STATE OF MICHIGAN

IN THE SUPREME COURT

LEJUAN RAMBIN,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court No. 146256

Court of Appeals No. 305422

Wayne County Circuit Court
No. 10-009091-NF

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146256

**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT, ALLSTATE INSURANCE COMPANY'S APPLICATION FOR LEAVE TO APPEAL**

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## JURISDICTIONAL STATEMENT

Plaintiff-Appellee does not dispute that the Supreme Court has jurisdiction to consider Defendant-Appellant's application for leave to appeal.

## COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **Whether Defendant-Appellant Allstate failed to raise and preserve the argument in the trial court and Court of Appeals that disputed material facts preclude summary disposition on the issue whether Plaintiff-Appellee unlawfully took the motorcycle under MCL 500.3113(a), precluding Supreme Court review.**

Plaintiff-Appellee states: Yes.

Defendant-Appellant, in violation of MCR 7.306(A) and MCR 7.212(C)(7), omits that it failed to preserve this argument in the trial court and Court of Appeals.

Since Defendant-Appellant did not raise this issue in the trial court, the trial court did not address it.

Since Defendant-Appellant did not raise this issue in the Court of Appeals, the Court of Appeals did not address it.

II. **Whether Defendant-Appellant Allstate fails to cite any admissible evidence raising a genuine issue of material fact that Plaintiff-Appellee violated the Michigan Penal Code and unlawfully took the motorcycle.**

Plaintiff-Appellee states: Yes.

Defendant-Appellant states: No.

Since Defendant-Appellant did not raise this issue in the trial court, the trial court did not address it.

Since Defendant-Appellant did not raise this issue in the Court of Appeals, the Court of Appeals did not address it.

## COUNTER-STATEMENT OF GROUNDS FOR SUPREME COURT REVIEW

Defendant-Appellant, Allstate Insurance Company ("Allstate") applies for leave to appeal from the Court of Appeals' unanimous, August 30, 2012 published decision reversing the Wayne Circuit's July 15, 2011 order granting its motion for summary disposition and denying Plaintiff-Appellee, Lejuan Rambin's ("Plaintiff's") motion for summary disposition. (Allstate's Exs A and C).

In this action for first-party no-fault benefits, relying on *Amerisure Insurance Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009), Allstate moved for summary disposition, arguing that, as a matter of law, Plaintiff unlawfully took the motorcycle he was operating at the time of the accident under MCL 500.3113(a) because he did not have the actual owner's permission. Plaintiff also moved for summary disposition, arguing that, as a matter of law, he did not unlawfully take the motorcycle because he believed he was borrowing it from a person who claimed to be the actual owner and did not know the motorcycle had been stolen. Neither Allstate nor Plaintiff argued that the material facts on the unlawful taking issue were in dispute.

Applying the strict-liability-type standard of *Amerisure v Plumb, supra*, the trial court granted Allstate's motion for summary disposition, holding that, because Plaintiff lacked the actual owner's consent, he unlawfully took the motorcycle (even if he innocently believed he borrowed the motorcycle from the actual owner). Plaintiff appealed, arguing that the trial court erroneously denied his motion for summary disposition and granted Allstate's motion. Allstate argued that the trial court properly applied *Amerisure v Plumb* and granted its motion for summary disposition. Neither Plaintiff nor Allstate argued, before the Court of Appeals released its opinion, that disputed material facts precluded summary disposition. Instead, both parties argued

that the facts mandated summary disposition, as a matter of law, on the unlawful taking issue.

Following the Supreme Court's recent holding in *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503; 821 NW2d 117 (2012), that determination of whether an unlawful taking rests on whether the Michigan Penal Code, most pertinently, MCL 750.413 and MCL 750.414 was violated, on August 30, 2012, the Court of Appeals unanimously reversed the trial court's order and remanded for entry of summary disposition for Plaintiff on the unlawful taking issue. (Opinion and concurrence – Allstate's Ex A). The Court of Appeals concluded that, since the undisputed material facts show that Plaintiff did not know the motorcycle was stolen and believed he was borrowing the motorcycle from someone who claimed to be the rightful owner, Plaintiff did not violate MCL 750.413 and MCL 750.414 and, as a matter of law, did not unlawfully take the motorcycle under MCL 500.3113(a).

After losing the legal, summary disposition issue it had exclusively litigated, Allstate fired its prior counsel, hired a new attorney, and filed a motion for reconsideration in the Court of Appeals arguing, for the first time, that a genuine issue of material fact precluded summary disposition on whether Plaintiff unlawfully took the motorcycle. Recognizing that a party cannot raise a new issue in a motion for reconsideration, the Court of Appeals properly denied Allstate's motion. (10/19/12 order – Allstate's Ex B).

Now, Allstate applies for leave to the Supreme Court. Freely conceding that, pursuant to *Spectrum Health, supra*, the Court of Appeals correctly reversed the order granting its motion, (Allstate's application, pp 3, 7), Allstate tries to erase and reboot the

entire trial court and appellate record, raising the unpreserved argument that disputed material facts preclude summary disposition for either party.

To make matters worse, in violation of MCR 7.306(A) and MCR 7.212(C)(7), Allstate fails to even notify this Court that its "material fact question" issue is unpreserved. Instead, Allstate wrongly criticizes the Court of Appeals for stating that "[t]he material facts are undisputed." (Allstate's application, p 7). Allstate's application also does not present any argument for why one of the narrow exceptions to the issue-preservation rule might somehow apply.

As demonstrated in this response, Allstate's application for leave to appeal is totally devoid of merit. Allstate cannot possibly hope to obtain Supreme Court review by withholding the fact that the one issue its application raises is unpreserved. This Court has repeatedly held that it will not review an issue – particularly an argument that the facts are in dispute – that was not raised in the trial court or Court of Appeals. In addition, Allstate's belated attempt to dispute the facts is unsupported by admissible record evidence. Allstate principally relies on the police/investigation report – which constitutes hearsay inadmissible for consideration in a motion for summary disposition and does not rebut Plaintiff's testimony that he borrowed the motorcycle from someone claiming to be the rightful owner.

Allstate's application not only fails to present any meritorious grounds for Supreme Court review, but borders on a vexatious pleading under MCR 7.316(D)(1)(b). By omitting the fact that its new issue was unpreserved, Allstate has "grossly disregarded the requirements of a fair presentation of the issues to the Court." Plaintiff accordingly and respectfully requests that this Honorable Court deny Allstate's application for leave to appeal.

## INTRODUCTION

In both the trial court and in its Court of Appeals brief, Defendant-Appellant Allstate Insurance Company ("Allstate") exclusively argued that, accepting Plaintiff-Appellee, Lejuan Rambin's ("Plaintiff's") testimony that he borrowed the motorcycle from a person he believed to be the owner, under *Amerisure Insurance Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009), he unlawfully took the motorcycle because he did not have authority traceable to the actual owner. Allstate never argued, in either the trial court or its Court of Appeal brief, that there was a genuine issue of material fact on the issue of unlawful taking that precluded summary disposition.

On August 30, 2012, the Court of Appeals issued its decision holding, pursuant to this Court's recent opinion in *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503; 821 NW2d 117 (2012), that because Plaintiff undisputedly believed he was borrowing the motorcycle from the actual owner, he lacked the requisite knowledge or intent to violate the Michigan Penal Code, specifically MCL 750.413 and MCL 750.414, and accordingly, as a matter of law, did not unlawfully take the motorcycle under MCL 500.3113(a). Immediately after release of the Court of Appeals' decision, Allstate fired its previous counsel, hired a new attorney, and filed a motion for reconsideration in the Court of Appeals arguing, for the first time, that evidence raises a material fact question whether Plaintiff unlawfully took the motorcycle. Recognizing that a party cannot raise an issue for the first time in a motion for reconsideration, (see below), the Court of Appeals properly denied Allstate's motion.

Allstate's new attorney now files an application for leave to appeal in the Supreme Court. Conceding that, pursuant to *Spectrum*, Plaintiff did not unlawfully take the vehicle under MCL 500.3113(a) if he lacked criminal knowledge or intent, Allstate's

application raises the unpreserved argument that disputed material facts preclude summary disposition on the unlawful taking issue. This Court has repeatedly held that it will not consider arguments – particularly fact-based arguments – that were not preserved in the trial court and Court of Appeals. Allstate's application for leave to appeal, which borders on a vexatious pleading under MCR 7.316(D)(1)(b), (see above), should be denied.

## COUNTER-STATEMENT OF FACTS

### Underlying Facts

Aside from raising the unpreserved argument that disputed material facts preclude summary disposition, Allstate's application alleges facts unsupported by admissible record evidence and omits substantial facts that were undisputed in the trial court and Court of Appeals. Plaintiff presents this record, pointing out the deficiencies and omissions in Allstate's application.

In 2008, for family-related reasons, Plaintiff quit his job in Tennessee and moved back to Michigan. (Rambin dep, pp 10-11, 14 – Allstate Ex I). Plaintiff had a Tennessee driver's license that, due to an unpaid ticket, was suspended. (Id, pp 13, 63).[1]

In June 2009, as he was looking for work in the Detroit area, Plaintiff joined the Phantom Motorcycle Club. (Id, pp 15, 16). On August 22, 2009, the Club was

[1] Trying to outrage the Court, Allstate repeatedly focuses on the irrelevant fact that, at the time of the accident, Plaintiff was driving on an expired license. Both the plain language of MCL 500.3113(a) and case law are clear that the secondary issue whether a driver lacks the reasonable belief to take and use a vehicle, such as if he or she lacks an operative driver's license, is relevant only if the court first determines that the taking was unlawful. *Amerisure Ins Co v Plumb,* 282 Mich App 417, 425; 766 NW2d 878 (2009). If the taking was lawful, the inquiry ends because § 3113(a) does not apply. *Id.* The secondary issue whether Plaintiff lacked a "reasonable belief" because his license expired is therefore irrelevant.

participating in a function at another motorcycle club. (Id, pp 15-17, 19, 22). Members were required to participate in the function and show up "on their bikes." (Id, p 17).

Since Plaintiff did not own a motorcycle, another club member, Andre Smith, told Plaintiff "he had an extra bike that I could borrow." (Rambin dep, pp 17-18 – Allstate Ex I). Mr. Smith added that Plaintiff "could use the bike to go to the function, and after the function I could bring it to him." (Id, p 18).

Accepting, on August 22, 2009, Plaintiff rode with a friend and met Andre Smith at a home on Kentfield in Detroit. (Id, pp 18, 21). Allstate omits that Smith showed Plaintiff the motorcycle, stated that he owned it, and gave Plaintiff the key. (Id, pp 19, 40). Plaintiff looked over the motorcycle and saw no signs of damage. (Id, p 20). The key, like the motorcycle, had a "Honda" logo. (Id, p 40). Plaintiff assumed the key specifically belonged to this motorcycle. (Id). Plaintiff and Mr. Smith repeated their arrangement that Plaintiff would use the motorcycle for the club gathering. (Id, p 19).

As agreed, Plaintiff drove the motorcycle to the Phantom Club, then rode with other club members to the function, located at the Chosen Few Club. (Rambin dep, pp 21-23 – Ex A). After the function, Plaintiff left, driving besides a fellow club member Cody. (Id, pp 24-25). Plaintiff and Cory were on their way to Andre Smith's place to return the borrowed motorcycle. (Id).[2] Cory agreed to give Plaintiff a ride home, from Andre's place, on his two-seat motorcycle. (Id, p 25).

At approximately 1:20 am on August 23, 2009, as Plaintiff was on westbound Davidson, a vehicle abruptly veered into this land and cut him off. (Id, pp 25-27). Trying to avoid a collision, Plaintiff laid the motorcycle down. (Id). He was

[2] Allstate argumentatively asserts that Plaintiff was only "purportedly" returning the motorcycle to Andre Smith at the time of the accident, but cites no rebutting or contradictory record evidence.

unsuccessful, however. Plaintiff struck the vehicle and was ejected from the motorcycle. (Id, pp 26-27).[3]

Mr. Rambin suffered a severely broken left ankle, broken right toes, a fractured right patella, and a shattered right patella. (Id, pp 30, 41, 44, 72). Over the course of a year, he underwent three knee surgeries, and one operation to repair the broken ankle. (Id, pp 44-45).

At the time of the accident, Plaintiff did not own an automobile or reside with any relatives. (Rambin affidavit, ¶ 22 – Ex B to Plaintiff's COA brief). Unknown to Plaintiff, the motorcycle he was operating on August 23, 2009 belonged to Scott Herzog. Herzog reported the motorcycle stolen on August 4, 2009. (Stolen Vehicle report – Allstate's Ex F). It is uncontested that Allstate insured a motor vehicle Herzog owned. (6/23/11 stipulated order).

**Material Proceedings**

Unsuccessful at obtaining PIP benefits, on August 8, 2010, Plaintiff filed a complaint in the Wayne Circuit against Allstate and Titan Insurance Company ("Titan"). (Complaint; Register of actions, p 1). Plaintiff alleged that either Allstate, who insured motorcycle owner Herzog, or Titan, the Assigned Claims Facility's servicing carrier, is liable for his substantial unpaid PIP benefits. (Complaint; Plaintiff's 6/24/11 motion for summary disposition, p 6). Titan filed a cross complaint against Allstate. (Cross

[3] Allstate cites no admissible record evidence supporting its allegation that, at the time of the accident, Plaintiff was traveling "as a speed of 85 m.p.h." (Allstate's application, p 4). Plaintiff's deposition, which Allstate cites, does not contain this fact. As for the police report, this Court has clearly held that police reports are hearsay and do not constitute admissible record evidence to support a "material fact question" argument under MCR 2.116(C)(10). *Maiden v Rozwood,* 461 Mich 109, 124-125; 597 NW2d 817 (1999); MCR 2.116(G)(6). Allstate's reference to the civil infractions Plaintiff was charged with are also hearsay, *Maiden, supra*, and irrelevant in this civil case, *Kirby v Larson,* 400 Mich 585, 599; 256 NW2d 400 (1977).

complaint; Register of actions, 10/14/10 entry). Allstate filed a third-party complaint against AAA of Michigan. (Third-party complaint; Register of actions, 4/8/11 entry).

On June 23, 2011, the trial court dismissed the third-party complaint against AAA of Michigan. (6/23/11 partial dismissal order). On that date, the court also entered a stipulated order declaring, as a matter of law, that:

> **IT IS HEREBY ORDERED** that Scott Herzog owned the 2000 Honda CVR 1100XX silver motorcycle that Plaintiff, Lejuan Rambin, was operating at the time of his accident of August 23, 2009 and that the motorcycle was stolen from Scott Herzog on August 4, 2009.
>
> **IT IS FURTHER ORDERED** that on August 23, 2009. Scott Herzog, owned a motor vehicle that was insured by Allstate Insurance Company. (6/23/11 stipulated order – Ex D).

In June, 2011, Titan,[4] Allstate and Plaintiff filed motions for summary disposition. (Register of actions, pp 5-6). In its motion filed on June 21, 2011, (Register of actions, p 5), Allstate relied on *Amerisure Insurance Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009) and exclusively argued it is not liable for Plaintiff's PIP benefits, stating:

1. Plaintiff unlawfully took the motorcycle under MCL 500.3113(a) because he did not have permission of its actual, titled owned, (Allstate's 6/21/11 motion, p 7); and,

2. Plaintiff did not reasonably believe he was entitled to use the motorcycle because he had a suspended license, (Id).

Allstate asserted that it was entitled to summary disposition under *Plumb, supra*, because "there is no genuine issue of material fact, and the moving party is entitled to partial judgment as a matter of law." (Id, p 6). Allstate omits that its June 21, 2011 motion never argued that the material facts on the issue of unlawful taking were in dispute.

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[4] Plaintiff did not appeal the order granting Titan's motion for summary disposition and, accordingly, does not address Titan's arguments.

In his motion and response to Allstate, Plaintiff argued that summary disposition should be granted determining that Allstate is liable for his PIP benefits because:

1. Allstate, as Mr. Herzog's auto insurer, is first in priority for payment of Plaintiff's PIP benefits under MCL 500.3114(5)(d), (Plaintiff's 6/24/11 motion, pp 5-6; Plaintiff's 6/24/11 response to Allstate's motion, p 3);

2. Allstate's sole defense, that MCL 500.3113(a) bars Plaintiff from receiving PIP benefits, is misplaced, (Id, p 9);

3. Plaintiff did not illegally take the motorcycle under MCL 500.3113(a). (Id). Andre Smith, after specifically representing that he owned the motorcycle, handed Plaintiff what appeared to be the original manufacturer-issued keys and loaned Plaintiff the bike. (Id, p 12). Plaintiff did not have any intent to unlawfully take the motorcycle and committed no crime. (Id).

4. Allstate incorrectly relies on *Amerisure v Plumb, supra.* (Id, p 9). *Plumb* is a fact-specific decision and is distinguishable from the case at bar. (Id, pp 11-12).

5. In addition, Plaintiff reasonably believed that he was entitled to take and use the vehicle under MCL 500.3113(a). The issue that Plaintiff had a suspended license is irrelevant. As the Court of Appeals held in *Butterworth Hospital v Farm Bureau Ins Co*, 225 Mich App 224, 250; 570 NW2d 304 (1997), "[i]t is the unlawful nature of the taking, not the unlawful nature of the use, that is the basis of the exclusion under MCL 500.3113(a)."

Allstate responded to Plaintiff's motion for summary disposition on July 12, 2011. (Register of actions, p 6). Once again, Allstate omits that this response never argued that Plaintiff's motion for summary disposition should be denied because the material facts are in dispute. (Allstate's 7/12/11 response). Indeed, after parenthetically quipping that Plaintiff's testimony was "somewhat suspicious," Allstate's response emphasized that it was not disputing the material facts and was solely arguing that, under *Plumb, supra*, Plaintiff unlawfully took the motorcycle under MCL 500.3113(a) because he "was utilizing the motorcycle without permission of the titled owner, Scott

Herzog, and . . . did not reasonably believe he was entitled to use the motorcycle." (Id, pp 5-6). Allstate's response did not argue or request that summary disposition be denied based on disputed material fact, but requested that its motion be granted and Plaintiff's motion denied. (Id, p 8).

The motions for summary disposition came up for hearing before the Hon. Susan D. Borman on July 15, 2011. (Tr 7/15/11, p 4 – Allstate's Ex D). Allstate's presentation of the motion hearing is incomplete.[5]

At the beginning of the hearing, without taking oral argument, the trial court indicated:

> I think the motions are well taken. I'm prepared to grant them. (Tr 7/15/11, p 4).

When Plaintiff's counsel asked for the opportunity to speak, the following brief colloquy occurred:

> THE COURT: Yeah, you can speak to the issue, but the *Plumb* case is exactly on point. . . . [a]nd I'm going to follow it.
>
> MR. PANZER: The law is . . . I'll talk about the law first. The law is, it's clear, I think we all agree on the law that the unlawful nature of the taking, it's the taking, not the use. That's the law.
>
> THE COURT: No, that's just the family member exception. And the case that you cited, the other case was dicta, so the *Plumb* case is controlling.
>
> MR. PANZER: Judge, this is –

[5] Allstate quotes only on the portion of the hearing where the trial court held that Plaintiff did not have a reasonable belief that he was entitled to take and use the vehicle under MCL 500.3113(a) because he "had a suspended license." (Tr 7/15/11, p 6). The Court of Appeals, however, ruled that no unlawful taking under MCL 500.3113(a) occurred. As discussed in footnote 1, since the Court of Appeals resolved the matter under the first-level inquiry that Plaintiff's taking of the vehicle was not unlawful, *Plumb, supra,* 282 Mich App at 425, the inquiry ended because § 3113(a) does not apply. *Id.* The secondary issue whether Plaintiff had a "reasonable belief" based on his expired driver's license is irrelevant. Allstate raises this issue solely in a transparent attempt to inflame the Court.

THE COURT: Take it up.

MR. PANZER: If you follow the *Plumb* case.

THE COURT: I'm going to.

MR. PANZER: It suggests that somehow my client had an unlawful taking of this vehicle.

THE COURT: No, no, I agree, and it says also in the *Plumb* case the court discussed that there is an issue of fact as to the unlawful taking part. But in that case she was not only intoxicated but had a suspended license. Your guy had a suspended license. He comes under the second part. I agree, there's an issue of fact as to the unlawful taking. But as to the fact that he had a suspended license and he knew he couldn't drive. The motion needs to be granted.

MR. PANZER: Judge –

MR. GRIFFITHS: Thank you, Your Honor.

MR. PANZER: [In *Priesman*][6] (sic), they allow a minor with no license to get covered.

THE COURT: That was a family joyriding –

MR. PANZER: But that has to do with the taking whether someone could steal a motor vehicle from a family member.

THE COURT: Take it up. Take it up. (Id, pp 5-6).

The trial court entered the final order granting summary disposition to Allstate and Titan on July 15, 2011. (7/15/11 order).

Plaintiff filed a timely claim of appeal in the Court of Appeals. In his February 22, 2012 brief, Plaintiff raised only the following argument:

> The trial court erroneously granted Allstate's motion for summary disposition and denied Plaintiff's motion for summary disposition. Plaintiff did not unlawfully take the motorcycle and had the reasonable belief that he was entitled to take and use it. The trial court erroneously relied on *Plumb, supra*, which was wrongly decided and must be set aside under MCR 7.215(J). (Plaintiff's 2/22/12 brief, pp v, 7).

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[6] *Priesman v Meridian Mutual Ins Co*, 441 Mich 60; 490 NW2d 314 (1992).

Allstate filed its Court of Appeals brief on March 27, 2012. Allstate's short counter-statement of facts relied on Plaintiff's testimony and raised none of the "credibility" arguments now presented in Allstate's Supreme Court application. (Allstate's 3/27/12 brief, pp 1-2). Allstate omits that its Court of Appeals brief raised only one issue/argument:

> Based on the fact that Plaintiff operated the stolen motorcycle without the owner's permission and while his driving privileges were suspended, did not the lower court correctly rule that Plaintiff was not entitled to no-fault benefits based on MCR 7.215(J), MCL 500.3113(a), and [*Plumb, supra*]? (Id, pp iii, 2).

Allstate exclusively argued that, under *Plumb* and other authority, as a matter of law, Plaintiff unlawfully took the motorcycle because he did not have the actual owner, Scott Herzog's permission; and that, because he was driving on a suspended license, he did not "reasonably believ(e) that he or she was entitled to take and use the vehicle." (Id, pp 2-12). As in the trial court, Allstate's brief did not argue that disputed material facts preclude summary disposition.

On August 30, 2012, the Court of Appeals released a published opinion in this case. (Opinion – Allstate's Ex A). Because neither party argued that the facts were in dispute, but exclusively presented legal arguments, the Court of Appeals correctly stated that "[t]he material facts are undisputed." (Majority opinion, p 1 – Allstate's Ex A).[7] The Court unanimously held that, pursuant to the Supreme Court's recent decision in *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503; 821 NW2d 117 (2012), Plaintiff lacked the requisite knowledge or intent under MCL 750.413 and MCL 750.414, and accordingly, as a matter of law, did not unlawfully take

[7] Allstate contends that this declaration by the Court of Appeals was a "false premise," (Allstate's application, p 7), but fails to mention that, in the trial court and its appellate brief, it did not argue that the facts were in dispute.

the motorcycle under MCL 500.3113(a). (Majority opinion, pp 4-5; Concurrence/dissent, p 1 – Allstate Ex A). The Court remanded for entry of summary disposition on the unlawful taking issue. (Majority opinion, pp 4-5, 14, 16 – Allstate's Ex A). The majority continued to address the law on the issues of unlawful taking and reasonable belief. (Id, pp 14-16). Judge Ronayne-Krause dissented as to this portion of the majority's decision, asserting that it was dicta unnecessary to the holding. (Concurrence/dissent, pp 1-2 – Allstate Ex A).

After the Court of Appeals released its decision, Allstate fired its prior attorney, Mr. Griffiths, and hired new counsel, Mr. Saylor. On September 20, 2012, Mr. Saylor filed a motion for reconsideration in the Court of Appeals. (Allstate's 9/20/12 motion for reconsideration). This motion conceded that, pursuant to the Supreme Court's decision in *Spectrum, supra*, that, "for a taking to be 'unlawful' for purposes of MCL 500.3113(a), the taking itself must violate Michigan law." (Id, p 2). The motion similarly admitted that "some element of 'intent' on the part of the actor' is necessary for the taking to be 'unlawful'". (Allstate's motion, p 3). Notwithstanding, Allstate's motion argued, for the first time in this case, that a genuine issue of material facts on the issue whether Plaintiff intended to unlawfully take the motorcycle precludes summary disposition. (Id, pp 3-8).

Plaintiff responded to Allstate's motion for reconsideration on October 3, 2012. (Plaintiff's 10/3/12 response). Plaintiff asserted that:

1. Allstate never preserved, in either the trial court or its Court of Appeals brief, the argument that a material fact question precludes summary disposition on the issue whether Plaintiff unlawfully took the motorcycle. (Id, pp 2-4).

2. An issue raised in a motion for reconsideration is not preserved. (Id, p 4, citing *Vushaj v Farm Bureau Gen Ins Co,* 284 Mich App 513, 519; 773 NW2d 758 (2009)). And,

3. Allstate cites no admissible evidence, as required under MCR 2.116(G)(6) and *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), raising a genuine issue of material fact that Plaintiff did not believe he had the actual owner's authorization to borrow the motorcycle. (Id, p 4).

The Court of Appeals denied Allstate's motion for reconsideration on October 19, 2012. (10/19/12 order).

Allstate now files an application for leave to appeal in the Supreme Court. Allstate concedes that, under *Spectrum Health*, the Court of Appeals correctly reversed the order granting Allstate's motion for summary disposition. (Allstate's application, p 3). Allstate's application argues that "the facts and circumstantial evidence cast doubt on Rambin's story, rendering summary disposition for Plaintiff Rambin inappropriate." (Id).

Plaintiff now responds to Allstate's application. For the reasons presented, the application should be denied.

## ISSUE PRESERVATION/STANDARD OF REVIEW

MCR 7.306(A), which incorporates the briefing requirements of MCR 7.212(C)(7), mandates that, in Supreme Court briefs, "[p]age references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means." (emphasis added). Use of the word "must" denotes a "mandatory" requirement. *Vyletel–Rivard v Rivard,* 286 Mich App 13, 25; 742 NW2d 627 (2009).

In violation of MCR 7.306(A) and MCR 7.212(C)(7), Allstate's application fails to cite "page references" to the record where it preserved the issue that a material fact question over whether Plaintiff unlawfully took the motorcycle precluded summary disposition. This is because, as demonstrated above, Allstate did not raise and

preserve the argument that disputed material facts preclude summary disposition in either the trial court or its Court of Appeals brief. MCR 7.212(C)(7).

Allstate moved for summary disposition under MCR 2.116(C)(7) and (10). (Allstate's 6/21/11 motion, p 2). Summary disposition under MCL 2.116(C)(7) is proper when a claim is barred by immunity granted by law to a defendant. *Fane v Detroit Library Comm,* 465 Mich 68, 74; 631 NW2d 678 (2001). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment ... as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). This Court reviews de novo the trial court's ruling on the motion for summary disposition. *Id.*

## ARGUMENT

### I. ALLSTATE FAILED TO RAISE AND PRESERVE THE ARGUMENT THAT DISPUTED MATERIAL FACTS PRECLUDE SUMMARY DISPOSTION ON THE ISSUE WHETHER PLAINTIFF UNLAWFULLY TOOK THE MOTORCYCLE UNDER MCL 500.3113(a), PRECLUDING SUPREME COURT REVIEW.

Allstate concedes that, pursuant to *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co of Michigan*, 492 Mich 503; 821 NW2d 117 (2012), the Court of Appeals correctly reversed the trial court's order granting its motion for summary disposition on the issue that Plaintiff unlawfully took the motorcycle under MCL 500.3113(a). (Allstate's application, p 3). It nonetheless argues that the Court of Appeals mistakenly noted that "the material facts are undisputed" and erroneously "went beyond" reversing the summary disposition order and holding, as a matter of law, that Plaintiff did not unlawfully take the motorcycle. Allstate claims that, instead, the Court of Appeals should have left the issue of unlawful taking "as a question of fact for jury resolution."

At the outset, Allstate omits that, in the trial court, Plaintiff moved for summary disposition arguing that, as a matter of law, he did not unlawfully take the motorcycle under MCL 500.3113(a). (Plaintiff's 6/24/11 motion, pp 5-6). In his Court of Appeals brief, Plaintiff raised the issue that the trial court erroneously denied his motion for summary disposition, (Plaintiff's 2/22/12 brief, pp v, 7). It was perfectly appropriate for the Court of Appeals to address and rule on the preserved argument that Plaintiff is entitled to summary disposition on the issue that he did not unlawfully take the vehicle under MCL 500.3113(a).

In turn, Allstate's application utterly fails to mention that, in either the trial court or its Court of Appeals brief, it never raised and preserved the issue that disputed material facts precluded summary disposition regarding an unlawful taking. (Allstate's 6/21/11 motion; Allstate's 7/12/11 response; Allstate's 3/27/12 brief). Like Plaintiff, Allstate solely argued that summary disposition should be granted, as a matter of law, on the unlawful taking issue. Both parties agreed that summary disposition should be granted based on the absence of a genuine issue of material fact.

Having lost the legal argument – a result Allstate essentially concedes this Court's *Spectrum Health* decision mandated – Allstate, ignoring the procedural history of this case, seeks Supreme Court review on an issue it never properly raised below. Indeed, Allstate has the temerity to argue that the Court of Appeals erroneously proceeded from "the false premise" that "[t]he material facts are undisputed," (Allstate's application, p 7, citing majority opinion, p 1 – Allstate's Ex A), while hiding the fact that it never challenged "the material facts" in the trial court or its Court of Appeals brief.

This Court has long held that it will not review issues that were not raised in the trial court (or agency) or Court of Appeals. *Neibarger v Universal Cooperative, Inc*, 439

Mich 512, 537 n 31; 486 NW2d 612 (1992) (issue not raised in the trial court or Court of Appeals "is not properly before us"); *Achtenberg on Behalf of Achtenberg v City of East Lansing*, 421 Mich 765, 773; 364 NW2d 277 (1988) ("we have declined to review issues which were not presented before the WCAB or the Court of Appeals"); *People v Wesley*, 421 Mich 375, 397; 365 NW2d 692 (1984) ("we decline to address issues not raised in the Court of Appeals"); *Long v Pettinato*, 394 Mich 343, 349; 230 NW2d 550 (1975) (same rule). By choosing not to argue that a material fact question exists, in either the trial court or its Court of Appeals brief, Allstate failed to preserve this issue for Supreme Court review.

Allstate's belated attempt to raise this argument in its post-decision, Court of Appeals motion for reconsideration, was unavailing. It is well-established that an issue first raised in a motion for reconsideration is not preserved. *Vushaj v Farm Bureau Gen Ins Co,* 284 Mich App 513, 519; 773 NW2d 758 (2009).

None of the narrow exceptions to the issue preservation rule potentially apply in this case. The Court will consider unpreserved issues when the questions presented on appeal are of law and all the facts necessary for their resolution have been presented, *Duffy v Mich Dep't of Natural Resources,* 490 Mich 198, 209 n 3; 805 NW2d 399 (2011), or to prevent a manifest injustice, *Napier v Jacobs*, 429 Mich 222, 232-233; 414 NW2d 862 (1987). Of course, since Allstate's application fails to even acknowledge that its "material fact question" argument is unpreserved, it does not raise any exception that would permit Supreme Court review.

Yet, even if Allstate had owned its failure to preserve this issue and invoked an exception, it would not apply. By its very nature, an argument claiming that a "material question of fact" precludes summary disposition is not a "question of law" that this Court

will consider despite being unpreserved. This eliminates the "question of law" exception.

Moreover, Allstate could not demonstrate that this Court must consider its factual argument to prevent a manifest injustice. Until the Court of Appeals issued its published opinion, Allstate chose to rest exclusively on the argument that, as a matter of law, Plaintiff unlawfully took the motorcycle under MCL 500.3113(a). For the Supreme Court to now reward Allstate's attempt to fire its previous lawyer and start a new appeal from scratch would not prevent a manifest injustice. It would only encourage other appellate litigants to waste scarce judicial resources knowing that, if they lose, they can merely raise a new factual issue in the Supreme Court.

The "material fact question" argument raised in Allstate's application is not properly preserved for Supreme Court review. The application should be denied.

## II. ALLSTATE FAILS TO CITE ANY ADMISSIBLE EVIDENCE RAISING A GENUINE ISSUE OF MATERIAL FACT THAT PLAINTIFF VIOLATED THE MICHIGAN PENAL CODE AND UNLAWFULLY TOOK THE MOTORCYLE.

In closing, Plaintiff must note that Allstate's "material fact question" argument is not only unpreserved, but meritless. As the Court of Appeals correctly held, under this Court's *Spectrum Health* decision, the Penal Code, pertinently MCL 750.413 and MCL 750.414, governs whether a taking is unlawful under MCL 500.3113(a). Allstate itself admits that "some element of 'intent' on the part of the actor' is necessary for the unauthorized taking to be 'unlawful.'" (Allstate's application, p 3). The strict liability standard in *Plumb, supra*, finding a taking unlawful even absent some criminal knowledge or intent, was incorrect.

With this, Allstate fails to present any admissible evidence raising a material fact question that, when he borrowed the motorcycle, Plaintiff manifested some wrongful "intent," rendering the taking unlawful under MCL 500.3113(a). Allstate's citation to the police report is misplaced. As indicated above, police reports are hearsay and do not constitute admissible evidence which may be considered in opposition to summary disposition. *Maiden, supra*, 461 Mich at 124-125; MCR 2.116(G)(6). Allstate's reference to the civil infractions Plaintiff was charged with are also hearsay, and irrelevant in this civil case, *Kirby v Larson,* 400 Mich 585, 599; 256 NW2d 400 (1977).

Allstate also fails to present any admissible record evidence contradicting Plaintiff's testimony that he borrowed the motorcycle from Andre Smith, who claimed to be the rightful owner, and that the motorcycle had no damage and had the original, factory key bearing the "Honda" logo. (Rambin dep, pp 19, 40 – Allstate's Ex I). Allstate surely would have rebutted this testimony in the trial court, if any contradictory evidence existed. Allstate also cites no evidence, let alone admissible evidence, proving that Plaintiff stole or was involved in the theft of the motorcycle.

This leaves, as Allstate's only argument, the claim that summary disposition is inappropriate because that a fact-finder may "disbelieve" Plaintiff's unrebutted testimony. If accepted, this would preclude summary disposition in almost any case.

Allstate presents no meritorious grounds for Supreme Court review. Its application for leave to appeal should be denied.

## RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant respectfully requests that this Honorable Court deny Defendant-Appellant, Allstate Insurance Company's application for leave to appeal.

Respectfully Submitted,

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