STATE OF MICHIGAN

COURT OF APPEALS

CONTINENTAL GENERAL INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED April 15, 2008
v	No. 277199 Oakland Circuit Court LC No. 06-076099-CK
ABE GERSHONOWICZ, as Personal Representative of the ESTATE OF CAROLE S. MERVIS, deceased, Defendant-Appellee.	

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's March 19, 2007, final order, in this declaratory judgment action. On appeal, plaintiff takes issue with the trial court's December 6, 2006, opinion and order denying its motion for summary disposition, finding that it could not rescind its policy with Carole Mervis (the deceased) because doing so would violate the "innocent third party exception." Plaintiff additionally takes issue with the trial court's March 5, 2007, opinion and order denying its motion for reconsideration.[1]

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[1] We reject defendant's argument that this Court lacks jurisdiction over plaintiff's appeal because there was no final judgment or final order from the trial court "from which an appeal by right may be claimed and heard." We have jurisdiction of an appeal of right filed by an aggrieved party from a "final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6)." MCR 7.202(6)(a)(i) defines a final judgment or order as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." Although an order denying a motion for summary disposition would generally not be considered a final order, here plaintiff filed a declaratory action asking the trial court to decide whether plaintiff had the right to rescind its health insurance policy with the deceased, and the trial court when denying plaintiff's subsequent motion for summary disposition specifically found that plaintiff could not rescind its policy with the deceased. By doing so, the trial court essentially denied plaintiff's request for a declaratory judgment, and in turn disposed of plaintiff's complaint and adjudicated the rights and liabilities of the parties. Moreover, after subsequently denying

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In particular, plaintiff argues that the trial court erroneously extended the innocent third party exception regarding rescission of auto insurance policies for misrepresentation by the insured to rescission of health insurance policies, and thus, erred when it denied plaintiff's respective motions for summary disposition and reconsideration, finding that plaintiff could not rescind its policy with the deceased. We vacate the trial court's December 6, 2006, and March 5, 2007, orders, and remand this case back to the trial court with instructions to make a determination whether the deceased made a material misrepresentation on her health insurance application with plaintiff.

I. Facts and Procedural History

On November 2, 2005, the deceased completed an insurance application seeking medical insurance coverage with plaintiff. One of plaintiff's agents, Mike Purpura, assisted the deceased with her application by asking the deceased all of the questions in the application. In relevant part, the deceased's application reflected that in the "past 5 years, [she had not] had any signs, symptoms, diagnosis, consultation, treatment, or taken any medication or received counseling for any of the following . . . tumors/cysts/polyps/growths." Purpura was present when the deceased signed her application, which included language that she understood that she would be "subject to a pre existing condition exclusion," and that if all of her application answers were not accurate, complete and true, plaintiff had the right to deny benefits or rescind her coverage. The deceased's policy went into effect on December 1, 2005.

On January 23, 2006, the deceased was admitted to William Beaumont Hospital (Beaumont) where she remained until her death on March 12, 2006. Despite the fact that the deceased's application indicated that she never had any sign of any "tumors/cysts/polyps/growths," and that Purpora did not notice any abnormalities about the deceased when she filled out her application, Beaumont's progress records from January 23, 2006, indicated that the deceased "had a egg size mass [(approximately 10 x 15 centimeters)] [on the] left side back of [her] head which started draining [(and emitting a foul smell)] last summer." Although the deceased denied the foul smell, she told the doctors that she was aware of the mass on the back of her head for the past two years. The deceased knew that the mass had been increasing in size and starting to drain, but did not seek medical attention because of her depression.[2]

Beaumont performed a biopsy on the mass/growth, and determined that it was a "squamous cell carcinoma," describing the growth as a "cancerous trichilemmal cyst basal cell that had grown to massive proportions." Beaumont subsequently removed the mass by "excision" on January 27, 2006. The deceased subsequently suffered a cerebral vascular accident. On March 12, 2006, the deceased expired. Her official cause of death was a "cerebral

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plaintiff's motion for reconsideration the trial court entered a final order on March 19, 2007, "closing the case" because there were "no other issues to resolve."

[2] Beaumont staff further opined that the mass/growth had been neglected "for quite some time," and may have been in existence for "the last 5-8 years gradually increasing in size."

vascular accident [which she had for one month] due to (or as a consequence of) Basal Cell Carcinoma [which she had for] years."

Plaintiff's claims manager, Bobbi Autry, stated that plaintiff had no prior knowledge of the deceased's tumor, and "would not have issued the policy had it known that [the deceased] had a tumor." Accordingly, after plaintiff reviewed the deceased's medical records, it sent defendant a letter stating that it was rescinding the deceased's insurance coverage "under the policy effective as of its inception date of December 1, 2005," because the deceased "made material misrepresentations as to her medical history and also failed to disclose material facts regarding her medical history." Plaintiff enclosed a refund check in the amount of $1,300.26, representing all premiums paid by the deceased as well as her application fee.

On July 20, 2006, plaintiff filed a complaint seeking a declaratory judgment "that the Certificate of Coverage number 4308011 be canceled and rescinded and be declared to be null and void as of its inception date" because the deceased fraudulently misrepresented her condition when filling out her application for insurance coverage. After defendant filed an answer on August 23, 2006, plaintiff filed a motion for summary disposition on October 10, 2006. After hearing the parties' arguments on November 29, 2006, the trial court issued an opinion and order on December 6, 2006, denying plaintiff's motion for summary disposition based on the "innocent third party" exception, which precludes an automobile insurer from rescinding an insurance contract on the basis of fraud when an innocent third party is injured in an automobile accident. The trial court specifically found that "although [the innocent third party exception] has [only] arisen in the context of automobile insurance, there is no reason why it should not be extended to other forms of insurance," despite the fact that there "does not seem to be any case law discussing the innocent third party exception in the context of health insurance." The trial court subsequently found that "both the estate of the deceased and the medical providers who treated the deceased are innocent third parties . . . who might be economically harmed if [plaintiff] is allowed to rescind the contract," and thus, concluded that "the exception for innocent third parties should apply in [this] case," and plaintiff is therefore "liable for coverage for expenses."

On December 20, 2006, plaintiff filed a motion for reconsideration of the trial court's order denying its motion for summary disposition. On March 5, 2007, the trial court issued an opinion and order denying plaintiff's motion for reconsideration based on its finding that the "motion for reconsideration seeks to reargue the same point," which is a more "appropriate issue to raise with the Court of Appeals." On March 19, 2007, the trial court entered a "final order" closing the case because there were "no other issues to resolve." Plaintiff appeals as of right.

II. Analysis

As previously discussed, plaintiff takes issue with the trial court's December 6, 2006, opinion and order denying its motion for summary disposition, finding that it could not rescind its policy with the deceased. We review a trial court's decision to grant or deny a motion for summary disposition de novo, *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence 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).

Here, without addressing whether the deceased made a material misrepresentation[3] when filling out her application for insurance, the trial court denied plaintiff's motion for summary disposition based on the "innocent third party" exception. Relying on *Lake States Insurance Co v Wilson*, 231 Mich App 327; 586 NW2d 113 (1998), and *Lash v Allstate Ins Co*, 210 Mich App 98; 532 NW2d 869 (1995), the trial court found that "although [the exception] has [only] arisen in the context of automobile insurance, there is no reason why it should not be extended" to the situation at hand to protect "both the estate of the deceased and the medical providers who treated the deceased . . . who might be economically harmed if [plaintiff were] allowed to rescind the contract."

We conclude that the trial court erroneously applied the innocent third party exception to this case involving health insurance. By statute, an insurer cannot rescind a no-fault automobile insurance policy based upon misrepresentation once an injury or damage covered by the mandatory policy occurs:

> 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 . . . 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*. [MCL 257.520(f) (emphasis added).]

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[3] We note that an insurer may rescind a health insurance policy if it discovers that an insured made a material misrepresentation on his or her insurance application, regardless of whether the misrepresentation was intentional. *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 129; 713 NW2d 801 (2005); *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998); *Fakhouri v Banner Life Ins Co*, 157 F Supp 2d 751, 757 (ED Mich 2001). A misrepresentation is material if "communication of it would have had the effect of '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.'" *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 253-254; 632 NW2d 126 (2001), quoting *Keys v Pace*, 358 Mich 74, 82; 99 NW2d 547 (1959). For example, if an insurer would not have issued the questioned policy if it had been aware of the questioned misrepresentation, the misrepresentation is material. *Montgomery, supra* at 129; *United of Omaha Life Ins Co v Rex Roto Corp*, 126 F3d 785, 787-788 (CA 6, 1997).

To the contrary, not only is an insurer's right to rescind a health insurance policy not limited by statute, but by statute the insurer is given the right to rescind for certain material misrepresentations:

> The falsity of any statement in the application for any disability insurance policy covered by chapter 34 of this code may not bar the right to recovery thereunder *unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer*.
>
> (1) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder *unless the misrepresentation was material*. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract. [MCL 500.2218 (emphasis added).]

Through enactment of these provisions, the Legislature has clearly expressed a policy choice to allow rescission of health care policies for certain material misrepresentations, while precluding rescission on the same ground for mandatory auto insurance policies once an accident has occurred. It was because of MCL 257.520(f), not because of the will of this Court, that we have applied the innocent third party exception in the context of auto insurance. See *Lake States Insurance Co, supra* at 331 (citing the statute when discussing the exception). As this Court has pointed out, "[u]nder the Michigan Constitution and its division of power between the Legislature and the judiciary, [the judiciary is] only authorized to implement statutes, not change," extend or ignore them for policy reasons or to create a result that it deems just. *Miller v Riverwood Recreation Ctr, Inc*, 215 Mich App 561, 563; 546 NW2d 684 (1996). The trial court erred when it ignored MCL 500.2218 and extended the innocent third party exception created by MCL 257.520(f), to a situation not covered by that statute.

Accordingly, we vacate the trial court's December 6, 2006, and March 5, 2007, orders, and remand this case back to the trial court with instructions to make a determination whether the deceased made a material misrepresentation on her health insurance application with plaintiff. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh