

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

MEEMIC INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellant,

v

ESTATE OF BRENDON PEARCE, by LYNN PEARCE, Personal Representative, PATRICIA MUSSER, JOSEPH GRINAGE, ESTATE OF MELISSA MUSSER, by LAWRENCE BENTON, Personal Representative, ANDREW MUSSER, and JOHN MUSSER,

Defendants-Appellees,

and

RYAN HARSTON and SPARROW HOSPITAL,

Defendants/Counterplaintiffs-Third-Party Plaintiffs,

and

MICHIGAN AUTOMOBILE PLACEMENT FACILITY and FARM BUREAU GENERAL INSURANCE COMPANY,

Third-Party Defendants,

and

HOPE NETWORK REHABILITATION SERVICES,

Intervenor.

UNPUBLISHED

November 23, 2021

No. 352724

Eaton Circuit Court

LC No. 15-000934-NF

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff Meemic Insurance Company appeals as of right the trial court's order granting summary disposition in favor of all defendants. Meemic is seeking a declaratory judgment that it had no duty to defend or indemnify under a no-fault policy issued to its insured, defendant Patricia Musser, in connection with an automobile accident. We reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

This appeal involves Meemic's obligation to provide insurance coverage in connection with a motor-vehicle accident on March 8, 2015, in Kalamo Township. Melissa Sue Musser was driving southbound in a 2002 Oldsmobile Silhouette registered to her mother, Patricia Musser, when the vehicle encountered a large water puddle. Melissa lost control of the vehicle, left the road, turned over, and struck a tree. Ryan Harston, Joseph Grinage, John Musser, Andrew Musser, and Brendon Pearce were all passengers in the vehicle. Melissa and Brendon sustained fatal injuries, and the others sustained nonfatal injuries. Brendon's mother, Lynn Pearce, sought damages for Brendon's death, and other occupants sought recovery of personal protection insurance benefits from Meemic under its no-fault policy issued to Patricia.

Meemic subsequently filed this action for declaratory relief. Meemic's complaint sought a declaration that its insurance policy was void because of Patricia's alleged fraud in procuring the policy and her alleged failure to inform Meemic about changes to the members of Patricia's household. Meemic attached to its complaint a copy of its automobile insurance policy issued to Patricia, which listed her as the only named insured and listed an address on Elm Street in Vermontville. The application listed a 2010 Ford Focus as the only insured automobile. The application also contains a checked box affirming that all of the vehicles are owned by, leased, or registered to the applicant. The application contains a page signed by Patricia beneath an "applicant's certification" that provides:

I certify that all information and all answers to all questions provided in this application are true and correct, and I understand, recognize and agree that said information and answers are given for the purpose of inducing MEEMIC to issue a policy to me for which I have applied. I further certify that ALL persons who live with me, as well as reside in my household and ALL persons who are drivers have been listed on this application. I further certify that my principal residence and place of vehicle garaging is correctly shown above, and that ownership of all vehicles to be insured have been correctly shown above. I understand that MEEMIC may declare this policy null and void if this application contains any false or misleading information or if any requested information has been omitted. In addition, I understand that I have a continuing duty to notify MEEMIC of any changes of address, location of vehicles, ownership of vehicles, members of my household, drivers of any vehicles listed on the policy or of any other information requested in this application. I further understand that MEEMIC may declare this

policy null and void if I do not comply with my continued duty to advise MEEMIC of any changes as stated herein.

The application contains an “effective date” of March 29, 2011, and an “expiration date” of September 29, 2011.

Meemic also attached its insurance contract with Patricia to its complaint. In the “Declarations” portion of the agreement, the policy provides:

16. DECLARATIONS

By accepting this Policy you agree that:

A. the statements on the Declarations Page and in the application for this Policy are **your** own;

B. this Policy is issued in reliance upon the truth of those representations; and

C. this Policy, including the Declarations Page and endorsements attached at the time of issuance, including all agreements existing between **you** and **us** or any of its agents relating to this Insurance.

The insurance contract also contains provisions specifying a continuing duty to report policy changes and a provision discussing Meemic’s right to void the agreement for fraud:

14. DUTY TO REPORT POLICY CHANGES

If the information used to develop the policy premium changes, **we** may adjust **your** premium during the policy term. The **named insured** must inform **us** within 30 days of any changes related to the following:

a. **your** address;

b. where **your car** is principally garaged;

c. **your car** or how it is used, including driving distance to work annual mileage;

d. the operators who regularly drive **your car**, including newly licensed family members.

e. the ownership or registration of **your car**.

If **you** fail to inform **us** of these changes within 30 days, we may void coverage as provided under Condition 22 — **Concealment or Fraud**.

* * *

22. CONCEALMENT OR FRAUD

This entire Policy is void if any insured person has intentionally concealed or misrepresented any material fact or circumstance relating to:

- A. This insurance;
- B. The Application for it;
- C. Or any claim made under it.

Also attached to the complaint were declaration pages for “renewals” reflecting six-month policy renewals from March 29, 2012, through September 29, 2015. The Ford Focus was the only automobile listed until the renewal that began on September 20, 2013, which also listed a 2002 Oldsmobile Silhouette as an additional insured vehicle and contained the title “vehicle added” instead of “renewal.” The form, and those from that date on, continued to list only Patricia Musser as a driver of the insured vehicles.

In its complaint, Meemic alleged that it was entitled to rescind and void the policy because Patricia failed to inform it that: (1) Melissa was a household member at the time of the execution of the policy; (2) Melissa was a household member “during all or a portion of the effective dates of the policy”; and (3) Melissa was operating a covered vehicle “during all or a portion of the effective dates of the policy.” The complaint also alleged that Patricia failed to inform Meemic about “all persons living at the Residence” at the time of the initial application or when renewing the policy.

During discovery, Patricia described her house as a structure that had been split into two separate “apartments” or “sections” in 2006. Patricia described the upper level as a two-bedroom apartment with its own kitchen, living room, and bathroom. The upper-level apartment was accessed through an outside stairway; there was no interior access between the two levels. The upper-level apartment did not have its own address because Patricia never sought one. The lower level had three entrances, four bedrooms, a kitchen, laundry room, and a bathroom. According to Patricia, when she submitted her initial application for insurance from Meemic in 2011, she was living in the upper level and Melissa was living in the lower level, and she did not list Melissa as a member of her household because she regarded the two levels as separate residences. Patricia and her family would occasionally move from one apartment to the other, but Patricia and Melissa lived together in the downstairs apartment at the time of the accident.

At the time of the accident, Patricia owned a Ford Focus and a Silhouette. Patricia purchased the Silhouette in 2014 to transport her family members to school activities. Patricia testified that Melissa did not drive the Focus because it had a manual transmission, which Melissa did not know how to operate. According to Patricia, Melissa drove the Silhouette approximately three or four times a week, but was not the primary driver. At that time, Melissa did not own a separate vehicle. Patricia informed Meemic that Melissa occasionally drove the Silhouette, but she failed to inform Meemic about Melissa’s 2011 operating-while-intoxicated conviction. According to a Meemic representative, if Meemic had known about Melissa’s alcohol-related conviction, it would not have continued to insure Patricia’s vehicles.

Lynn Pearce, as personal representative for the estate of her son, moved for summary disposition under MCR 2.116(C)(10), arguing that Meemic was not entitled to rescind its policy because, after Meemic filed this action, it had sent Patricia a notice of nonrenewal of the policy, which operated as a waiver of any right to rescind the policy. In supplemental briefing, the parties further disputed whether Meemic was entitled to rescind the policy. At the hearing on the motion, counsel for Meemic clarified that Meemic was seeking rescission, not because Patricia made any misrepresentation at the time she initially applied for insurance, but because she failed to disclose Melissa's status as a member of the household and a driver of the Silhouette during the renewal period preceding the accident. Pearce's counsel argued that Meemic could rescind the policy only if it could show that there was fraud at the inception, i.e., at the time Patricia initially applied for the insurance, which it failed to do. The trial court subsequently granted summary disposition in favor of all defendants for the reasons stated by Pearce's counsel. This appeal followed.

II. ANALYSIS

Meemic argues that the trial court erred by determining that it was not entitled to rescind its policy on the basis of fraud and granting summary disposition to defendants. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). "The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Barnes v 21st Century Premier Ins Co*, 334 Mich App 531, 540; 965 NW2d 121 (2020). Indeed, summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Patrick*, 322 Mich App at 605. "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). Finally, we review de novo issues of contract interpretation, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005), and whether to apply an equitable doctrine, *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013).

Michigan courts have long relied on *Bahri v IDS Property Cas Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014), to determine whether an insurance claim is fraudulent. But the circumstances under which an insurer may invalidate an insurance contract based on fraud have changed, since this case began, starting with this Court's opinion in *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719; 957 NW2d 858 (2020). The current state of insurance-fraud litigation in Michigan separates fraud into two broad categories based on when it occurred: (1) fraud that occurred before the parties entered into an insurance contract (preprocurement fraud); and (2) fraud that occurred after the parties entered into an insurance contract (postprocurement fraud). Postprocurement fraud has further been divided into two types: (1) fraud that occurred before litigation began; and (2) fraud that occurred after litigation began. The crucial distinction between the two types of postprocurement fraud is when the fraud occurred, not when it was discovered.

Fashho v Liberty Mutual Ins Co, 333 Mich App 612, 619; 963 NW2d 695 (2020). Consequently, evidence of fraud obtained during the course of litigation can be used to void an insurance contract as long as it relates to fraud that occurred before litigation began. *Id.* In contrast, however, if alleged fraud occurred after litigation began then it cannot void an insurance contract. *Id.*

In *Meemic Ins Co v Fortson*, 506 Mich 287, 293; 954 NW2d 115 (2020), our Supreme Court concluded that antifraud provisions in insurance contracts “are valid when based on a defense to mandatory coverage provided in the no-fault act itself or on a common-law defense that has not been abrogated by the act.” The *Meemic* Court examined common-law defenses and the no-fault act MCL 500.3101 *et seq.*, and concluded that rescission is available as a remedy for postprocurement no-fault insurance fraud only if the fraud amounted to a substantial breach of the insurance contract. *Id.* at 307-308. Rescission, however, remains available as a remedy for preprocurement fraud for even a regular, nonsubstantial-breach of contract. *Id.* This distinction is important because not every breach of contract amounts to a substantial one. As explained by this Court in *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007), “To determine whether a substantial breach occurred, a trial court considers whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive.”

Thus, when the fraud occurred is crucially important in insurance-fraud cases. If fraud occurred before the parties entered into the insurance contract, then rescission is available as a remedy under the normal breach-of-contract standard. *Meemic Ins Co*, 506 Mich at 305-308. If fraud occurred after the contract was signed, but before litigation began, then rescission is available as a remedy only if the fraud substantially breached the contract. *Id.* at 307-310. Finally, if fraud occurred after litigation began—which necessarily also means that it occurred after the contract was signed—then rescission is not available as a remedy. *Fashho*, 333 Mich App at 619.

A. PREPROCUREMENT FRAUD

In analyzing Meemic’s claims of error, the first question is whether Meemic can show that Patricia Musser committed preprocurement fraud when she certified that she had listed on the application “ALL persons who live with me, as well as reside in my household and ALL persons who are drivers.” Although Meemic, at least initially, appears to have relied on preprocurement fraud as justification for its claim, on appeal it makes only passing reference to the initial application and it relies solely on evidence of where Melissa was living at the time of the accident. Indeed, the submitted evidence established that, at the time of Patricia’s application, she and Melissa were living in separate apartments at the residence—each of which had its own bedrooms, living space, kitchen, and bathroom—and Meemic clarified in later arguments, as it does on appeal, that the alleged fraud occurred when Patricia failed to later inform Meemic that Melissa had moved into the same level where Patricia was living. This is particularly evident from Meemic’s reply brief where it asserts, “While the Policy was not necessarily ‘obtained’ by fraud . . . , Meemic’s ‘antifraud provision’ and common law defenses apply nonetheless to Patricia’s ‘failure to perform a substantial part of the contract or one of its essential terms[.]’ ” Given Meemic’s arguments during the summary disposition hearing and on appeal, as well as Meemic’s failure to specify the factual support for a finding that there was preprocurement fraud, it is apparent that Meemic has abandoned any claim of preprocurement fraud and instead bases its claim for rescission on postprocurement fraud arising from Patricia’s failure to notify Meemic

when Melissa returned to live in the same part of the home where Patricia resided. See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015).

B. POSTPROCUREMENT FRAUD

As discussed earlier, to be entitled to rescission on the basis of postprocurement fraud, Meemic must demonstrate that Patricia substantially breached the insurance contract. See *Meemic*, 506 Mich at 307-308. The insurance contract required Patricia, in relevant part, to inform Meemic of any changes to her household as well as any changes to the drivers of her vehicles. The contract clearly stated that Patricia's failure to do so would allow Meemic to "declare this policy null and void." The contract further stated that Meemic could adjust Patricia's premium based on new information that she provided and that if she failed to update Meemic within 30 days of specified changes—such as a change to who lived with her or "regularly" drove one of her vehicles—then Meemic could void the policy.

It is uncontested that Melissa's name did not appear on Patricia's policy at any point relevant to the issue presented in this case. The record is less clear, however, regarding what Patricia told Meemic about Melissa driving the Silhouette. Patricia could not recall whether she told Meemic that Melissa was living with her. Patricia did, however, contact Meemic to ensure that Melissa would be covered under Patricia's insurance policy when driving the Silhouette. Patricia told Meemic that Melissa "would be transporting the kids to and from school with it, from time to time to activities, possibly to get groceries and possibly to even job hunt," but she did not tell Meemic that Melissa "would be a regular user" of the Silhouette. Patricia opined that Melissa used the Silhouette three or four times per week and that she used the vehicle about as much as Patricia did. Importantly, Patricia was aware that Melissa had an alcohol-related driving offense, but she failed to disclose this to Meemic.

Patricia, therefore, gave Meemic some information about Melissa driving the Silhouette. The information Patricia provided to Meemic, however, did not cause Meemic to add Melissa as a "regular" driver of the Silhouette under Patricia's insurance policy. And Patricia failed to inform Meemic about Melissa's alcohol-related driving offense. Thus, Patricia gave Meemic some information about Melissa using the Silhouette, but not all of her available information. We must now determine whether the information Patricia omitted amounted to postprocurement fraud that would permit rescission as a remedy.

As discussed, rescission is available as a remedy only if Patricia substantially breached the insurance contract. A substantial breach occurs when a party does not receive the benefit of the bargain. *Able Demolition*, 275 Mich App at 585. Meemic contracted with Patricia to insure her vehicles. It offered to compensate Patricia for injuries to her person and property in exchange for Patricia paying Meemic a specified rate. That rate was decided based on information Patricia provided to Meemic, such as the individuals in her household and the drivers of her vehicles. These factors were crucially important because the potential drivers of a vehicle correlate to Meemic's perceived risk of insuring that vehicle. Indeed, Meemic has a policy not to insure vehicles driven by individuals with alcohol-related driving offenses. As such, if Patricia had sought to add Melissa to her policy as a driver of the Silhouette, then Meemic would have refused to insure the vehicle.

The record, however, does not provide us with adequate information to decide this issue. Patricia testified that she contacted Meemic to see if Melissa would be covered while driving the Silhouette. When she did so, Patricia did not ask for Melissa to be added to her insurance policy, and she did not notify Meemic about Melissa's alcohol-related driving offense. That said, Patricia did tell Meemic that Melissa would frequently drive the Silhouette. Whether this level of disclosure was sufficient to notify Meemic that Melissa would be a "regular driver" of the Silhouette is a question of fact for the jury to decide.

Who drives a vehicle on a regular basis is an integral part of a car-insurance policy. The driver of a vehicle is one of the largest factors an insurer uses to determine the rates it charges. Thus, if Patricia failed to disclose sufficient information, then it amounted to a substantial breach of contract because Meemic no longer knew the actual terms of the contract it had entered into. Such a substantial breach would permit Meemic to rescind the contract. But we cannot conclude that Patricia substantially breached the contract based on the record before us. Rather, that is a question for the jury to decide on remand.

Meemic also relies in part on *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437; 889 NW2d 759 (2016), for its argument that an insurance company can obtain rescission even though the fraud occurred during a renewal. *Zufelt*, however, involved an insured who unsuccessfully attempted to use the intervening act of a policy renewal as a defense against the insured's initial misrepresentation. See *id.* at 442-447. This case is distinguishable.

C. WAIVER

It is questionable whether the trial court actually relied on a waiver argument as a basis for granting summary disposition to defendants. Despite this uncertainty, we choose to address this issue here to assist the parties and the trial court on remand.

Lynn Pearce argues that, "having elected to non-renew, MEEMIC waived any potential ability to rescind the Policy as it claimed." Pearce relies on *Burton v Wolverine Mut Ins Co*, 213 Mich App 514, 517; 540 NW2d 480 (1995), for the proposition that "[a]n insurer may waive its right to rescission by first seeking cancellation of an insurance policy on the same grounds," and argues that "[t]he same rationale would apply with respect to non-renewal." While Pearce correctly cites the holding in *Burton*, this case is factually distinguishable. In *Burton*, this Court found it significant that the defendant insurer discovered the material misrepresentation in an insurance application before the subject accident (i.e., before any loss), but chose to issue a cancellation notice rather than seek rescission. *Id.* at 517-518. This Court noted that the effect of the defendant's decision, after having knowledge of the material misrepresentation, was to induce the plaintiffs to believe that they would continue to have insurance until the effective date of the cancellation. *Id.* at 518. This Court found it "untenable" for the defendant, "upon the discovery of the misrepresentation in the application, to have the right to collect a premium and provide coverage as long as there are no losses and yet remain entitled to choose rescission and deny coverage if a loss occurs." *Id.* at 519-520.

Conversely, in this case, Meemic sought rescission after the loss and upon becoming aware of Patricia's alleged fraud, and only later decided not to renew the policy. Unlike in *Burton*, these decisions were not inconsistent and did not induce any reliance by Patricia to her detriment. Pearce

cites no authority for the proposition that an insurance company that seeks a determination of its right to rescind an insurance policy on the basis of fraud forfeits its right to do so by choosing also not to renew the policy. Contrary to what Pearce argues, the rationale in *Burton* does not support a finding that Meemic in this case waived its right to pursue its claim for rescission of the policy by later electing not to renew it. Accordingly, we decline to affirm the trial court's decision on the basis of a waiver analysis.

III. CONCLUSION

For the reasons stated in this opinion, we reverse the trial court's order granting summary disposition to defendants and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Michael F. Gadola