STATE OF MICHIGAN

COURT OF APPEALS

LAURA SPRINGBORN,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee,

and

CORRINE JELKEN,

Defendant.

UNPUBLISHED
October 7, 2010

No. 292064
Livingston Circuit Court
LC No. 08-023596-NI

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant summary disposition of plaintiff's breach of contract claim under MCR 2.116(C)(10). We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In March 2006, plaintiff went to an independent insurance broker to obtain homeowner's insurance with Allstate. The insurance broker, Nichole Goudie, attempted to cross-sell automobile insurance to plaintiff at the same time. However, when Goudie investigated the driving record of plaintiff's husband, Eric Springborn, Goudie realized that she would be unable to issue the policy because Eric had too many violations and points on his driving record. Goudie stated that it was defendant's policy that spouses could not be excluded, and thus plaintiff could not obtain insurance for herself alone.

In October 2006, plaintiff submitted another application for automobile insurance through Allstate, via the Internet. Defendant alleges that plaintiff represented herself as divorced in this application by checking an interactive box on the computer screen. During her deposition, plaintiff stated that she believed she checked the box indicating that she was married, and did not remember checking the "divorced" box:

Q. Now you're saying that you would not have checked divorced or that you don't remember? Because I need to clarify that in fairness to you and to the company.

A. I don't remember checking divorced. I don't see why I would have checked divorced.

Q. If the documentation shows that you did check divorced, would that be an error or are you saying that's wrong, that you didn't do it? Because I need to find that out.

A. No, I'm not saying that I didn't do it. I don't remember doing that.

Defendant issued plaintiff a policy after plaintiff submitted the online application.

On April 4, 2007, plaintiff and her husband were stopped at a railway crossing when they were rear-ended. Eric Springborn was driving the car at the time of the accident. Plaintiff began to experience pain over the next few days, and eventually she ceased working at her position as a factory supervisor. Defendant subsequently voided the policy ab initio, alleging that plaintiff materially misrepresented her marital status on the application.

Plaintiff filed suit alleging that defendant breached its contract with plaintiff when it voided the insurance policy and refused to pay plaintiff's medical expenses. In response to the complaint, defendant asserted that plaintiff made a material misrepresentation on the application, and, therefore, defendant was within its rights to rescind the policy. Subsequently, defendant moved for summary disposition under MCR 2.116(C)(10). The trial court granted the defendant's motion.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). On review, this Court's task is to determine whether any genuine issues of material fact exist such that judgment should not be entered against the non-moving party. See *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence that was presented in the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

"This Court ordinarily reviews preserved evidentiary issues for an abuse of the trial court's discretion and unpreserved evidentiary issues to determine whether there was plain error affecting a party's substantial rights." *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001). However, to the extent that the issue "requires the Court to interpret a rule of evidence, included in the court rules, [ ] de novo review [is] appropriate for that section." *Id.*

A moving party is entitled to summary disposition when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). Once the moving party has supported its motion by producing evidence alleging that there is no genuine issue of material fact, the non-moving party has the burden of producing evidence that genuine issues of material fact exist. *Arthur Land Co, LLC v*

Otsego Co, 249 Mich App 650, 666; 645 NW2d 50 (2002). The court must consider the motions, pleadings, affidavits, and other admissible evidence in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Ruff v Isaac*, 226 Mich App 1, 4; 573 NW2d 55 (1999); see also *USA Cash # 1, Inc v Saginaw*, 285 Mich App 262, 266; 776 NW2d 346 (2009) ("All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact").

Plaintiff first argues that there is a question of fact as to defendant's reason for rescinding the policy. Specifically, plaintiff argues that it is unclear whether defendant rescinded the policy because of plaintiff's alleged misrepresentation, or because of Eric Springborn's driving record. Plaintiff fails to understand that the two issues are one and the same. Defendant states that it rescinded the policy because plaintiff misrepresented her marital status, and as a result of that misrepresentation, it approved a coverage policy for plaintiff when it otherwise would not have done so due to Eric Springborn's driving record at the time of plaintiff's second application. There is no actual factual disagreement as to *why* defendant rescinded the policy, and, thus, plaintiff's argument that there is an issue of fact still in dispute, based on this assertion, is without merit.

That said, whether there is a factual dispute as to whether plaintiff actually misrepresented her marital status is a different issue. Plaintiff asserts that she does not remember indicating that she was divorced when she applied for coverage the second time and that she indicated on her application that she was married but that her husband was living in another city. In an effort to prove that there was no genuine issue of material fact, defendant offered a printout purporting to reflect what plaintiff had entered when completing the online application, including the indication that plaintiff represented herself as divorced. Defendant's entire argument, that there existed no genuine issue of material fact concerning plaintiff's misrepresentation, turns on the admissibility of the printout. See *Ruff*, 226 Mich App at 4. However, defendant did not submit any foundational testimony, affidavits, or other evidence to support the origin or authenticity of the printout, relying instead only on the assertion of its counsel that the printout showed what it purported to show. Plaintiff specifically objected to this in the lower court, arguing that the printout was not the "best evidence" as required by MRE 1001. Plaintiff continues to maintain that the trial court erroneously ruled otherwise and also argues, on appeal, that the printout was not admissible under MRE 901.

"The authenticity of a document and the hearsay problem presented by it are separate issues under the evidentiary rules." *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). The requirement that a document be authenticated "as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). Evidence sufficient to support such a finding includes "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." MRE 901(b)(9).

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided . . .." MRE 1002. "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" MRE 1001(3).

We agree with plaintiff's challenge under MRE 1001. MRE 1001(3) requires that a party submitting evidence generated from data "stored in a computer or similar device" must show that it reflects that data accurately. Aside from defense counsel's mere assertion that the printout accurately reflected the data allegedly entered by plaintiff during the application process, and that defendant allegedly stored in its system, defendant did not introduce any supplementary evidence or testimony to demonstrate that the printout was accurate. For example, defendant did not offer the testimony of anyone in its information technology department to show that the program used by defendant to capture the data input from plaintiff or other applicants was used to create the printout, or whether any error could have occurred in the process to render the printout an inaccurate reflection of plaintiff's input or the stored data. Defendant did not even offer the testimony of any employee with knowledge of the process. Thus, the trial court erred when it considered the content of the printout in ruling on defendant's motion, because defendant did not show that the printout reflected the data accurately, and thus, did not meet the requirements of MRE 1001(3).

Further, we agree with plaintiff that defendant also failed to meet the requirements for admissibility of the printout under MRE 901. Plaintiff's challenge to the inadmissibility of the printout under MRE 901 was not properly preserved, as trial counsel did not object on that ground below. See MRE 103(a)(1); *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003) (objection to evidence on one ground does not preserve appellate attack on a different ground). Thus, we review this claim for plain error affecting plaintiff's substantial rights. *Hilgendorf*, 245 Mich App at 700.

Under the plain error standard, plaintiff must first show that error occurred. MRE 901(b)(9) requires that there must be a "showing that the process or system produces an accurate result." Defendant never submitted supplementary evidence or testimony showing that the defendant's computer system, which takes online applications and transforms them into internal-use printouts, produces accurate results. It is not plaintiff's burden at this stage to show that the system does not produce an accurate result; the initial burden on defendant is to submit admissible evidence to support its motion for summary disposition; i.e., evidence that is *shown to be accurate*. MRE 901; *Arthur Land Co*, 249 Mich App at 666. No information technology or other employee testified, either by deposition or through an affidavit, that the printout was generated in response to information entered by plaintiff. Therefore, defendant did not make a showing sufficient to support a finding that the printout was actually what it purported to be; i.e., an accurate reflection of plaintiff's representations in applying for insurance online. Thus, the trial court erred when it accepted the printout as admissible evidence.

Second, plaintiff must show that the error was plain, i.e., clear or obvious. The error was plain because the only submission by defendant to show an absence of an issue of fact was the single-page computer printout purporting to show that plaintiff had misrepresented herself as divorced. Given the lack of any supporting evidence, it should have been clear to the trial court that the document was inadmissible, absent an appropriate foundation, and, therefore, unusable for purposes of summary disposition as presented.

Lastly, plaintiff must show that the error affected her substantial rights, that is, that the error affected the outcome of the lower court proceedings. Had the trial court properly determined that the printout was not admissible, and, therefore, could not be used to establish the absence of issues of fact, there would have been no basis for the trial court to have granted

defendant's motion for summary disposition. Thus, the trial court's error affected the outcome of the proceedings.

Defendant relies on MCL 450.831 *et seq*. for the proposition that plaintiff's online application constitutes a contract between the parties. Specifically, defendant argues that the representations made by plaintiff as to her marital status are attributable to her under MCL 450.839, and form the basis of the contract between the parties under MCL 450.844. Defendant correctly states the law. However, nothing in the statutes cited by defendant alter the requirement that an electronic record must satisfy evidentiary rules otherwise applicable to a document submitted for purposes of a motion for summary disposition.[1] Therefore, defendant must still establish the proper foundation for admissibility of the printout before summary disposition may be granted on the basis of the data presented therein. If defendant is able to establish the admissibility of the printout, that is, that the printout is an "original" and accurately reflects the data input by plaintiff and stored by defendant in its computer system, defendant will likely be able to show that the printout reflects the agreement between plaintiff and defendant, including any representations made by plaintiff in that agreement. Therefore, should defendant establish the admissibility of the printout screen indicating that plaintiff represented her marital status as divorced during her October 2006 application for auto insurance, that document would likely warrant the granting of summary disposition in defendant's favor.

An insurance carrier may rescind a no-fault insurance policy ab initio when the insured makes material misrepresentations in the application for insurance. *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998). See also *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997); *Farmers Ins Exchange v Anderson*, 206 Mich App 214, 218; 520 NW2d 686 (1994). Rescission is appropriate even if the insured's misrepresentations were unintentional, so long as the insurer relies on those misrepresentations. *Lake States*, 231 Mich App at 331; *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995). 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). There is no requirement that the nature of the misrepresentation causally relate to the accident that results in injury to be material. *Auto-Owners Ins Co v Comm'r of Ins*, 141 Mich App 776, 781-782; 369 NW2d 896 (1985).

Defendant asserts that plaintiff's misrepresentation regarding her marital status was sufficiently material as to allow it to rescind the policy ab initio. Defendant contends that it would not have issued the policy to plaintiff because Eric Springborn's driving record rendered him an unacceptable risk, and therefore, that plaintiff would have been ineligible under its guidelines and policies, as evidence by its denial of coverage to plaintiff and her husband just a few months prior. In *Lash*, the plaintiff sued his insurer for breach of contract after the insurer

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[1] MCL 450.843 provides that "evidence of a record or signature shall not be excluded *solely* because it is in electronic form," (emphasis added); plainly, indicating that such records may be excluded on other evidentiary bases.

voided the policy due to the plaintiff's misrepresentations about his driving record. *Lash*, 210 Mich App at 100. The plaintiff claimed that when he informed the insurer of the dates of his traffic violations, he unintentionally misstated those dates. *Id.* This resulted in the insurer issuing a policy to the plaintiff when it otherwise would not have done so, because he was ineligible for coverage under the insurer's guidelines. *Id.* at 103. This Court held that even though the plaintiff may have mistakenly, rather than intentionally, misrepresented the dates of his infractions, the insurer relied on those representations, and, therefore, was entitled to void the policy. *Id.* at 104.

This case is indistinguishable from the pertinent facts in *Lash*. Here, if defendant establishes that the printout is admissible evidence of plaintiff's representation as to her marital status, defendant will thereby establish that plaintiff, mistakenly or otherwise, represented herself as divorced, even though she was still legally married. As a result of this representation, defendant issued plaintiff a policy when it otherwise would not have done so. Under such circumstances, defendant was entitled to void the policy ab initio. Thus, if defendant establishes that the printout accurately reflects the data input by plaintiff during the application process, it will be entitled to summary disposition of plaintiff's breach of contract claim.

We reverse the trial court's decision, and remand for further proceedings. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra