S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CITIZENS INSURANCE COMPANY OF AMERICA, Plaintiff-Appellee, v HILDA MAE RIPPY, PHILLIP GOLDMAN, and BARBARA GOLDMAN, Defendants, and MYRA LOU TRENT, Personal Representative of the Estate of CYRUS E. TRENT, Deceased, Defendant-Appellant.	UNPUBLISHED September 17, 2009 No. 284510 Genesee Circuit Court LC No. 06-084984-CK

CITIZENS INSURANCE COMPANY OF AMERICA, Plaintiff-Appellee, v HILDA MAE RIPPY, PHILLIP GOLDMAN, and BARBARA GOLDMAN, Defendants-Appellants, and MYRA LOU TRENT, Personal Representative of the Estate of CYRUS E. TRENT, Deceased, Defendant.	No. 284511 Genesee Circuit Court LC No. 06-084984-CK

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

PER CURIAM.

In Docket No. 284510, defendants, Hilda Mae Rippy, Phillip Goldman, and Barbara Goldman, appeal as of right an order granting summary disposition to plaintiff, Citizens Insurance Company of America. In Docket No. 284511, defendant Myra Lou Trent, as personal representative of the Estate of Cyrus E. Trent, deceased, appeals as of right the same order.[1] We affirm.

Barbara's mother, Rippy, was in a car accident that resulted in the death of Cyrus E. Trent. The Estate of Trent filed a claim against Phillip and Barbara's umbrella insurance policy with plaintiff, alleging that Rippy was covered as a member of Phillip and Barbara's household because she lived above the garage. Plaintiff subsequently rescinded the umbrella insurance policy and filed a declaratory judgment action with the trial court to establish its indemnity with respect to the Estate of Trent's claim. Subsequently, plaintiff's motion for summary disposition was granted on grounds including that the umbrella insurance policy in effect at the time of the accident could be rescinded and was void ab initio because Phillip misrepresented the members of the household in the application for the policy by omitting Rippy's name.

On appeal, defendants claim that the trial court erred when it relied on *Oade v Jackson Nat'l Life Ins Co of Mich*, 465 Mich 244; 632 NW2d 126 (2001), to grant the motion for summary disposition. After de novo review, we disagree. See *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

In *Oade*, *supra* at 246, 248, the insured completed an application for life insurance stating that he had been treated for chest pain or other disorders of the heart, but had not been hospitalized for this treatment. *Id*. By contract, however, the insured had a duty to ensure that his answers on the application remained true until the effective date of the policy. *Id*. After he completed the application and before the policy was issued, the insured went to the emergency room complaining of chest pains and stayed overnight for tests. *Id*. at 248. The insured did not inform the insurer of the hospitalization and the insurer issued the policy. *Id*. at 249. When the insured subsequently died of a heart attack, the insurer denied the beneficiaries' claim for payment of death benefits. *Id*. This Court concluded that the insured's misrepresentation was not material because there was a possibility that a policy would have been offered by the insurer at a higher rate. *Id*. at 250. The Supreme Court disagreed. *Id*. at 253-254. Quoting *Keys v Pace*, 358 Mich 74, 82-83; 99 NW2d 547 (1959), it stated that "a fact or representation in an application is 'material' where 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." *Id*. at 254. Because there was no genuine issue of material fact regarding the materiality of the insured's misrepresentations in *Oade*, the insurer could avoid the contract. *Id*. at 256.

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[1] This Court consolidated the appeals. *Citizens Ins Co of America v Rippy*, unpublished order of the Court of Appeals, issued April 9, 2008 (Docket Nos. 284510 and 284511).

Defendants challenge the Supreme Court's materiality rule in *Oade* by claiming that misrepresentations leading to a minor increase in the premium should not be equally material as misrepresentations leading to significant increases in the premium. They suggest that a better test would be whether the insurer would have refused to issue any policy for insurance with the applicant. Here, plaintiff would not have refused to issue a policy, but rather, would have only increased the premium if Rippy had been listed. Thus, defendants maintain that the omission of Rippy was not material.

In *Oade*, *supra* at 254, our Supreme Court rejected a similar argument, overruling *Zulcosky v Farm Bureau Life Ins Co of Mich*, 206 Mich App 95; 520 NW2d 366 (1994). It cited MCL 500.2218(1), which provides:

> 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. [*Oade*, *supra* at 253.]

Interpreting this statute, the *Oade* Court emphasized the Legislature's use of the words refusal "to make *the* contract," as opposed to the use of the words refusal to make "'a' contract." *Id*. at 254 (emphasis in quotation). It stated, "[t]he proper materiality question under the statute is whether 'the' contract issued, at the specific premium rate agreed upon, would have been issued notwithstanding the misrepresented facts." *Id*. Accordingly, here, defendants' argument that a minor increase in the premium should not be as material as misrepresentations leading to significant increases in the premium must fail.

Next, defendants question whether MCL 500.2218 should apply to the umbrella policy. They maintain that the materiality rule in MCL 500.2218 is limited to policies for disability insurance.

MCL 500.2218 provides, in part:

> 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. [Emphasis added.]

MCL 500.2218 further provides, in part:

> (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. [Emphasis added.]

Despite language in MCL 500.2218 referencing disability insurance, in *Oade*, *supra* at 251, our Supreme Court stated that the "touchstone of the statute's applicability is 'misrepresentation.'" Thus, in *Oade*, even though the contract at issue was for life insurance, not disability insurance,

the Supreme Court concluded that MCL 500.2218 applied because the insured made a misrepresentation. *Id*.

Likewise, in this case, the contract at issue was not for disability insurance. Rather, it was for umbrella coverage of personal injury or property damage that the insured would be liable to pay. Therefore, for MCL 500.2218 to be applicable according to *Oade*, a misrepresentation must have occurred. Pursuant to MCL 500.2218(2), a misrepresentation is a "false representation." A representation is a "statement as to past or present fact, made to the insurer by or by the authority of the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof." MCL 500.2218(2).

In 2001, Phillip met with his brother, Lawrence, an independent insurance agent at Lake Agency, to complete the application for the umbrella policy. Phillip answered the questions on the application verbally and Lawrence recorded them. Specifically, Lawrence recorded that Phillip, Barbara, and their daughters Blaine and Paige were members of the household, but he did not list Rippy. Phillip's answers and Lawrence's recordation were made to induce plaintiff to issue the 2001 to 2002 umbrella insurance policy, thereby constituting representations. Phillip's representation with respect to the members of the household was false and constituted a misrepresentation because Rippy lived above the garage and Phillip believed that she was a member of the household. In light of the misrepresentation on the 2001 application, MCL 500.2218 applied.

Phillip and Barbara entered into renewed contracts for umbrella insurance coverage from 2002 to 2006. An employee at Lake Agency, Jillyn Crooks, stated that Lake Agency employees complete renewal questionnaires for insureds based on information in their previous applications for insurance. Then, the employees send the renewal questionnaires to the insurer. Relevant to the instant matter, Phillip faxed the 2006 renewal questionnaire to Lake Agency and Crooks and a personal lines manager, Debra Gray, completed it for Phillip and Barbara based on their 2001 application. Because the renewal questionnaires were completed by Lake Agency with Phillip's authority to induce the 2006 to 2007 renewal contract, the answers regarding the members of the household in the renewal questionnaires constituted representations. The 2006 renewal questionnaire did not list Rippy as a member of the household and Phillip admitted that this omission was false. Thus, the representations in the 2006 renewal questionnaire constituted misrepresentations and MCL 500.2218 applied.

Defendants maintain that, unlike the applicant in *Oade*, Phillip did not sign and verify the 2001 application and renewal questionnaires. Consequently, defendants appear to argue that Phillip did not make any representations. This argument fails. Nothing in the definition of representation in MCL 500.2218(2) requires the applicant for insurance to sign and verify representations. Furthermore, even though Phillip and Barbara did not sign and verify the representations in the 2001 application and renewal questionnaires, they contractually adopted them by the terms of the umbrella insurance policy. The umbrella insurance policy stated:

> By accepting this policy **you** agree that:
>
> (1) The statements in **your** application and declarations page and all future notices relating to the **primary policies** are:

(A) Offered to induce **us** to issue and continue this policy;

(B) **Your** agreements and representations and;

(C) Relied on by **us** as true in issuing and continuing this policy.

Defendants also maintain that MCL 500.4503, requiring the intent to deceive, should apply instead of MCL 500.2218. MCL 500.4503 provides, in relevant part:

> A fraudulent insurance act includes, but is not limited to, acts or omissions committed by any person who knowingly, and with an intent to injure, defraud, or deceive:
>
> (a) Presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer or any agent of an insurer, or any agent of an insurer, reinsurer, or broker any oral or written statement knowing that the statement contains any false information concerning any fact material to an application for the issuance of an insurance policy.

This statute only defines a fraudulent insurance act for the purposes of MCL 500.4511, which provides that a person who commits a fraudulent insurance act is guilty of a felony. Unlike MCL 500.2218, MCL 500.4503 does not address circumstances in which an insurer may rescind a contract of insurance. Consequently, the statute is inapplicable to the facts of this case. Moreover, this Court has repeatedly held that rescission is justified for innocent misrepresentations if the party relies on the misrepresentations. See *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998); *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995).

In summary, Phillip misrepresented the members of his household in the 2001 application and this misrepresentation was manifested on his behalf in the renewal questionnaires. See *Oade*, *supra* at 254. Plaintiff relied upon the 2006 renewal questionnaire to make the 2006 to 2007 renewal contract. Because plaintiff would have charged a higher premium for umbrella coverage if it had known that Rippy was a member of the household, the misrepresentation was material. See *id*. Thus, the trial court did not err when it allowed plaintiff to rescind the contract, declared it void ab initio, and granted plaintiff's motion for summary disposition. See *Lake States Ins Co*, *supra* at 331.

Defendants' next argument, that the easily ascertainable exception precludes plaintiff's defense of rescission, is not included in their Statement of Questions Presented. See MCR 7.212(C)(5); *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997). Thus, defendants' claim is not properly before this Court.

Defendants further argue that Lake Agency was the agent of plaintiff, so plaintiff should be bound by any mistakes made by Lake Agency in obtaining Phillip and Barbara's umbrella coverage. We disagree.

An agent's authority may be actual or apparent. *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 216; 565 NW2d 907 (1997).

> Actual authority may be either express or implied. Implied authority is the authority that an agent believes the agent possesses. Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent. [*Id*. (internal citations omitted).]

"It is hornbook learning that because one is an agent for one purpose he is not an agent for all." *Sherman v Korff*, 353 Mich 387, 397; 91 NW2d 485 (1958).

"[A]n insurance agent typically acts on behalf of the parties to facilitate the sale and execution of [an insurance] policy." *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008). "When an insurance policy 'is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer.'" *Id*., quoting *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998).

In *Genesee Foods Services*, *supra* at 656, the insurer and an independent insurance agency had an agency agreement giving the independent insurance agency authority to sell, accept, and bind the insurer to insurance contracts in exchange for a commission on the sale. Despite this agreement creating a "limited fiduciary relationship," this Court stated that when the independent insurance agency assisted the insureds to find an insurer that could provide them with the most comprehensive coverage and to ensure that the insurance contract properly addressed their needs, the independent insurance agency's primary fiduciary duty of loyalty rested with insureds. *Id*. Therefore, this Court concluded that the independent insurance agency was the agent of the insureds, not the insurer. *Id*. at 656-657. Consequently, the independent insurance agency was not released from liability when the insureds signed a settlement agreement releasing the insurer and its agents from liability for coverage following a fire. *Id*. at 657.

Like the parties in *Genesee Foods Services*, *supra* at 656, plaintiff and Lake Agency had an agency agreement expressly giving Lake Agency authority to sell, accept, and bind plaintiff to insurance contracts in exchange for a commission on the sale. There was also some evidence of Lake Agency's apparent authority to bind plaintiff to insurance contracts because plaintiff's service center is staffed by plaintiff's employees, but located at Lake Agency. When customers call the service center to make a change in coverage, plaintiff's employees answer the telephone "Lake Agency." Notably, however, conflicting evidence existed regarding Lake Agency's apparent authority because Phillip and Barbara's 2001 application stated, "No coverage is bound until this application is accepted by the Company."

Even if a question of fact existed regarding whether Lake Agency had a limited fiduciary duty to bind plaintiff to insurance contracts, it was not material to the resolution of plaintiff's motion for summary disposition. Instead, following *Genesee Foods Services*, *supra* at 656-657, Lake Agency's primary fiduciary relationship was with Phillip and Barbara in the facilitation of the insurance contract as an independent insurance agent. Lake Agency is an independent insurance agent because it represents over 20 insurers. Here, Lawrence acted as an independent insurance agent because Phillip called him into action. See Restatement Agency, 3d, § 3.14. Phillip requested coverage from Lawrence and Phillip urged Lawrence to take care of all of the

family's insurance matters. Moreover, even though plaintiff supplied the insurance forms and determined policy premiums, Phillip controlled Lake Agency's actions because it completed the 2001 application and subsequent renewals based on Phillip's responses to application questions. See *id*. In light of these facts, Lake Agency was the agent for Phillip and Barbara, not plaintiff, in the facilitation of the insurance contract. Consequently, defendants' argument that Lake Agency was the agent of plaintiff and plaintiff should be bound by any mistakes made by them fails.

In light of our conclusions above, that the trial court did not err when it allowed plaintiff to rescind the 2006 to 2007 renewal contract, declared the 2006 to 2007 renewal contract void ab initio, and granted plaintiff's motion for summary disposition, this Court need not address plaintiff's remaining argument on appeal that the trial court erred when it relied on *Merrill v Fidelity & Cas Co of NY*, 304 F2D 27 (CA 6, 1962), as an alternative ground for granting plaintiff's motion for summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra