STATE OF MICHIGAN

COURT OF APPEALS

GREAT LAKES CASUALTY INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED June 29, 2010
v	No. 290871 Huron Circuit Court
AUTO OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 08-003920-CK

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In this no-fault insurance action arising from an automobile accident, plaintiff appeals as of right from an order of the trial court granting defendant's motion for summary disposition, denying plaintiff's motion for summary disposition, and dismissing plaintiff's complaint with prejudice. Because the "innocent third party" rule is applicable, we affirm.

Plaintiff and defendant are insurance companies that issued separate policies that ostensibly covered Mr. Garrit Hewitt on the date of his accident on August 31, 2004. Plaintiff's policy was issued to Mr. Hewitt's estranged wife, Mrs. Jodie Hewitt, whereas defendant's policy was issued to Mr. Hewitt's parents. At the time of the accident, Mr. Hewitt was separated from Mrs. Hewitt and living with his parents. After Mr. Hewitt initiated a lawsuit against both parties for failure to pay under the policies, plaintiff and defendant each agreed to pay $258,266.80 toward the claim. Plaintiff subsequently discovered that Mrs. Hewitt made a material misrepresentation on her insurance application and obtained a declaratory judgment in the Bay Circuit Court that entitled it to declare Mrs. Hewitt's policy void *ab initio*.

Thereafter, plaintiff filed the instant lawsuit, claiming unjust enrichment and seeking to require defendant to pay it the sum of $258,226.80 (the amount it had paid to settle the original lawsuit filed by Mr. Hewitt). The trial court granted defendant's motion for summary disposition on the ground that Mr. Hewitt was an innocent third party and therefore plaintiff could not now deny coverage. The applicable statute of limitations was also discussed, but was ultimately not decided by the trial court because of its ruling on the innocent third party issue. The trial court denied plaintiff's cross-motion for summary disposition and dismissed the lawsuit with prejudice.

On appeal, plaintiff argues that the trial court erred in concluding that plaintiff should not be reimbursed for the funds it paid against Mr. Hewitt's claim, since that policy had been declared void *ab initio*. Plaintiff asserts that defendant was liable to pay the claimed damages in full, and the fact that Mr. Hewitt was an innocent third party is irrelevant. We disagree.

We review a lower court's decision on both a motion for summary disposition and statutory interpretation issues de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003); *In re MCI Telecommunications*, 460 Mich 396, 413; 596 NW2d 164 (1999).

"[W]here an insured makes a material misrepresentation in the application for insurance, . . . the insurer is entitled to rescind the policy and declare it void *ab initio*. Rescission is justified without regard to the intentional nature of the misrepresentation, as long 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." *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998). One exception to this allowance is where an innocent third party is affected by the rescission of the contract. "The 'innocent third party' rule prohibits an insurer from rescinding an insurance policy because of a material misrepresentation made in an application for no-fault insurance where there is a claim involving an innocent third party." *Sisk-Rathburn v Farm Bureau Gen Ins Co*, 279 Mich App 425, 430; 760 NW2d 878 (2008).

Both parties acknowledge that Mr. Hewitt was unaware of the material misrepresentations that Mrs. Hewitt made on her application for insurance with plaintiff, and therefore was an innocent third party with respect to plaintiff's policy.

However, plaintiff claims that the innocent third party rule is not applicable to this case because there was a second, same-priority insurer involved. The law that plaintiff relies on, MCL 257.520(j), provides: "The requirements for a motor vehicle liability policy may be fulfilled by the policies of 1 or more insurance carriers which policies together meet such requirements." Plaintiff argues that the public policy of ensuring that the injured automobile accident victim is financially protected would still be met in this case because, even if plaintiff voids its policy with Mrs. Hewitt, defendant is still liable for Mr. Hewitt's claim.

Plaintiff refers this Court to *Lake States Ins Co*, 231 Mich App at 331-332, where a panel of this Court held that the plaintiff was not precluded from reforming a policy for the innocent-third-party in order to void defendant's "optional" coverage. The Court quoted the definition of optional coverage from MCL 257.520(g): "[A]ny lawful coverage in excess of or in addition to the (mandatory minimum) coverage specified for a motor vehicle liability policy." *Id.* at 332 n 2.

Plaintiff's argument relies on the premise that its coverage of Mr. Hewitt's claim was "optional," since there was a second, same-priority insurer. However, plaintiff's coverage was not optional, but instead provided the same level of coverage as defendant's policy, with each insurer responsible for defendant's claim. As the trial court pointed out, and plaintiff acknowledged, if Mr. Hewitt did not have a second policy through defendant, then plaintiff would have been required to pay the full claim with no recourse. Here, instead of having a primary and secondary insurer, each party was responsible for full payment against Mr. Hewitt's claim in the same priority. See MCL 500.3114. The fact that there were two same-priority

insurers essentially limited plaintiff's payment liability to only one-half of the total instead of the full coverage amount. We conclude that it also limited the same-priority insured's ability to avoid the innocent-third-party-rule exception.

Under the innocent-third-party rule, an insurance company is prohibited from rescinding a policy where an innocent third party has made a claim. Here, Mr. Hewitt made a claim against two separate companies. This does not change Mr. Hewitt's status as an innocent third party and it does not nullify his claim. There is no established exception for same-priority insurers, and we decline to extend the exception for this situation. Therefore, because Mr. Hewitt, as an innocent third party, made a claim against plaintiff's policy, plaintiff is precluded from rescinding its payment against the claim based on a late-discovered misrepresentation of material fact in the insurance application.

Because we find this issue dispositive, we need not consider plaintiff's remaining issues on appeal.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering