# STATE OF MICHIGAN

# COURT OF APPEALS

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DAHLIA TERPENING,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant,

and

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellee.

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UNPUBLISHED
February 15, 2005

No. 251232
Barry Circuit Court
LC No. 01-000357-NF

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the trial court's order denying plaintiff's motion for summary disposition, granting summary disposition in favor of defendant Farm Bureau Mutual Insurance Company of Michigan, and dismissing plaintiff's cause of action. The court rejected plaintiff's argument that defendant failed to effectively cancel a no-fault insurance policy issued by defendant to plaintiff. We reverse and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was involved in a motor vehicle accident on May 22, 2000, and subsequently commenced this action to recover first-party no-fault benefits under an automobile insurance policy issued by defendant. Plaintiff moved for summary disposition under MCR 2.116(C)(10) with regard to the question whether an "auto cancellation notice" sent to her by defendant in April 2000, indicating that the policy was cancelled effective March 24, 2000, effectively cancelled the policy. The notice was sent after plaintiff's check in payment of the first premium installment was dishonored by the bank for non-sufficient funds (NSF). The trial court determined that the policy was effectively cancelled and, therefore, granted summary disposition in favor of defendant.

An appellate court reviews de novo issues concerning the proper interpretation of a statute and a trial court's grant or denial of a motion for summary disposition. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp,* 469 Mich 177; 183; 665 NW2d 468 (2003). If it appears that the nonmoving party is entitled to judgment, the court may grant summary disposition in favor of the nonmoving party. MCR 2.116(I)(2).

The trial court erred in determining that defendant was entitled to judgment on the cancellation issue. Pursuant to MCL 500.3020(1)(b), defendant was required to issue an insurance policy that provided for "not less than 10 days' written notice of cancellation." The purpose of the notice requirement is to give the insured time to obtain other insurance or to put his or her affairs in order so as not to run the risk of operating a motor vehicle without insurance. *Depyper v Safeco Ins Co,* 232 Mich App 433, 440; 591 NW2d 344 (1998).

The insurance policy issued by defendant comports with this notice requirement because it provides that "if the named insured fails to discharge when due any of his obligations in connection with the payment of premium for this policy or any installment thereof, this policy may be cancelled by the company by mailing to such insured, by first class mail, written notice stating when not less then ten days thereafter such cancellation shall be effective." Defendant did not strictly comply with this provision, however, because the "auto cancellation notice" that it sent to plaintiff in April 2000 stated that the effective date of cancellation was March 24, 2000, which was the date of plaintiff's insurance application.

As a general rule, a cancellation provision requires strict compliance to be effective, unless "its application does not serve its purpose of preserving the contract intended by the parties." *Blekkenk v Allstate Ins Co,* 152 Mich App 65, 74; 393 NW2d 883 (1986). This rule serves to protect the rights and interests of both parties to the insurance policy. *Id.*

We reject defendant's claim that a rule of substantial compliance, rather than strict compliance, governs this case. Defendant's reliance on *Nowell v Titan Ins Co,* 466 Mich 478; 648 NW2d 157 (2002), is misplaced because the Supreme Court in *Nowell* did not apply a rule of substantial compliance. Rather, it construed MCL 500.3020 as not requiring that an insured receive actual notice.

Nonetheless, even if we were to recognize a rule of substantial compliance, the undisputed facts in this case do not establish that defendant substantially complied with the notice requirement. In *Cooper v State Farm Mut Auto Ins Co,* 33 Mich App 390; 190 NW2d 350 (1971), an insurer gave the required cancellation notice, but did not include language required under former MCL 500.3020, that the notice specify that any excess premium would be refunded. Although lacking technical compliance with the statutory requirement, there was evidence that the notice disclosed relevant information relative to any excess premium. Because the insured's cancellation was for nonpayment of the premium and the notice disclosed that the plaintiff had paid $10.50 too little, this Court found that the statute was substantially complied with and, therefore, the cancellation was effective. *Id.* at 394.

In the present case, however, defendant did not comply, substantially or otherwise, with the cancellation provision's time requirement. To apply the cancellation provision in the policy,

plaintiff necessarily would have to be charged with notice that she was entitled to at least ten days of coverage under the policy. Plaintiff would also have to conclude that defendant intended no more than ten days, notwithstanding defendant's use of a cancellation date in its notice that could not possibly comply with either the insurance policy or the statute. Defendant's mistake does not support that it substantially complied with the cancellation provision in the policy. Nor does the fact that plaintiff had more than ten days before the accident to cure any policy defects or obtain other insurance demonstrate substantial compliance. Allowing defendant to avoid its obligation to provide proper notice would not protect plaintiff's rights and interests under the insurance policy. *Blekkenk, supra* at 74. Hence, as a matter of law, defendant's attempted cancellation of the insurance policy was ineffective. Cf. *Farmers Ins v Progressive Casualty Ins Co,* 84 Mich App 474, 483; 269 NW2d 647 (1978) (notice of intent to cancel insufficient to establish an effective cancellation under MCL 500.3020). Summary disposition should have been granted in favor of plaintiff, rather than defendant, with regard to the effectiveness of defendant's cancellation.

Apart from the question of the effectiveness of the cancellation notice, defendant offers two alternative theories concerning the enforceability of the insurance policy. Considering that defendant did not move for summary disposition with regard to either theory, but merely offered the theories in opposition to plaintiff's motion for summary disposition, on the question of cancellation, we find no alternative basis for affirmance.

With regard to defendant's theory that plaintiff's tender of the NSF check caused the insurance policy to terminate automatically, we note that MCL 500.3020 does not preclude parties from agreeing to automatic termination based on nonpayment of the premium or some other event. The statute applies to situations in which termination is not automatic, but rather optional with the insurer. *Wynn v Farmers Ins Group,* 98 Mich App 93, 97; 296 NW2d 197 (1980). Nonetheless, summary disposition under MCR 2.116(C)(10) is proper only if the parties' insurance policy unambiguously provides for automatic termination when an applicant tenders a NSF check as the first premium installment. See generally *Henderson v State Farm Fire & Casualty Co,* 460 Mich 348, 353; 596 NW2d 190 (1999); *SSC Associates Ltd Partnership v General Retirement System,* 192 Mich App 360, 363; 480 NW2d 275 (1991). In this regard, a court looks to the contract as a whole and gives meaning to all of its terms when construing the parties' intent. See *Auto-Owners Ins v Harrington,* 455 Mich 377, 381; 565 NW2d 839 (1997), and *Hagerl v Auto Club Group Ins Co,* 157 Mich App 684, 690; 403 NW2d 197 (1987). Here, none of the policy provisions on which defendant relies can reasonably be construed as providing for automatic termination for plaintiff's tender of an NSF check toward payment of the first premium installment.

The prefatory statement in the insurance policy regarding the premium constituting consideration contains no automatic termination language. The amendatory endorsement for renewals is not applicable to the facts in this case because plaintiff tendered the NSF check for an initial policy, not a renewal policy. Finally, the amendatory endorsement that "[n]o action can be brought against the company, unless there has been full compliance with all policy provisions" plainly does not contain automatic termination language. It establishes only a condition for an insured to file a lawsuit. Limiting our review to whether plaintiff's tender of the NSF check caused an automatic termination of the insurance policy, we hold that defendant has not established any alternative ground for affirming the trial court's order of summary

disposition. We express no opinion regarding whether defendant can establish a basis for enforcing the condition in the trial court on remand.

Further, defendant's rescission theory, grounded on plaintiff's alleged innocent misrepresentation, does not afford an alternative basis for affirming the trial court's order. First, defendant has not established that it properly pleaded plaintiff's alleged misrepresentation as an affirmative defense. See MCR 2.111(F), and *United States Fidelity & Guaranty Co v Black,* 412 Mich 99, 118 n 10; 313 NW2d 77 (1981). Second, even if properly pleaded, defendant has not established that it was entitled to judgment as a matter of law. An innocent misrepresentation in the making of a contract requires proof of a false representation. *M & D, Inc v McConkey,* 231 Mich App 22, 27-28; 585 NW2d 33 (1998). Although a material misrepresentation in an insurance policy can provide grounds for rescission, *Lash v Allstate Ins Co,* 210 Mich App 98, 103; 532 NW2d 869 (1995), the representation must relate to a past or existing fact, rather than a future promise. *Forge v Smith,* 458 Mich 198, 212; 580 NW2d 876 (1998). Here, plaintiff's alleged misrepresentation relates to her performance under the insurance policy. Stated otherwise, the alleged misrepresentation relates to plaintiff's promised consideration for the insurance. *Katinsky v Auto Club Ins Ass'n,* 201 Mich App 167, 171; 505 NW2d 895 (1993). The evidence regarding plaintiff's tender of the NSF check, viewed most favorably to plaintiff, does not demonstrate a false statement of an existing or past fact in an insurance application.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen