

STATE OF MICHIGAN
COURT OF APPEALS

MONA SADLER,

Plaintiff-Appellant,

v

METROPOLITAN PROPERTY & CASUALTY
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

October 28, 2004

No. 248839

Wayne Circuit Court

LC No. 02-212895-NF

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. *Id.* Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Id.*

The general rule is that "[w]here 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." *Hammoud v Metropolitan Property & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997). "An insurer may only void a policy of insurance *ab initio* where an innocent third party is not affected thereby and where it can be shown that the insured *intentionally* misrepresented a *material* fact communicated at the time of effecting the insurance; that is, where such misrepresentation substantially increased the risk of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985) (emphasis in original). 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. *Hammoud, supra* at 485.

In the present case, plaintiff did not make any representations to defendant. Plaintiff's sister-in-law, Catherine Freeman, made arrangements to have the Dodge Neon added to her no fault policy and Emery Freeman's no-fault policy, but whatever representations she might have made have not been disclosed. While defendant contends that the parties deliberately concealed plaintiff's ownership and use of the vehicle, the record does not show that the facts on that point are undisputed. The record shows that Emery apparently bought the car for plaintiff's use; it was titled in his name alone. Plaintiff took care of insuring the vehicle, but eventually Emery learned it was not insured. Emery reclaimed the vehicle and had Catherine add it to their policy to protect his interest in it. He kept the Neon at his wife's home while deciding what to do with it. Before a decision could be made, Emery allowed plaintiff to use the car again and she was involved in an accident. There is no evidence that at the time Emery had Catherine insure the vehicle, they deliberately obtained insurance to save plaintiff money on a policy. Nor is there any evidence that, at the time the insurance coverage was obtained, Emery intended to return the vehicle to plaintiff and insured it so she could drive it. Finally, there is no evidence that plaintiff was involved in the decision to have the vehicle added to the Freemans' policy. In light of these circumstances, we find that there was a genuine issue of fact as to whether plaintiff and the Freemans made a misrepresentation to obtain coverage on plaintiff's behalf and, thus, the trial court erred in granting defendant's motion for summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Richard A. Bandstra