STATE OF MICHIGAN

COURT OF APPEALS

LATRICE SMITH and ZACHERY CARR,

Plaintiffs-Appellees,

and

CRESCENTOX, INC., TOTAL CARE OF MICHIGAN, LLC, and COMPLETE CARE AND PHYSICAL THERAPY, LLC,

Intervening Plaintiffs-Appellees,

v

AUTO CLUB GROUP,

Defendant-Appellant,

and

MICHIGAN ASSIGNED CLAIMS PLAN and JOHN DOE INSURANCE COMPANY,

Defendants.

UNPUBLISHED
April 29, 2021

No. 352662
Wayne Circuit Court
LC No. 16-017708-NF

Before: GLEICHER, P.J., and BORRELLO and SWARTZLE, JJ.

PER CURIAM.

In this no-fault action, defendant appeals as of right the trial court's final judgment. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This case arises from a car accident which occurred when Latrice Smith was driving her car and Zachery Carr was a passenger. At the time of the accident, Smith had an insurance policy

with defendant that covered the vehicle involved in the accident. At some point prior to suit being filed, defendant discovered what it claimed constituted a discrepancy between addresses listed in Smith's application for the insurance policy and the address listed as Smith's on the police report of the accident. Defendant considered this a material misrepresentation or false information and sent Smith a letter of rescission. The letter of rescission detailed defendant's reasoning for the rescission and indicated that Smith would receive a refund of her premium. Defendant then refunded Smith's premium through an electronic funds transfer (EFT), which automatically refunded the premium to Smith's credit card. Smith testified that she received the letter of rescission and the refund of her premium. However, she stated that she did not use the refund; rather, she set it aside.

Smith and Carr filed a complaint, instituting the present no-fault action and alleging that defendant owed them PIP benefits. Intervening plaintiffs, who provided medical care to Smith and Carr, were allowed to intervene. Defendant moved for summary disposition, arguing that Smith and Carr were not entitled to PIP benefits from defendant because defendant rescinded Smith's insurance policy *ab initio*, and Smith consented to the rescission. The trial court held a hearing on defendant's motion for summary disposition and ultimately denied the motion, concluding that a genuine issue of material fact existed regarding whether Smith consented to the rescission.

Defendant moved for reconsideration, arguing that the trial court relied on the false belief that Smith received a physical check, rather than an EFT, when deciding to deny defendant's motion for summary disposition. The trial court denied defendant's motion for reconsideration. This appeal ensued.

II. ANALYSIS

Defendant argues on appeal that no genuine issue of material fact exists regarding whether Smith consented to the rescission of her insurance policy, and therefore, the trial court erred by denying its motion for summary disposition.

"We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *El-Khalil*, 504 Mich at 160. "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id.* "A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a matter in which reasonable minds could differ." *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68; 919 NW2d 439 (2018).

"Insurance policies are contracts subject to the same contract construction principles that apply to any other species of contract." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 399; 919 NW2d 20 (2018) (quotation marks and citations omitted). "[I]t is well settled that an insurer is entitled to rescind a policy *ab initio* on the basis of a material misrepresentation made in an application for no-fault insurance." *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 445; 889 NW2d

759 (2016). However, "to constitute a mutual rescission there must of necessity be a mutual release of further obligations under the contract and a restoration of the status quo." *Tuomista v Moilanen*, 310 Mich 381, 384; 17 NW2d 222 (1945) (quotation marks and citation omitted). "A mutual rescission may be inferred from the conduct of the parties clearly evidencing their intention to treat the contract as at an end." *Young v Rice*, 234 Mich 697, 701; 209 NW 43 (1926) (quotation marks and citation omitted). "The rescission of a contract by mutual consent does not require a formal agreement or release, but may result from any act or any course of conduct of the parties which clearly indicates their mutual understanding that the contract is abrogated or terminated, or from the acquiescence of one party in its explicit repudiation by the other." *Kundel v Portz*, 301 Mich 195, 208; 3 NW2d 61 (1942) (quotation marks and citation omitted).

"A mutual rescission may be inferred from the conduct of the parties clearly evidencing their intention to treat the contract as at an end." *Young*, 234 Mich at 701. (quotation marks and citation omitted). In *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938), our Supreme Court adopted the description of rescission provided by 1 Black, Rescission and Cancellation (2d ed), § 1: "To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the status quo." Additionally, the other party's acceptance of the return of the consideration it paid toward the contract creates a "mutual agreement" or mutual "assent" to rescind the contract and excuses all the duties and rights flowing from that contract. 13 Corbin, Contracts (rev ed), § 67.8, pp 47-49; 29 Williston, Contracts (4th ed), § 69:50, pp 119-121, § 73:15, pp 48-49.

Defendant argues that no genuine issue of material fact exists regarding whether mutual rescission occurred because Smith admitted to receiving the letter of rescission, acknowledged receiving the premium refund, and did not return the refund to defendant. However, defendant's characterization of the "facts" is not an accurate representation of the testimony. While Smith admitted to receiving the letter of rescission, acknowledged receiving the premium refund, and did not return the refund to defendant, Smith testified that she set the refunded money aside and did not use it. We note that defendant directs this Court to a number of unpublished decisions where this Court has held that mutual recession occurred. However, in each of those cases, the insurance company refunded the premium in the form of a check and the insured endorsed and cashed the check. *e.g. Green v Meemic Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued August 20, 2020 (Docket No. 348651). Unlike *Green*, here, defendant sent the funds back to Smith via an EFT. As previously stated, Smith's testimony was that she did not use the money but rather, she set it aside. As such, Smith's conduct did not clearly indicate a "mutual understanding that the contract [was] abrogated or terminated" or acquiescence to defendant's rescission of the insurance policy. *Kundel*, 301 Mich at 208. Because the trial court had no evidence that Smith used or "cashed" the money refunded to her, viewing the evidence in a light most favorable to Smith, reasonable minds could differ regarding whether Smith consented to the rescission of the insurance policy. *Puetz*, 324 Mich App at 68. The trial court therefore did not err by denying defendant's motion for summary disposition.

Affirmed. Plaintiff having prevailed may tax costs. MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Brock A. Swartzle