STATE OF MICHIGAN

COURT OF APPEALS

TITAN INSURANCE COMPANY, Plaintiff-Appellant, v AUTO-OWNERS INSURANCE COMPANY, Intervening Plaintiff-Appellee, and NICOLE FALLS, KYLE RICHARD FALLS, and LARRY HENRY, Individually and as Personal Representative of the Estate of BONNIE HENRY, Deceased, Defendants-Appellees.	UNPUBLISHED March 13, 2012 No. 302191 Oakland Circuit Court LC No. 2010-108438-NF

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff Titan Insurance Company appeals as of right the trial court's order granting summary disposition in favor of intervening plaintiff Auto-Owners Insurance Company and defendants Nicole Falls, Kyle Richards Falls, and Larry Henry, individually and as personal representative for the estate of Bonnie Henry. We affirm.

I. BACKGROUND

On June 10, 2009, Nicole and Titan entered into an automobile insurance contract. That day, Nicole called KC Insurance Agency[1] and spoke with an insurance agent over the phone for five minutes. Later on, Nicole went to the insurance agent's office where the agent handed

[1] KC Insurance Agency is an independent agency used by Titan to market its policies. Although Titan argued before the trial court that KC Insurance representative was not its agent, Titan does not argue this point on appeal.

Nicole the insurance application one page at a time for her to review, initial, and sign. Nicole was never shown the first page of the insurance application, which contained a section to list all household drivers. Nicole then made a $300 down payment on the premium and left the office three minutes after she arrived. Although Nicole informed the insurance agent that she was married, her husband, Kyle, held the family's medical insurance, and he was able to drive both vehicles, Kyle was not listed as a household driver on the insurance application. On July 10, 2009, 30 days after the insurance application was completed, Kyle was involved in an automobile accident that led to the death of Bonnie, Larry's wife.

After the automobile accident, Titan filed a complaint for declaratory relief in Oakland Circuit Court. Titan alleged that Nicole made a material misrepresentation when she failed to disclose that Kyle was a household driver. Titan alleged that if it had known that Kyle was a household driver, it would have increased the premium on the insurance policy from $1,038 to $1,095. Pursuant to MCL 500.3009, Titan requested that the bodily injury liability limits within the contract be reformed from $100,000 per person or $300,000 per occurrence to the statutory minimum policy limits of $20,000 per person or $40,000 per occurrence.

Thereafter, Titan filed a motion for summary disposition pursuant to MCR 2.116(C)(10). After oral argument, the trial court denied Titan's motion for summary disposition. The trial court concluded that if there was a material misrepresentation on the insurance application, it was easily ascertainable to Titan:

> I think even though there's a question of fact on whether she - - whether she knew or should have known that there was another page where she was supposed to list the drivers in the household, I don't think it really matters because, in the application, she did put down that she was married.
>
> And, I think, therefore, under the case law it was readily ascertainable that there would be another driver in the household, and I don't think that the insurance company, Titan, in this case, can hide behind the fact that, uh, there was an agent who was not their agent that should have asked the question.
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> The application was for the insurance company, the insurance company had the information that she was married and, therefore, it was readily ascertainable and easily ascertainable that there'd be another driver. So, therefore, I'm denying the summary disposition motion and I'm ruling that the $100,000 policy applies under Titan.

From this ruling, Titan now appeals.

II. ANALYSIS

A. MATERIAL MISREPRESENTATION

Titan argues that the failure to list Kyle as a household driver was a material misrepresentation in the insurance application. The decision of a trial court pertaining to a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Under MCR 2.116(C)(10), summary disposition is proper

when the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record reveals an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"[I]t is a well-established rule 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*.'" *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 359-360; 764 NW2d 304 (2009) (citation omitted); see also *Farmers Ins Exch v Anderson*, 206 Mich App 214, 218; 520 NW2d 686 (1994). A material misrepresentation occurs when the misrepresentation "substantially increase[s] 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); see also *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993) ("A false representation in an application for no-fault insurance that materially affects the acceptance of the risk entitles the insurer retroactively to void or cancel a policy."). Because the undisputed evidence shows that a higher premium would have been charged had Kyle been listed on the application, his omission from that application was a material misrepresentation. *Darnell*, 142 Mich App at 9.

However, pursuant to MCL 257.520(f)(1), an insurer may not use the existence of fraud, misrepresentation or other listed defense to completely void the statutory minimum coverage once a claim is made under the policy. MCL 257.520(f)(1) provides:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
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> (1) The liability of the insurance carrier *with respect to the insurance required by this chapter* shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled *as to such liability* by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy, and except as hereinafter provided, no fraud, misrepresentation, assumption of liability or other act of the insured in obtaining or retaining such policy, or in adjusting a claim under such policy, and no failure of the insured to give any notice, forward any paper or otherwise cooperate with the insurance carrier, shall constitute a defense as against such judgment creditor. [Emphasis added.]

Rather, the insurer may only use fraud to void any *excess coverage* over the statutory minimum coverage of $20,000/$40,000. *Titan Ins Co v Hyten*, 291 Mich App 445, 454-455; 805 NW2d 503 (2011), citing *Anderson*, 206 Mich App at 218. Here, Titan is arguing precisely that, i.e.,

that because of Nicole's material misrepresentation the only available coverage is the statutory minimum.

In addition to these statutory rules, however, is another rule – this one created by the courts – that an insurer is not allowed to void excess coverage once it has collected premiums when it could have "easily ascertained"[2] the fraud at the time the contract was formed. *Hyten*, 291 Mich App at 455. This means that an "'automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. This duty directly inures to the benefit of third persons injured by the insured.'" *Id*. at 456 quoting *State Farm Mut Auto Ins Co v Kurylowicz*, 67 Mich App 568, 576; 242 NW2d 530 (1976); see also *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997) (The "right to rescind ceases to exist once there is a claim involving an innocent third party.").

In this case Larry, individually and as personal representative of Bonnie, qualifies as an innocent third party and the undisputed facts reveal that the material misrepresentation was easily ascertainable. The evidence submitted highlights that while Nicole did not list Kyle as a household driver on the insurance application, she informed the insurance agent that she had a husband both over the telephone and in person. Significantly, the evidence shows that Titan's insurance agent inquired into whether there was any household driver who could *not* use the vehicles, and Nicole informed the agent that her husband was allowed to drive both vehicles. Moreover, according to Nicole, she was never shown the first page of the application where the household drivers were listed. Under these facts, and looking at them in a light most favorable to the non-moving party, Titan could have easily ascertained whether Kyle was a household driver by simply asking Nicole or having Nicole review and initial the first page of the insurance application to verify that all household drivers were listed, especially after Nicole informed the agent that her husband was allowed to drive the vehicles. Therefore, the trial court properly denied Titan's request to reduce the insurance policy to the statutory minimum limits.

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[2] At the outset of this discussion we acknowledge that we are following *Hyten* as binding precedent. MCR 7.215(C)(2). However, as noted by the *Hyten* Court, "public policy" as *declared by the courts* has developed two rules at issue in this appeal: (1) that an insurance policy cannot be rescinded once there is a claim under the policy by an innocent third party, *Hyten*, 291 Mich App at 452 n 4, and (2) that an insurance company cannot cancel an insurance contract if the alleged misrepresentation relied upon was "easily ascertainable" by the insurance company, *id*. at 458-460. At best, the latter rule is "gleaned" from the overall intent of the no fault act and the common law. *Id*. We need not decide whether these rules should be abandoned in favor of limiting the duties imposed on insurance companies to those imposed by statute, see MCL 257.520(f) and MCL 500.3220, because the Michigan Supreme Court has granted leave in *Hyten* to decide "whether an insurance carrier may reform an insurance policy on the ground of misrepresentation in the application for insurance where the misrepresentation is 'easily ascertainable' and the claimant is an injured third party." *Titan Ins Co v Hyten*, 490 Mich 868; 802 NW2d 617 (2011).

B. THE 55-DAY CANCELLATION DEADLINE

Titan argues that this Court should employ the 55-day cancellation deadline pursuant to MCL 500.3220(a), as discussed in *Hyten*, to allow it to reform the policy to the statutory minimums. This issue was not raised before the trial court (*Hyten* was not released until after the trial court's denial of summary disposition, though of course the statute existed).[3] However, the interpretation and application of a statute is a question of law. *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002). This Court has the discretion to review an unpreserved question of law when all necessary facts are presented. *Bertrand v Mackinac Island*, 256 Mich App 13, 21; 662 NW2d 77 (2003).

In *Hyten*, this Court did conclude that MCL 500.3220(a)[4] allows an insurer to cancel a policy within 55 days from the formation of the insurance contract if the insurer determined that the risk was unacceptable. *Hyten*, 291 Mich App at 459-461. Nonetheless, we disagree with Titan that this means it may reform the policy to the statutory minimum limits of $20,000/$40,000. Titan does not argue that the addition of Kyle as a household driver would have been an unacceptable risk resulting in a cancellation of the insurance policy. Rather, it merely asserts that the addition of Kyle as a household driver would have raised the premium for the policy. Thus, Titan itself admits that it would not have cancelled the insurance policy within the proscribed 55 days even if it had discovered that Kyle was a household driver during that timeframe. Consequently, Titan cannot rely upon *Hyten* or MCL 500.3220(a) to reform the policy to the statutory minimums.

C. AN INSURER'S DUTY TO INVESTIGATE

Titan also asserts that the easily ascertainable standard imposes an improper duty upon an insurer by requiring the insurer to verify the accuracy of the information provided to it by the

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[3] Generally, judicial decisions are given complete retroactive effect. *Lincoln v Gen Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000).

[4] MCL 500.3220 provides:

> Subject to the following provisions no insurer licensed to write automobile liability coverage, after a policy has been in effect 55 days or if the policy is a renewal, effective immediately, shall cancel a policy of automobile liability insurance except for any 1 or more of the following reasons:
>
> (a) That during the 55 days following the date of original issue thereof the risk is unacceptable to the insurer.
>
> (b) That the named insured or any other operator, either resident of the same household or who customarily operates an automobile insured under the policy has had his operator's license suspended during the policy period and the revocation or suspension has become final.

insured within an insurance application. Titan did not raise this issue before the trial court, therefore it is unpreserved for appellate review. However, the existence of a legal duty is a question of law. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004). And, as previously noted, this Court has the discretion to review an unpreserved question of law when all necessary facts are presented. *Bertrand*, 256 Mich App at 21.

Essentially, Titan complains that it is being punished by not being allowed to reform policies where innocent third parties are injured because it is not required, i.e., it has no duty, to investigate the information an insured places on an insurance application. Titan is correct that it owes no duty to the *insured* to investigate that the information provided is accurate, for as this Court has ruled, "an insurer does not owe a duty to the *insured* to investigate or verify that individual's representations or to discover intentional material misrepresentations." *Hammoud*, 222 Mich App at 489 (Emphasis added.). However, as to an *innocent third party*, we have said that "an automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. *This duty directly inures to the benefit of third persons injured by the insured*." *Kurylowicz*, 67 Mich App at 576 (Quotations omitted and emphasis added.). Likewise, the *Hyten* Court concluded that while "no Michigan statute directly imposes on an insurance company the *duty* to investigate the representations of an insured . . . MCL 500.3220 does express that if an insurer opts against undertaking an early investigation, it may not use later-acquired information to terminate its policy obligations except under very limited circumstances." *Hyten*, 291 Mich App at 461 (Emphasis in the original.).

According to *Hyten*, while Titan has no statutory duty to investigate, it cannot use its failure to investigate as a reason to reform an insurance policy once an innocent third party is injured because Michigan's no-fault system seeks to protect innocent third parties. *Hyten*, 291 Mich App at 462-464; *Kurylowicz*, 67 Mich App at 576. As the *Hyten* panel stated, requiring Titan to honor the policy terms as to an innocent third party where there was a material misrepresentation in an insurance application because the misrepresentation was easily ascertainable does not place a duty on Titan to investigate each insurance application. *Hyten*, 291 Mich App at 461.

Affirmed.

No costs are to be awarded. MCR 7.219(A).

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray