Fileccia*, 213 Mich App 1, 2-3; 539 NW2d 531 (1995). This Court reviews the trial court's grant or denial of a motion for summary disposition de novo as a matter of law. *Id.*

Plaintiff sought rescission of defendant's insurance policy on the basis that she failed to notify plaintiff that Sokol was a resident driver of her household. A material misrepresentation made in an application for no-fault insurance entitles the insurer to rescind the policy. *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995). Rescission is justified even in cases of innocent misrepresentation if a party relies upon the misstatement, because otherwise the party responsible for the misstatement would be unjustly enriched if he were not held accountable for his misrepresentation. *Id.* This is true, even if it was a mutual mistake of fact. *Id*.

The determination of domicile is a question of fact to be resolved in the trial court and this Court will not reverse the trial court's determination unless the evidence clearly preponderates in the opposite direction *Bronson Methodist Hospital v Forshee*, 198 Mich App 617, 631; 499 NW2d 423 (1993). In determining whether a person is domiciled in the same household as the insured, the following factors should be considered: (1) the subjective or declared intent of the person to remain indefinitely or permanently in the insured's household; (2) the formality or informality of the relationship between the person and the members of the insured's household; (3) whether the place where the person lives is in the same house, within the same curtilage, or upon the same premises as the insured; and (4) the existence of another place of lodging for the person alleging domicile in the household; (5) the person's mailing address; (6) whether the person maintains possessions at the insured's home; (7) whether the insured's address appears on the person's driver's license and other documents; (8) whether a bedroom is maintained for the person at the insured's home; and (9) whether the person is dependent upon the insured for financial support or assistance. *Williams v State Farm Mutual Automobile Ins Co*, 202 Mich App 491, 494-95; 509 NW2d 821 (1993).

Although Sokol testified at his deposition that he did not reside with defendant at the time she renewed her policy, the trial court instead relied on Sokol's deposition statement that he kept his personal belongings at defendant's home to determine that there was a genuine issue of material fact where he resided. Because Sokol's statement that he kept all his personal belongings at defendant's residence at all times was inconsistent with his assertion that he did not reside at defendant's home at the time she renewed her insurance policy, there was a genuine issue of material fact about where he resided.[1]

Defendant also argues that in determining that there was a genuine issue of material fact whether Sokol resided with her at the time she renewed her insurance policy, the court improperly considered a statement taken from her by Thomas Pardo, plaintiff's claims representative, because it was inadmissible hearsay. In the statement, defendant indicates that Sokol was living with her at the time she renewed her policy. Although the existence of a material fact must be established by admissible evidence and not by inadmissible hearsay, *Amorello v Monsanto Corp*, 186 Mich App 324, 329; 463 NW2d 487 (1990); *Desot v Auto Club Ins Ass'n*, 174 Mich App 251, 253; 435 NW2d 442 (1988), the court makes no mention of Pardo's statement in its opinion and order denying defendant's motion for summary disposition. Rather the court appears to base its determination that there was a genuine issue of material fact on Sokol's inconsistent statements at his deposition regarding where he kept his personal belongings. Therefore, defendant's argument that the trial court improperly considered the inadmissible hearsay statement of Pardo in denying her motion for summary disposition is without merit.

Defendant next argues that she was not required to disclose that Sokol was a resident and a licensed driver because his license had been suspended. In response to this somewhat creative argument, the trial court said:

> The Court is not persuaded at this time that the suspension of Sokol Bojaj's operator's license transformed Bojaj into being "unlicensed." It would be reasonable for a jury to infer that, in the context of applying for no-fault automobile insurance, an insurer would expect an applicant to understand that a "licensed resident" means a person that has been issued a state driver's license even if that license has been temporarily suspended.

We concur with the trial court that the term "licensed driver" in an insurance policy is reasonably construed to include an individual in the possession of a driver's license which has been temporarily suspended. That a person may for a period of time be unable to effectively utilize his license is not the equivalent of not being in the possession of a license altogether. In fact, Sokol, as a person with a supended license, was eligible to regain his driving privileges, he regained these privileges during the period of the insurance policy, he drove a car insured by the policy, he was involved in an accident and he made a claim under the policy. We do not find error in the trial court's interpretation of the contract.

Defendant next asserts that plaintiff was precluded from arguing in response to her motion for summary disposition that she misrepresented the ownership of the Honda as a basis for rescission of the insurance policy since plaintiff did not raise that issue in its complaint and since Gerald Lobsinger, plaintiff's retired vice-president of underwriting, testified that the only basis for rescinding her policy was her failure to notify plaintiff that Sokol was a licensed resident of her household when she renewed her policy. However, because there is no indication that the court considered this alleged misrepresentation in denying defendant's motion, we decline to address it.[2]

Defendant further claims that she did not make any misrepresentation on the insurance application because she explained to the insurance agent that Sokol bought the Honda for her and that the agent crossed out the "no" box and marked the "yes" box in response to whether she owned the

vehicle. We again decline to address this issue because there is no indication that the court considered it in denying defendant's motion for summary disposition.

Defendant contends that, even if she did make a material misrepresentation to plaintiff, that this should not preclude the payment of PIP benefits to Sokol for his injury as a result of the accident because Sokol was an innocent third party. However, because defendant did not argue that issue in the trial court, it is also not preserved for review. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996). Further, Sokol was not innocent as to the misrepresentation that defendant was the owner of the 1990 Honda when Sokol was actually the owner, because defendant testified that Sokol and his father took out the insurance policy for her on the Honda.

Accordingly, the trial court properly denied defendant's motion for summary disposition because there was a genuine issue of material fact whether Sokol lived with defendant at the time she renewed her policy.

Next, defendant challenges the trial court's findings of fact and conclusions of law. This Court reviews a trial court's findings of fact in a bench trial under the clearly erroneous standard. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98; 535 NW2d 529 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id*. at 99. In applying this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *Id*.

Defendant claims that plaintiff was precluded from raising the issue of alleged misrepresentation of the ownership of the Honda on the insurance application since that issue was not raised in plaintiff's complaint and plaintiff did not file an amended complaint. However, because defendant did not object at trial to plaintiff's raising this issue and presented evidence that she did not misrepresent ownership of the Honda, the trial court's finding that the issue was tried by implicit consent was supported by the evidence and not clearly erroneous. See *Goins v Ford Motor Co*, 131 Mich App 185, 195; 347 NW2d 184 (1983); *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 221; 457 NW2d 42 (1990).

Defendant next asserts that the information she supplied on the insurance application was not a material misrepresentation sufficient to justify rescission of the policy because she told the insurance agent the situation regarding ownership of the Honda through the interpreter and the agent marked the boxes accordingly. Thus, she claims that the application was ambiguous and should be construed against plaintiff.

Both Sokol and defendant claimed that Sokol purchased the Honda for defendant by making the down payment, that defendant made the monthly payments and that Sokol never drove the car. However, there is no dispute that Sokol was the registered owner of the Honda. As the registered owner, Sokol had the authority to take the car back at any time. Had plaintiff been informed that Sokol was the owner of the Honda, it would almost certainly have canceled the insurance policy within fifty-

five days of the effective date of the policy because of his suspended license and his negligent driving record, both of which would have made him an unacceptable risk.[3]

> The generally accepted test for determining the materiality of a fact or matter as to which a representation is made to the insurer by an applicant for insurance is to be found in the answer to the question whether reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as *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.* [Emphasis supplied.] [*Auto-Owners Ins Co v Michigan Comm'r of Ins*, 141 Mich App 776, 781; 369 NW2d 896 (1985), citing *Keys v Pace*, 358 Mich 74, 82; 99 NW2d 547 (1959).]

Thus, defendant's indication that she was the owner of the Honda was a material misrepresentation.

Defendant suggests that any misrepresentation on her part was innocent because she explained the situation regarding the ownership of the Honda through her interpreter, and the insurance agent was the person who marked that she was the owner.[4] However, whether or not the misrepresentation was innocent or a mutual mistake of fact is irrelevant since plaintiff relied on it and defendant would be unjustly enriched if she were not held accountable for her misrepresentation. *Lash*, *supra* at 103. Additionally, defendant's argument that the application was ambiguous due to her use of an interpreter is without merit. The response "yes" was marked for the question whether defendant owned the Honda and she is presumed to have understood the application when she signed it. *Sowiczki v Modern Woodmen*, 192 Mich 265, 274-275; 158 NW 891 (1916); see also *Aluia v Harrison Hospital (On Remand)*, 139 Mich App 742, 749-750; 362 NW2d 783 (1984). Thus, the trial court's finding that defendant made a material misrepresentation which justified rescission of the policy was supported by the evidence and not clearly erroneous.

Defendant also claims that that the court's finding that she insured the Honda for Sokol so that it could be registered since his license was suspended was clearly erroneous. We disagree. This Court must defer to the trial court's decision because of the trial court's superior ability to view the evidence and evaluate the credibility of the witnesses. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). Sokol and defendant both testified that he made the downpayment on the Honda and expected defendant to make the monthly payments. They also testified that Sokol was not allowed to and never did drive the Honda. Defendant explained that she retained the Honda after buying the Toyota Camry because she did not receive an acceptable price to sell it and she bought the Dodge Colt to save both new cars. However, the trial court found that defendant's and Sokol's testimony was not credible and did not believe that Sokol never drove the Honda. It was reasonable for the trial court to infer, based on the circumstantial evidence, that defendant insured the car for Sokol so that it could be registered. Thus, the trial court's finding was not clearly erroneous.[5]

Defendant also argues that the trial court clearly erred in finding that Sokol lived with defendant and was a licensed driver at the time she renewed her policy in October or November 1991. Again,

the determination of domicile is a question of fact to be resolved in the trial court, and this Court will not reverse the trial court's determination of that fact unless the evidence clearly preponderates in the opposite direction *Bronson, supra* at 631.

With regard to the first factor articulated in *Bronson, supra,* to determine domicile, Sokol's intent to remain indefinitely or permanently in the defendant's household, Sokol did not testify whether he intended to remain at either his mother or father's house permanently. Regarding the second factor, Sokol did not testify as to the formality or informality of his relationship with defendant, but since he was apparently able to choose when to live with her, it seems that the relationship was not formal. Pursuant to the third factor, when Sokol lived with defendant, it was in the same apartment. Under the fourth factor, Sokol frequently resided at his father's house. He used his father's address when he purchased the Honda and when he applied for disability income insurance, pursuant to the fifth factor. Under the sixth factor, Sokol provided contradictory testimony, during his deposition and during trial, regarding whether he maintained possessions at the defendant's home. The next factor, Sokol's father's address was originally on his license and he changed the address to defendant's home as of March 30, 1993. The eighth factor is whether a bedroom was maintained for the person at the insured's home. Sokol testified that neither parent maintained a bedroom for him, but there was one available for him to use at each parent's home. Finally, there was no testimony relating to the final factor, whether the person was dependent upon the insured for financial support or assistance.

Thus, based on the evidence presented, Sokol fluctuated between living at defendant's and his father's home depending on which he preferred at the time. Sokol's deposition statement that he kept all of his personal belongings at defendant's home at all times was inconsistent with his trial testimony that he took his personal belongings wherever he happened to go. However, it is not logical that Sokol would have not taken any personal belongings, namely his clothes, when he went to live with his father. Sokol, his father and defendant testified that Sokol was living at his father's house in October and November 1991. Yet, the trial court found that because Sokol's living arrangements fluctuated between his father and defendant, Sokol was a resident of both parents' homes and that defendant was therefore obliged to include his name as a resident driver of her household. See *Dairyland, supra*. Because the evidence does not clearly preponderate in the opposite direction, the trial court's finding that Sokol was a resident of defendant's household at the time she renewed the policy was not clearly erroneous.

Finally, defendant argues that she did not have a duty to notify plaintiff regarding Sokol's residency after she renewed her policy. However, because the trial court did not address this issue in its findings of fact given that it determined that Sokol was living with defendant at the time she renewed her policy, we decline to address this issue.

Accordingly, the trial court's findings of fact were not clearly erroneous because they were supported by the evidence.

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

[1] Moreover, in ascertaining domicile for purposes of the no-fault act, this Court has held that persons domiciled may include those who are not actually living in the same household as the insured. *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 681; 333 NW2d 322 (1983). Thus, even if Sokol was staying at his father's home at the time defendant renewed her policy, it is possible that Sokol could also be considered to reside with defendant.

[2] Further, at trial, plaintiff raised the issue in its opening statement without objection and defense counsel questioned defendant about it during direct examination. Thus, this issue was not preserved and was likely tried by implicit consent.

[3] Sokol, age 22, had been in possession of a probationary license since age 16. His license had been suspended on three or four occasions.

[4] Defendant also essentially suggests that she viewed herself as the owner of the Honda since it was in her control and possession. However, the trial court found that her subjective view was irrelevant. We agree with the court since the issue is whether there was a misrepresentation that would have stopped plaintiff from insuring the vehicle. Had plaintiff known that Sokol was the owner, it would have canceled the policy.

[5] Defendant also argues that whether she made a misrepresentation as to ownership of the Honda was irrelevant for purposes of denying coverage for Sokol's injuries which occurred as a result of the accident in the Dodge Colt. Defendant avers that because there was no misrepresentation as to the ownership of the Colt, plaintiff is not justified in rescinding the policy. However, the trial court's finding that it was irrelevant whether or not there was any misrepresentation as to the Colt for purposes of rescinding the policy is not clearly erroneous, because the Colt, the Honda and the Toyota were all under the same policy which was obtained because defendant did not disclose that Sokol owned the Honda.