STATE OF MICHIGAN

IN THE SUPREME COURT

KAITLIN HAHN,

Plaintiff-Appellee,

v

GEICO INDEMNITY COMPANY,

Defendant-Appellant.

Supreme Court No. 158141

Court of Appeals No. 336583

Oakland County Circuit Court
No. 16-152229-NI

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PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT GEICO INDEMNITY 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 GEICO'S challenge to the validity of the ruling of *Farm Bureau v Allstate Ins Co*, 233 Mich App 38; 592 NW2d 395 (1998) – that an out-of-state automobile insurance policy issued to a Michigan resident by an insurer certified under MCL 500.3163 must be reformed to provide Michigan PIP coverage pursuant to MCL 500.3012, Michigan law and public policy if the insurer knew or should have known that the insured was a Michigan resident – is neither preserved no meritorious.

Plaintiff-Appellee states: Yes.

Defendant-Appellant states: No.

The trial court did not address this issue because Defendant-Appellant failed to raise and preserve it.

The Court of Appeals did not address this issue because Defendant-Appellant failed to raise and preserve it.

II. Whether the lower courts correctly held that evidence raises a genuine issue of material fact that the policy must be reformed to provide mandatory Michigan PIP coverage to Plaintiff because GEICO knew or should have known that the named insured, Zachary Waller, was a Michigan resident; and whether the Court of Appeals correctly held, in addition, that summary disposition was premature.

Plaintiff-Appellee states: Yes.

Defendant-Appellant states: No.

The trial court states: Yes.

The Court of Appeals states: Yes.

COUNTER-STATEMENT OF ORDERS APPEALED AND GROUNDS FOR SUPREME COURT REVIEW

Defendant-Appellant, GEICO Indemnity Company ("GEICO"), applies for leave to appeal from the Court of Appeals' unanimous, unpublished June 12, 2018 opinion, (GEICO Ex 1), affirming the January 10, 2017 opinion & order of Oakland Circuit Court Judge Michael Warren, (GEICO Ex 2), denying GEICO's amended motion for summary disposition on the issue that, pursuant to *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 42-43; 592 NW2d 395 (1998), MCL 500.3012 and Michigan law, the subject auto insurance policy GEICO issued to Zachary Waller should be reformed to include mandatory Michigan PIP coverage. GEICO fails to present grounds for Supreme Court review.

GEICO's proffered MCR 7.305(B)(3) issue, that *Farm Bureau* was wrongly decided and must be "overruled," is neither preserved nor meritorious. As the Court of Appeals correctly concluded, GEICO failed to raise this argument either in the trial court or in its January 18, 2017 application for leave from the order denying summary disposition. (COA decision, p 6 – GEICO Ex 1). The issue accordingly is not preserved for review. Although the Court of Appeals considered another unpreserved issue GEICO raised, that the *Farm Bureau* decision's reformation analysis under MCL 500.3012 constituted "obiter dictum," (*Id*),[1] the court did not address GEICO unpreserved argument that *Farm Bureau* was wrongly decided. Since this Court will not consider an issue that was not raised and addressed by the lower courts, see *People v Smith*, 420 Mich 1, 11 n 3; 360 841 (1984); *Long v Pettinato*, 394 Mich 343, 553; 230 NW2d 550 (1975); *Kushay v Sexton Dairy Co*, 394 Mich 69, 77; 228 NW2d 205 (1975),

[1] An argument GEICO's current application abandons.

leave to appeal on GEICO's unpreserved issue challenging *Farm Bureau's* validity must be denied.

Even if considered, GEICO fails to raise a meritorious MCR 7.305(B)(3) issue requesting that *Farm Bureau* be overruled. As demonstrate below, *Farm Bureau* correctly concluded that, when the insurer knew or should have known the insured is a Michigan resident, MCL 500.3012, Michigan law and public policy require reformation of an insurance policy to include mandatory PIP coverage. Moreover, since, over the past 20 years, only two unpublished decisions have applied *Farm Bureau's* analysis to reform an out-of-state policy – the Court of Appeals' decision in this case and *Gordon v GEICO Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 301431) (GEICO Ex 15) – this factually rare case does not present an issue involving "a legal principle of major significance to the state's jurisprudence," warranting leave under MCR 7.305(B)(3).

GEICO's MCR 7.305(B)(5)(a) appeal from the lower courts' holdings that evidence raises a material fact question the policy should be reformed because GEICO knew or should have known that the insured, Mr. Waller, was a Michigan resident is meritless. Contrary to the standard of review, MCR 7.305(A)(1)(d) and MCR 7.212(C)(6), this argument is based on GEICO's vexatious omission of the fact that the policy itself repeatedly lists the fact that Mr. Waller resided at "5750 Saint John Road, Grass Lake MI 49240-9568," (Policy Declarations, pp 1, 3 – GEICO Ex 5; emphasis added), and that, at all times pertinent, Mr. Waller had a Michigan driver's license. GEICO's reliance on the fact that Mr. Waller's vehicle was registered and "garaged" in North Carolina also deceptively omits that it knew the vehicle was "garaged" at Camp Lejeune, (Id, pp 1, 4), and, as such, Mr. Waller was only stationed in North Carolina on

military service. Based on this compelling evidence, the lower courts correctly held there is a genuine issue of material fact that GEICO knew or should have known Mr. Waller was a Michigan resident and, accordingly, the policy must be reformed. The Court of Appeals also correctly concluded, in addition, that summary disposition was premature because discovery remained incomplete. GEICO's application for leave to appeal should be denied.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

Defendant-Appellant GEICO Indemnity Company ("GEICO") applies for leave to appeal from the Court of Appeals' June 12, 2018 decision affirming the Oakland Circuit's January 10, 2017 opinion & order denying its amended motion for summary disposition under MCR 2.116(C)(10). Although the motion standard, *de novo* standard of review, and MCR 7.305(A)(1)(d) and MCR 7.212(C)(6) required GEICO to "fairly" present "all material facts, both favorable and unfavorable, … without argument or bias,"[1] GEICO's application omits substantial evidence raising a material fact question that, when Zachary Waller applied for insurance on his 2002 GMC Sierra truck, GEICO knew or should have known that he was a resident of Michigan – necessitating coverage of Mr. Waller and Plaintiff-Appellee, Kaitlin Hahn ("Kaitlin" or "Plaintiff"), his resident spouse, under Michigan's no-fault law. GEICO's statement of facts also contains misplaced arguments. Plaintiff accordingly sets forth the material facts, noting in particular GEICO's omissions.

Underlying Facts

Kaitlin was born on April 20, 1996. (Plaintiff dep, 8:18-8:19 – Ex 10).[2] She grew up in Jackson, Michigan. (Id, 8:10-9:12, 59:20-59:21). Her parents divorced when she was seven or eight. (Id, 10:25-11:3). At that point, she split time living with her mother

[1] Particularly since the evidence and reasonable inferences in this MCR 2.116(C)(10) appeal must be construed in the light most favorable to Plaintiff, the non-moving party. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[2] Unless otherwise indicated, all cited exhibits – designated by number – are attached to GEICO's application for leave to appeal. Exhibits attached to this answer are designed by letter.

and father. (Id, 8:8-11:3). Until her junior year at Northwest High School in Jackson, Kaitlin lived with her father during the week and her mother on weekends. (Id). Starting in her junior year, she lived weekdays with her mother and weekends with her father. (Id). Kaitlin made the change because she "had horses at (her) mom's house." (Id, 9:21-10:20).

While Kaitlin was a freshman at Jackson's Northwest High School, she met Zachary ("Zach") Waller. (Plaintiff dep, 12:3-12:8, 12:23-12:25, 30:10-30:11 – Ex 10). Zach was attending East High School in Jackson. (Id, 13:8-13:13). Kaitlin and Zach became sweethearts. (Id, 14:9-14:12; Waller dep, 31:19-31:24 – Ex 11).

Zach Waller was born on June 20, 1994. (Waller dep, 7:16-7:19 – Ex 11). He graduated from high school in 2012. (Plaintiff dep, 56:2-56:3 – Ex 10). Up to that time, for his whole life, Zach lived with his mother, Debra Snell. (Waller dep, 16:14-16:17, 32:23-33:2 – Ex 11; Snell dep, 4:8-4:9, 6:17-6:18 – Ex 13). Since 1999, Ms. Snell lived at 5750 St. John Road in Grass Lake, Michigan. (Snell dep, 5:17-5:20 – Ex 13).

In April 2012, before graduating from high school, Zach enlisted in the Marines at a Lansing Michigan recruitment center. (Waller dep, 39:22-39:24 – Ex 11; Enlistment documents, pp 1-2 – Ex 6). When he enlisted, Zach declared, as his "HOME OF RECORD," his mother's address in Grass Lake. (Enlistment documents, p 1 – Ex 6; Waller dep, 19:4-19:22 – Ex 11). Zach would serve in the Marines four years – until January 2017. (Enlistment documents, pp 1, 3 – Ex 6; Waller dep, 16:5-16:8 – Ex 11).

In January 2013, the Marines stationed Zach for boot camp at Camp Lejeune in North Carolina. (Waller dep, 10:11-11:6 – Ex 11). Zach remained at this post throughout his term of service. (Id).

When he traveled to Camp Lejeune, Zach brought only some clothes. (Waller dep, 33:9-33:15 – Ex 11). He kept all his other possessions in his bedroom at his mother's Grass Lake home. (Id, 33:3-33:8). Wherever the Marines posted him, Zach always intended to return to Michigan and attend college. (Id, 16:9-16:13, 37:20-38:7). Accordingly, on January 8, 2013, after arriving at Camp Lejeune, Zach completed a "DD Form 2058," the "CERTIFICATE" of his "STATE OF LEGAL RESIDENCE." (DD Form 2058 – Ex 6). In this form, Zach formally declared his "LEGAL RESIDENCE/ DOMICILE" "Grass Lake MI." (DD Form 2058 – Ex 6, final page). From this point, Zach maintained his declaration of Michigan as his state of legal residence and domicile. (Waller dep, 32:20-32:22 – Ex 11). He never requested the Marines to change this legal declaration. (Id, 40:7-40:10).

While in North Carolina, Zach purchased a used 2002 GMC Sierra 2500 truck. (Waller dep, 12:2-12:5, 37:2-37:4 – Ex 11). He owned an older, 1994 truck, which he kept in Michigan. (Id, 12:24-12:19). Zach bought the Sierra because his older truck "is not a reliable vehicle." (Id, 37:5-37:7).

On April 8, 2015, GEICO issued Zach a "Personal Automobile Policy" on the 2002 GMC Sierra 2500. (GEICO policy declarations – Ex 5). Gieco concedes it not only transacts insurance business in Michigan, but maintains a certification under MCL 500.3163 to provide PIP insurer under Michigan law. (GEICO application, p 4).

GEICO materially omits that the policy's declarations repeatedly list Zach's address as "5750 Saint John Road, Grass Lake MI 49240-9568." (Id, pp 1, 3; emphasis added). In vaguely stating the 2002 Sierra "was garaged in North Carolina," (GEICO application, p 6), GEICO omits that the declarations repeatedly list the Sierra's location at "Camp Lejeune NC 28542." (Id, pp 1, 4; emphasis added). GEICO additionally omits

Zach has always had (since he started driving) a Michigan driver's license. (Waller dep, 25:12-25:15 – Ex 11; Police report, p 1 – Ex 4).[3]

Plaintiff graduated from high school in 2014. (Plaintiff dep, 57:10-57:11 – Ex 10). While Plaintiff completed school and Zach was posted at Camp Lejeune, they continued their relationship. (Id, 57:12-57:14).

In April 2015, missing Zach and wanting to be with him, Kaitlin quit her job at Jimmy John's in Jackson and drove her car down to North Carolina. (Plaintiff dep, 15:10-15:14, 17:18-18:2, 26:14-26:15, 48:7-48:9 58:10-58:15 – Ex 10; Waller dep, 23:1-23:2, 28:25-29:4 – Ex 11). Kaitlin brought only the couple's dog, Sadie, and one suitcase of personal items. (Plaintiff dep, 25:3-25:6, 25:18-26:24 – Ex 10; Waller dep, 27:20-28:12 – Ex 11). She kept all her remaining belongings in her furnished bedrooms at her mother's and father's homes. (Plaintiff dep, 67:18-68:13 – Ex 10).[4]

Once the couple reunited, Zach asked Kaitlin to marry him. (Plaintiff dep, 31:9-31:11, 72:25-73:4 – Ex 10). Even before Kaitlin traveled to North Carolina, they had discussed getting married. (Waller dep, 23:9-23:12 – Ex 11). While they preferred having a formal wedding ceremony in Michigan, Kaitlin and Zach decided to marry right away in North Carolina because "we wanted to be married," so Zach could live with her away from his billet at Camp Lejeune, and they had a place to keep their dog, Sadie. (Plaintiff dep, 31:18-31:20, 53:23-54:3 – Ex 10; Waller dep, 23:13-23:15, 34:8-34:11 – Ex 11).

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[3] Plaintiff addresses below GEICO's argumentative discussion that the policy was issued under North Carolina law.

[4] To make sure she had a safe trip, Kaitlin's father, David Hahn, accompanied her down to North Carolina, along with one of his friends, in a separate vehicle. (Plaintiff dep, 24:17-25:25 – Ex 10). Once Kaitlin safely arrived, Mr. Hahn and his friend departed for a vacation in Tennessee. (Id, 29:11-29:19).

On May 8, 2015, Kaitlin and Zach married at a courthouse in North Carolina. (Plaintiff dep, 11:14-11:20 – Ex 10). Shortly after, on May 21, 2015, Zach obtained a VA loan and the couple purchased a townhouse located at 602 Ebb Tide Lane, Sneads Ferry, NC 28460. (Deed – Ex 8; Waller dep, 35:6-35:7 – Ex 11).[5] Kaitlin got a job at a nearby gas station to help pay the bills. (Waller dep, 14:13-14:25 – Ex 11).

GEICO's discussion of Kaitlin's and Zach's long-term plans, including about the townhouse, is incomplete. Kaitlin and Zach testify that they purchased the townhouse only as an "investment." (Plaintiff dep, 27:17-21:18, 37:22-37:3, 70:22-70:25 – Ex 10; Waller dep, 34:14-34:18 – Ex 11). Their townhouse purchase did not alter the fact that the couple continued to consider Michigan their permanent legal domicile. (Plaintiff dep, 51:25-52:1, 59:10-59:13, 70:1-70:10 – Ex 10; Waller dep, 16:20-16:24. 18:19-18:24, 32:20-32:22 – Ex 11).[6] Both kept personal possessions at their parents' homes in Michigan. (Plaintiff dep, 63:23-63:25, 67:18-68:13 – Ex 10; Waller dep, 33:3-33:8 – Ex 11).[7] Both maintained their Michigan driver's licenses. (Plaintiff dep, 8:22-9:16 – Ex 10; Waller dep, 25:12-25:15 – Ex 11; Police report, p 1 – Ex 4). Zach continued to file tax returns in Michigan. (Waller dep, 40:16-40:25 – Ex 11). Both consistently intended to return to Michigan after Zach was discharged from the Marines in January 2017.

[5] When Kaitlin arrived in North Carolina, Zach was living in the barracks at Camp Lejeune. (Plaintiff dep, 27:5-27:9 – GEICO Ex 9). Shortly before getting married, the couple started leasing the Sneads Ferry property. (Id, 27:25-28:3). It was located five minutes off Zach's base. (Id, 27:25-28:20).

[6] Zach testifies that, even if Kaitlin did not consider Michigan her legal residence, once they married, under laws relating to the military, she became a resident of his declared domicile, which always remained Michigan. (Waller dep, 41:7-41:10 – Ex 11).

[7] Kaitlin and Zach kept some additional furniture and personal items in the Townhouse they received as gifts from family and friends. (Plaintiff dep, 60:8-61:1 – Ex 10; Waller dep, 39:7-39:10 – Ex 11).

(Plaintiff dep, 12:13-12:22, 30:21-30:23, 40:15-40:18, 56:19-56:21, 70:1-70:5 – Ex 10; Waller dep, 16:5-16:24, 18:19-18:24, 32:17-32:19, 34:20-34:22, 37:20-38:7 – Ex 11).[8] At that point, they would rent or sell the townhouse. (Plaintiff dep, 30:15-30:17, 63:1-63:4 – Ex 10; Waller dep, 16:20-16:24 – Ex 11).

In July 2015, Zach received a two-week leave so the couple could return to Michigan. (Waller dep, 19:23-20:1 – Ex 11). Since they always wanted to have a formal wedding ceremony with all their family and friends, they planned to renew their vows and have a reception at Cascades Park in Jackson, Michigan. (Waller dep, 20:19-21:12, 23:13-23:15 – Ex 11; Plaintiff dep, 38:14-39:16 – Ex 10).

Driving his 2002 GMC Sierra, which was insured under the GEICO policy, Zach left North Carolina with Kaitlin on July 17, 2015. (Waller dep, 11:25-12:17 – Ex 11; Plaintiff dep, 38:12-38:13 – Ex 10). Trying to drive straight through, at 4:00 a.m. on July 18, 2015, while on US-23 in Whiteford Township, Monroe County Michigan, Zach fell asleep behind the wheel. (Police report – Ex 4). The Sierra left the highway, and struck a ditch and two trees. (Id).

Kaitlin suffered catastrophic injuries in the accident, including multiple vertebral fractures. (Amended complaint, ¶¶ 9-10 – Ex 3). The accident left Kaitlin, then only 20-years-old, a quadriplegic. (Id). After the accident, no longer able to pay their bills, Kaitlin and Zach lost their townhouse through foreclosure. (Waller dep, 9:1-9:5, 35:20-35:22 – Ex 11).

[8] Zach did not plan to reenlist. (Plaintiff dep, 59:17-59:19 – Ex 10). Moreover, if the Marines transferred Zach from Camp Lejeune or deployed him overseas, Plaintiff did not plan to remain at the North Carolina Townhouse. She intended to return to Michigan while Zach was transferred or deployed. (Waller dep, 24:1-24:10 – Ex 11; Plaintiff dep, 40:24-41:8 – Ex 10).

Plaintiff presented a claim for personal protection insurance ("PIP") benefits to GEICO, Zach's insurer. On February 22, 2016, GEICO notified Plaintiff that it would pay PIP benefits, but only to a limit of $500,000. (GEICO 2/22/16 letter – Ex 9).

Material Proceedings

On March 29, 2016, Plaintiff filed a complaint in the Oakland Circuit against GEICO and the Automobile Club Insurance Association ("ACIA"), the no-fault insurer of Kaitlin's father, David Hahn. (Complaint). Plaintiff requested a judgment declaring that GEICO and ACIA are liable for her PIP benefits under Michigan law and declaring that GEICO's liability is not limited by MCL 500.3163(4). (Amended complaint, p 6, ¶ 1 – GEICO Ex 3). Plaintiff also requested entry of a money judgment for the PIP benefits owing under the No-Fault Act. (Id, p 6, ¶ 2).

On October 31, 2016, ACIA moved for summary disposition. (ACIA MSD). ACIA asserted it was not liable for any of Plaintiff's PIP benefits because, as a matter of law, at the time of the accident, she did not live with her father, ACIA's insured. (Id).

GEICO filed an amended motion for summary disposition under MCR 2.116(C)(10) on November 3, 2016. (GEICO amended MSD, p 1). GEICO argued that, because Plaintiff and Zach Waller were domiciled in Michigan, MCL 500.3163(1) does not apply and it is not liable for any of Plaintiff's PIP benefits. (Id, pp 3, 9-13).

In her November 30, 2016 response, Plaintiff stated, in pertinent part,[9] that GEICO is liable for her PIP benefits because:

1. GEICO's policy covers Plaintiff as the resident spouse of Zach Waller, the named insured. "GEICO knew that Mr. Waller was in the military, listed his residence as a Michigan address and noted the vehicle location at Camp Lejeune." (Plaintiff response, p 5).

[9] The issues relating to ACIA's motion for summary disposition are not material to GEICO's Supreme Court application.

> The policy specifically designates, as an insured, "[t]he spouse if a resident of the same household." (Id).

2. GEICO's attempt, after its February 22, 2016 letter, to disavow liability for Plaintiff's PIP benefits violates the mend-the-hold doctrine. (Plaintiff response, pp 6-7).

3. Under Michigan and federal law, GEICO's liability for Plaintiff's benefits is not limited to $500,000. (Id, pp 7-8).

Plaintiff requested that the trial court deny GEICO's motion and grant her summary disposition on the issue of GEICO's liability under MCR 2.116(I)(2). (Id, pp 1, 11-12).

ACIA filed a response to GEICO's motion for summary disposition on December 1, 2016. (ACIA response). ACIA agreed that GEICO is liable for Plaintiff's PIP benefits. (Id). Citing *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 42-43; 592 NW2d 395 (1998), *Gordon v GEICO Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 301431) (Ex 15) and MCL 500.3012, ACIA argued, in material part, that because GEICO knew or should have known Mr. Waller was a Michigan resident, GEICO must have issued a policy under the Michigan No Fault Act. (Id, pp 7-9). ACIA explained:

> Like the GEICO policy in *Gordon*, GEICO in the case at bar knowingly issued a North Carolina policy to a Michigan resident. The face of the declaration page has Zachary Waller's Michigan address. Zachary Waller maintained a Michigan driver's license at the time of the accident. GEICO knew that Zachary Waller would be in need of Michigan no fault coverage and by issuing this policy to a Michigan resident, purported to provide Michigan PIP coverage.
>
> Under *Farm Bureau, supra*, and *Gordon, supra*, GEICO is responsible to provide Michigan PIP benefits to Plaintiff. Further since section 3163 does not apply, GEICO is liable to Plaintiff without the benefit of the $500,000 cap provided for in section 3163(4). (Id, p 9).

On January 10, 2017, ruling on the pleadings filed, the Hon. Michael Warren issued a 34-page opinion & order granting ACIA's motion for summary disposition and

denying GEICO's motion. (1/10/17 opinion & order – Ex 2). The trial court granted ACIA's motion, concluding there is no genuine issue of material fact establishing that Plaintiff lived with ACIA's insured, her father, at the time of the accident. (Id, pp 11-30). The trial court denied GEICO's motion, holding that:

a. "The undisputed facts establish … Waller and the Plaintiff were Michigan domiciles at the time of the accident." (Id, pp 11-29).

b. "Geico fails to present evidence and authority dispelling, as a matter of law, application of the mend-the-hold doctrine. (Id, pp 32-33).

c. Since "Geico's own motion argues Waller and Plaintiff were domiciled in Michigan, Geico's own policy uses Waller's address on the Declarations Page, and Geico knew or should have known of the military service rule and its extension to military spouses residing with their partners which may affect the 'spouse if a resident of the same household' definition in its policy[,]" the issue of Geico's liability for Plaintiff's PIP benefits under Michigan law "has not been conclusively established." (Id, p 33).[10]

On January 18, 2017, GEICO filed an application for leave to appeal from the January 10, 2017 opinion & order in the Court of Appeals. (GEICO COA application). GEICO materially omits that its application did not raise any issue or argument challenging the precedential authority or validity of the *Farm Bureau* and *Gordon* cases. Instead, addressing this portion of the trial court's ruling, GEICO's application merely argued that *Farm Bureau* and *Gordon* were factually distinguishable. (Id, pp xii, 16-20).

The Court of Appeals granted GEICO's application on May 17, 2017. (5/17/17 order). GEICO omits that, as is custom, the Court of Appeals' order "limited" the appeal

[10] GEICO incorrectly alleges that only ACIA advanced this theory of GEICO's liability. (GEICO application, p 12). While it was ACIA who cited *Farm Bureau*, *Gordon* and MCL 500.3012, Plaintiff's response also argued that GEICO is liable for her PIP benefits based on its actual or constructive knowledge that Zach was a Michigan domiciliary and that, as a Marine, his wife would have the same domicile. (Plaintiff response, pp 5, 7-8).

"to the issues raised in the application and supporting brief." (Id, citing MCR 7.205(E)(4)).[11]

On June 12, 2018, the Court of Appeals issued a unanimous unpublished decision affirming, in part, and reversing, in part, Judge Warren's January 10, 2017 opinion & order. (COA decision – Ex 1).[12] The Court of Appeals affirmed denial of summary disposition on the issue of GEICO's liability under MCL 500.3012 and *Farm Bureau*, (*Id*, pp 4-6), holding:

> In the present matter, the trial court found that a factual question existed regarding whether reformation was appropriate under MCL 500.3012. The trial court reached this conclusion on the basis of factual questions arising from the record evidence regarding whether Geico should have known that Waller was a Michigan resident. We agree with the trial court's determination. *Farm Bureau Ins Co* indicates that if an insurer knows, or has reason to know, that the individual seeking insurance is a Michigan resident, but the insurer nonetheless issues a policy that does not provide Michigan no-fault coverage, MCL 500.3012 may be invoked to reform the policy to one providing Michigan no-fault coverage. See *Farm Bureau Ins Co*, 233 Mich App at 41 (finding no basis to invoke the statute under the factual circumstances of that case because "there is no evidence from which one may reasonably determine that Allstate should have known that [its insured] was a Michigan resident."). See also *id*. at 43 n 2 ("We emphasize that a case in which an insurer is aware that it is dealing with a Michigan resident and nevertheless issues an out-of-state automobile insurance policy that does not comply with Michigan's no-fault act would be a far different circumstance.").
>
> There is record evidence indicating that Geico knew, or at a minimum, had reason to know, that Waller was a Michigan resident when he obtained the

[11] GEICO deceptively alleges that its "primary contention in the Court of Appeals was that *Farm Bureau Ins Co's* construction of MCL 500.3012 and, in particular, its articulation of a policy reformation rule to be applied to non-Michigan policies, are legally unfounded and should be disavowed." (GEICO application, p 13). Actually, GEICO did not raise any challenge to *Farm Bureau's* analysis until its 9/15/17 appellant brief, filed after the Court of Appeals granted leave and limited the issue to those raised in GEICO's previous application.

[12] The Court of Appeals' reversal of Judge Warren's denial of summary disposition on the mend-the-hold issue is not material to GEICO's application. Plaintiff accordingly does not address it.

> policy. Waller's address is listed as a Michigan address on the face of the policy. Waller also had a Michigan driver's license. Further, the declarations page noted that the vehicles would be garaged in North Carolina, but at a military base. This Court has found that an individual's temporary military address has little or no effect on one's place of domicile for purposes of the no-fault act. *Salinger v Hertz Corp*, 211 Mich App 163, 166-167; 535 NW2d 204 (1995). See also *id*. at 166 ("Because military personnel often do not have a choice of where they are stationed, there is a presumption in favor of retaining domicile in one's home state."). Under the circumstances, we agree with the trial court that genuine issues of material fact existed with regard to whether Geico knew, or should have known, that Waller was a Michigan resident who required a Michigan no-fault policy. Under *Farm Bureau Ins Co*, this is enough to trigger the potential applicability of MCL 500.3012.
>
> Summary disposition with regard to this aspect of the suit is also inappropriate for an entirely different reason. It is generally premature to grant summary disposition when discovery on a disputed issue has not been completed. *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id*. (quotation marks and citation omitted). Here, the parties conducted discovery under an agreement to limit the subject matter of depositions to the residency questions that have now been resolved. Once these questions were resolved, the parties planned to conduct additional discovery, taking additional depositions, on any remaining issues. As it pertains to MCL 500.3012, while residency is a relevant concern, the primary question is Geico's knowledge at the time Waller obtained the policy. Discovery into this particular issue would not appear to have even begun. And given the facts that have been discovered, we certainly cannot conclude that further discovery stands no reasonable chance of uncovering further relevant facts. Thus, it would have been premature for the trial court to grant summary disposition in Geico's favor once MCL 500.3012 became a part of this suit.

(*Id*, p 5; emphasis added).

Having concluded that the trial court correctly determined there is a genuine issue of material fact that GEICO knew or should have known Zach Waller was a Michigan domiciliary and that it needed to issue a Michigan PIP policy, the Court of Appeals referenced GEICO's arguments, raised for the first time in its appellant brief, that *Farm Bureau, supra* and *Gordon, supra* are either non-binding or wrongly decided.

(*Id*, p 6). The Court of Appeals explained that GEICO failed to preserve these arguments by failing to raise them in the trial court or in its January 18, 2017 Court of Appeals application. (*Id*). Nonetheless, exercising its discretion to considering the first argument, the Court of Appeals rejected GEICO's contention that *Farm Bureau's* discussion of MCL 500.3012 was "mere obiter dictum," because it was "germane to the controversy" in that case. (*Id*). The Court of Appeals "decline(d) Geico's invitation to not follow binding precedent of this Court with respect to MCL 500.3012." (*Id*). GEICO omits that the Court of Appeals did not address its argument that *Farm Bureau's* "construction of MCL 500.3012 is flawed and not congruent with the text of the statute." (*Id*; emphasis added).

GEICO applies for leave to appeal in the Supreme Court from the Court of Appeals' decision affirming denial of summary disposition on the issue of GEICO's potential liability for Plaintiff's PIP benefits under MCL 500.3012, *Farm Bureau* and *Gordon*. Plaintiff now responds. For the reasons presented, GEICO's application should be denied.

ISSUE PRESERVATION/STANDARD OF REVIEW

GEICO preserved below its argument that *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 42-43; 592 NW2d 395 (1998) and *Gordon v GEICO Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 301431) (Ex 15), are factually distinguishable and that there is no genuine question of material fact, when it issued the policy, that it knew or should have known that Zach Waller was a Michigan resident. (GEICO 12/14/16 reply brief, pp 4-5; GEICO 1/18/17 COA application, 16-20). However, as the Court of Appeals correctly held, GEICO failed to preserve, either in the trial court or in its Court of Appeals application, any

arguments that the *Farm Bureau's* analysis of MCL 500.3012 was "obiter dictum" or that *Farm Bureau* and *Gordon* were wrongly decided. (COA decision, p 6 – Ex 1).

GEICO moved for summary disposition under MCR 2.116(C)(10). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in the light most favorable to the party opposing the motion." *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). The court must "review the record, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In deciding a motion for summary disposition, the court may not make findings of fact or weigh credibility. *Id*; *Johnson v Wayne County*, 213 Mich App 143, 149; 540 NW2d 66 (1995). A trial court may grant a motion under MCR 2.116(C)(10) only if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith, supra*. This Court's review of the order granting summary disposition under MCR 2.116(C)(10) is *de novo*. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

I. GEICO'S CHALLENGE TO THE VALIDITY OF *FARM BUREAU'S* RULING – THAT AN OUT-OF-STATE AUTOMOBILE INSURANCE POLICY ISSUED TO A MICHIGAN RESIDENT BY AN INSURER CERTIFIED UNDER MCL 500.3163 MUST BE REFORMED TO PROVIDE MICHIGAN PIP COVERAGE PURSUANT TO MCL 500.3012, MICHIGAN LAW AND PUBLIC POLICY IF THE INSURER KNEW OR SHOULD HAVE KNOWN THAT THE INSURED WAS A MICHIGAN RESIDENT – IS NEITHER PRESERVED NOR MERITORIOUS.

A. GEICO failed to raise any challenge to the precedential authority or validity of the *Farm Bureau* decision in the trial court or Court of Appeals. Moreover, since the Court of Appeals exercised its discretion to consider only GEICO's unpreserved argument that *Farm Bureau's* analysis under MCL 500.3012 was "obiter dictum," which GEICO's current application abandons, the Supreme Court should deny leave on GEICO's other unpreserved issue that *Farm Bureau* and *Gordon* were wrongly decided.

At the outset, as the Court of Appeals correctly concluded, GEICO failed to preserve any issue challenging the precedent or validity of *Farm Bureau's* ruling regarding reformation of policy under MCL 500.3012 and Michigan's No-Fault Act, MCL 500.3101, *et seq*. As demonstrated above, GEICO did not raise any arguments regarding *Farm Bureau's* precedential authority or validity in the trial court. GEICO also failed to raise any issues in its Court of Appeals application that *Farm Bureau's* ruling regarding reformation under MCL 500.3012 was "obiter dictum" or incorrect. For both reasons, the Court of Appeals correctly held that these issues were unpreserved. (COA decision, p 6, citing *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005), *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004), and the May 17, 2017 order granting leave); see also MCR 7.205(E)(4) ("Unless otherwise

ordered, the appeal is limited to the issues raised in the application and supporting brief.").

It is well established that the Supreme Court will not consider an issue the appellant failed to properly raise and preserve in the Court of Appeals or trial court. See *People v Smith*, 420 Mich 1, 11 n 3; 360 NW2d 841 (1984); *Long v Pettinato*, 394 Mich 343, 553; 230 NW2d 550 (1975); *Kushay v Sexton Dairy Co*, 394 Mich 69, 77; 228 NW2d 205 (1975). While the Court of Appeals, in its discretion, considered and rejected GEICO's unpreserved argument that *Farm Bureau's* analysis of the MCL 500.3012 reformation issued constituted "obiter dictum," (COA decision, p 6 – Ex 1),[13] the Court of Appeals did not address GEICO's other, unpreserved issue that *Farm Bureau* and *Gordon* were incorrectly decided, (*id*).

Accordingly, GEICO's current attempt to challenge the validity of *Farm Bureau* and *Gordon* remains unpreserved. GEICO never considered this issue meritorious enough to properly raise it in either the trial court or Court of Appeals. GEICO accordingly has failed to present grounds for Supreme Court review under MCR 7.305(B)(3). GEICO's application for leave to appeal, which principally rests on this unpreserved issue, must be denied.

[13] An argument GEICO's Supreme Court application abandons. (GEICO application, p 18 n 7). Because consideration of reformation was "germane to the controversy" in *Farm Bureau*, the Court of Appeals correctly rejected GEICO's unpreserved argument that this analysis constituted "obiter dictum." (COA decision, p 6 – Ex 1).

B. Even if the unpreserved argument is considered on the merits, GEICO fails to demonstrate that *Farm Bureau* and *Gordon* were wrongly decided. These decisions correctly held that a policy must be reformed to provide Michigan PIP coverage, if the carrier is a certified Michigan auto insurer under MCL 500.3163 and, at the time it issued the policy, it knew or should have known the insured was a Michigan resident.

GEICO's contention that *Farm Bureau* and *Gordon* were wrongly decided is not only unpreserved, but meritless. Since Michigan residents must obtain PIP coverage for vehicles to be driven on our highways, and since GEICO admits it is a certified Michigan first-party auto insurer under MCL 500.3163, (GEICO application, p 4), the trial court correctly held, pursuant to *Farm Bureau* and *Gordon*, that the subject policy must be reformed to provide Michigan PIP coverage to Plaintiff, the named insured's resident spouse, if evidence establishes, at the time it issued the policy, GEICO knew or should have known Zach Waller was a Michigan resident.

1. *Farm Bureau* concluded that, when an insurer certified under MCL 500.3163 has notice that the insured is a Michigan resident, an out-of-state auto insurance policy issued by the insurer must be reformed to provide Michigan PIP coverage under MCL 500.3012.

In *Farm Bureau, supra*, the Court of Appeals, Judges Markey, Richard Allen Griffin, Jr. and Whitbeck, unanimously concluded that, under certain circumstances, an out-of-state auto insurance policy issued by an insurer certified under MCL 500.3163 may be reformed under MCL 500.3012 and Michigan law to provide mandatory PIP coverage to a Michigan resident. MCL 500.3163(1) states:

> An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall filed and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or sue of a motor vehicle as a motor vehicle by an out-of-

> state resident who is insured under its automobile liability policies, is subject to the personal and property insurance system under this act.

MCL 500.3012 provides:

> Such a liability insurance policy issued in violation of sections 3004 through 3012 shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties and obligations of the insured, the policyholder and the injured person shall be governed by the provisions of such sections: Provided, however, That the insurer shall have all the defenses in any action brought under the provisions of such sections that it originally had against its insured under the terms of the policy providing the policy is not in conflict with the provisions of such sections.

The *Farm Bureau* majority, Judges Markey and Whitbeck, ruled that MCL 500.3012 supports reformation where the insurer "is aware that it is dealing with a Michigan resident and nevertheless issues an out-of-state automobile insurance policy that does not comply with Michigan's no-fault act …." *Id*, 233 Mich App at 43 n 2. They asserted:

> In our view, it is evident that the basic purpose of § 3012 is to treat an insurance policy that an insurer issues *purporting to be a Michigan policy that complies with Michigan law* as such even if the written terms of the policy are inconsistent with Michigan law. See, e.g., *Adrian School Dist v Michigan Public School Employees Retirement System,* 458 Mich 326, 332; 582 NW2d 767 (1998) (primary goal of statutory construction "is to ascertain and give effect to the intent of the Legislature"). Simply put, the Indiana insurance policy issued by Allstate in this case was not issued 'in violation of' the no-fault act because Allstate neither purported to issue a policy that complied with Michigan's no-fault act nor knew that it was dealing with a Michigan resident.
>
> Indeed, the Michigan Supreme Court in one of the cases relied on by the dissent was referring to a policy issued by a company that purported the policy provided statutorily required no-fault insurance:
>
> > It would be unconscionable to permit an insurance company *offering statutorily required coverage* to collect premiums for it with one hand and allow it to take the coverage away with the other by using a self-devised "other insurance" limitation. Nothing could more clearly defeat the intention of the Legislature.

> [*Blakeslee v Farm Bureau Mut Ins Co of Michigan,* 388 Mich 464, 474; 201 NW2d 786 (1972) (emphasis added).]

Further down on the same page of the *Blakeslee* opinion, the Court stated, as quoted by the dissent:

> Given this clear purpose and the mandatory language of the statute, such language must be read into those provisions of a policy of insurance that differ or vary from the statutory language. [*Id.*]

Id at 41-42 (original emphasis). After recognizing that an out-of-state policy may be reformed to provide Michigan PIP coverage if the insurer had notice the insured was a Michigan resident, the majority held the insurer in that case, Allstate, was not obligated to provide PIP coverage under Michigan law because there was no evidence it could "reasonably have been expected to have known" or "should have known" the insured was a Michigan resident. *Id* at 43, 41. The majority also rejected the proposition that an insurer doing business in Michigan and other states must "routinely investigate every person who seeks automobile insurance outside Michigan while using a non-Michigan address to determine whether that person is a Michigan resident[,]" which would impose "an onerous burden on insurers." *Id* at 44.[14]

In his dissent, Judge Griffin agreed that, when a "mutual mistake" occurs, pursuant to "the public policy of the state of Michigan, as reflected by our Insurance Code and our case law," an out-of-state auto liability policy issued to a Michigan resident must be reformed to provide PIP coverage under the No-Fault Act. *Id* at 44-51 (Griffin, J, dissenting). He reached this conclusion because:

[14] As further discussed below, the Farm Bureau majority's rejection of the proposition that an insurer has an a duty to investigate the prospective insured's residence status rebuts GEICO's contention that *Farm Bureau* and *Gordon, supra* violate this Court's holding in *Harts v Farmers Ins Exchange,* 461 Mich 1; 597 NW2d 47 (1999). (GEICO application, pp 25-26).

a. the "Legislature's intent and goal" was to provide "a system of compulsory no-fault insurance for all Michigan motorists," *Id* at 47-48;

b. MCL 500.3101 and MCL 257.216 jointly mandate that Michigan residents must purchase PIP coverage under the No-Fault Act. *Id* at 48. Only "nonresidents" are exempt. *Id*.

c. Under MCL 500.3012, because the plaintiff was a Michigan resident and "her vehicle was required to be registered in Michigan, her insurance must conform to the minimum requirements of the Michigan Insurance Code." *Id* at 49. "Otherwise, the insurance contract violates public policy and subjects (the plaintiff) to misdemeanor criminal liability." *Id*, citing MCL 500.3102.

d. In *Blakeslee, supra*, 388 Mich at 474, "our Supreme Court addressed the now repealed uninsured motorist statutory provision and held that when the language of an automobile insurance contract is at odds with a statutory mandate, the automobile insurance contract must be reformed to comply with our law[.]" *Id*.

e. "Following the repeal of compulsory uninsured motorist protection, the Supreme Court reiterated that in regard to statutorily mandated coverages, Michigan automobile insurance policies must be construed to satisfy the minimum statutory requirements." *Id*, citing *Rohlman v Hawkeye-Security Ins Co,* 442 Mich 520, 524-525; 502 NW2d 310 (1993).

f. "Recently, in both *State Farm Mut Automobile Ins Co v Enterprise Leasing Co,* 452 Mich 25; 549 NW2d 345 (1996), and *Citizens Ins Co v Federated Mut Ins Co,* 448 Mich 225; 531 NW2d 138 (1995), the Supreme Court held that provisions of automobile insurance policies that violate the Insurance Code are void and that such contracts must be reformed to comply with compulsory insurance requirements." *Id*.

Judge Griffin noted, in particular, that it is "an incongruous result … that an automobile insurance policy issued to an out-of-state resident must be reformed to comply with Michigan law (under MCL 500.3163) while a policy issued to a Michigan resident need not." *Id* at 47 (emphasis added).

After agreeing with the majority that an out-of-state policy may be reformed to provide mandatory PIP coverage to a Michigan resident insured, Judge Griffin dissented

because he concluded that "a mutual mistake" in the case necessitated reformation. *Id* at 44. Judge Griffin did not state whether notice to the insurer that the insured was a Michigan resident is a condition precedent to reformation.

Before the case at bar, only three unpublished decisions have applied *Farm Bureau's* standard for reformation of a policy. Of these, only *Gordon v GEICO Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 301431) (Ex 15) found grounds for potential reformation based on a material fact question whether the insurer had actual or constructive notice the insured was a Michigan resident.

2. Of the four cases applying *Farm Bureau's* ruling, only this case and *Gordon* found potential grounds for reformation based on a genuine issue of material fact the insurer had actual or constructive notice the insured was a Michigan resident.

Over the past 20 years, aside from this case, only three unpublished Court of Appeals' decisions have applied *Farm Bureau's* reformation analysis. Of these, only *Gordon, supra*, held there was a fact question, at the time the policy was issued, that the insurer had actual or constructive notice the insured was a Michigan resident. In *Gordon*, relying on *Farm Bureau*, the Court of Appeals affirmed the trial court's order granting summary disposition and dismissal of *GEICO's* action alleging that another insurer, Farmers Insurance Exchange, was liable for the plaintiff's PIP benefits. *Id*, slip opinion, pp 1-2. The court held, in pertinent part, that:

> The *Farm Bureau* Court was silent regarding a scenario in which an insurer *should have known* it was dealing with a Michigan resident and issues an out-of-state insurance policy. However, the trial court's reasoning is sound: if an insurer knows or has reason to know that it is dealing with a Michigan resident and issues insurance coverage which purports to provide coverage in the insured's state, then MCL

> 500.3012 applies. Further, we see no reason not to extend *Farm Bureau* in this manner because, if the insurer knows or has reason to know that the insured is a Michigan resident, the risks discussed in *Farm Bureau* are not implicated. When the insurer knows or has reason to know it is providing coverage to a Michigan resident, there is no risk that the Michigan resident is seeking an out-of-state policy for lower premiums. When the applicant's residency is known, there is no misrepresentation, and the insurer must provide the coverage it purports to provide. Therefore, if Geico had reason to know that Ms. Gordon was a Michigan resident and issued her a policy for no-fault insurance coverage in Michigan, we hold that MCL 500.3012 applies.
>
> The record is clear that Geico did know, or clearly should have known, it was dealing with a Michigan resident.[15] Even though Ms. Gordon admitted that she told Geico that she lived in Mississippi, provided a Mississippi address, and told Geico that she intended to change her car registration to Mississippi, she provided a Michigan driver's license and Michigan car registration. She also told Geico she would be traveling back and forth to Michigan. Further, Ms. Gordon made claims with Geico, all of which were Michigan losses. At a minimum, the evidence shows that Geico knew, or should have known, that it was dealing with a Michigan resident who would at least be traveling frequently to Michigan. Thus, Ms. Gordon would have needed no-fault protection based on her conversation with the Geico representative. Therefore, Geico would have issued an insurance policy to comply with her needs.

Id, p 4 (original emphasis).[16]

The two other previous cases applying *Farm Bureau – Auto-Owners v Integon Nat Ins Co, supra* (Ex 16) and *Williams v Allstate Ins Co*, unpublished opinion per

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[15] GEICO spuriously argues that *Gordon* departed from *Farm Bureau* by applying a "knew or should have known" standard. (GEICO application, pp 24-25). As quoted above, and as the Court of Appeals recognized in *Auto-Owners Ins Co v Integon Nat Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued September 17, 2015 (Docket No. 321396) (Ex 16), the *Farm Bureau* majority rejected reformation in that case because there was no evidence it could "reasonably have been expected to have known" or "should have known" the insured was a Michigan resident. *Id*, slip op, p 5, quoting *Farm Bureau*, 233 Mich App at 43, 41.

[16] As addressed further below, since *GEICO* was the defendant insurer in *Gordon*, which the Court of Appeals released in 2012, GEICO unquestionably knew, as a Michigan-certified auto insurer under MCL 500.3163 providing auto coverage to Zach Waller in April 2015, that it had to tender mandatory PIP coverage under the No-Fault Act when it notice he was a Michigan resident.

curiam of the Court of Appeals, issued May 10, 2002 (Docket No. 229005) (Ex A) – affirmed orders granting summary disposition on the plaintiff's claim for reformation of an out-of-state policy to provide Michigan PIP benefits. In each, the courts accepted *Farm Bureau's* analysis, but held that the plaintiffs failed to present a genuine issue of material fact the insurer had notice they were Michigan residents. *Auto-Owners*, slip op, pp 6-7 (Ex 16); *Williams*, slip op, p 2 (Ex A) ("[T]he trial court did not err in granting summary disposition in favor of defendant because there is no evidence from which to conclude that defendant reasonably should have known that plaintiffs were Michigan residents. Defendant did not violate Michigan law by issuing the Florida automobile insurance and plaintiffs are not entitled to reformation of the insurance policy.").[17]

The paucity of decisions addressing, let alone finding potential grounds for reformation of an out-of-state auto policy, rebuts GEICO's contention that its unpreserved issue is jurisprudentially significant and constitutes grounds for review under MCR 7.305(B)(3). Moreover, compelling legal and factual grounds establish that *Farm Bureau* was correctly decided. GEICO's application for leave should be denied.

3. *Farm Bureau* correctly recognized that Michigan residents, like Zach Waller, are required to obtain PIP coverage under the No-Fault Act.

Farm Bureau's unanimous conclusion that, in certain circumstances, an out-of-state policy may be reformed to provide PIP coverage first springs from the unavoidable fact that coverage under Michigan's No-Fault Act is compulsory for Michigan residents, like Zach Waller. The No-Fault Act "created a compulsory motor vehicle insurance program under which insureds may recover directly from their insurers, without regard

[17] *ACIA v Progressive West Ins Co*, No. CV 09–5368 CAS, 2010 WL 11519507 (CD CA, Sept 13, 2010) (Ex B, pp 2-3) rejected application of *Farm Bureau* to reform a policy because the carrier, unlike GEICO, was not "a Michigan insurer."

to fault, for qualifying economic losses arising from motor vehicle incidents." *McCormick v Carrier,* 487 Mich 180, 189; 795 NW2d 517 (2010), citing MCL 500.3101 and 500.3105. The Legislature has "mandated" PIP benefits as part of the No-Fault Act. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993). Because the statute's provisions are compulsory, a PIP "policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements." Id at 525 n 3. As this Court recently reaffirmed, "[t]here is no question that PIP benefits are mandated by the statute and that the insurance policy must therefore be read together with the no-fault act …." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 400; 919 NW2d 20 (2018).

Based on the Legislature's comprehensive and compulsory first-party No-Fault Act, since *Shavers v Attorney General,* 402 Mich 554; 267 NW2d 72 (1978), this Court has acknowledged that:

> The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort. . . .
>
> The act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence advanced at trial that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were over-compensated, serious injuries were undercompensated, long payment delays were

> commonplace, the court system was overburdened, and those with low income and little education suffered discrimination.

Id at 579, subsequently cited in, among other cases, *McCormick, supra*, 487 Mich at 234; *Kreiner v Fischer,* 471 Mich 109, 116; 683 NW2d 611 (2004), overruled on other grounds in *McCormick, supra*; and *Cassidy v McGovern*, 415 Mich 483, 498; 330 NW2d 22 (1982). Accordingly, the No-Fault Act "is remedial in nature and must be liberally construed in favor of persons intended to benefit thereby." *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 179; 617 NW2d 735 (2000), quoting *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 61; 404 NW2d 199 (1987).

The No-Fault Act redundantly establishes that both PIP coverage and residual liability insurance (up to the $20,000 minimum – see MCL 257.520(f)(1), MCL 500.3009(1), MCL 500.3131(2), and *Husted v Dobbs*, 459 Mich 500, 507-508; 591 NW2d 642 (1999)) are compulsory. MCL 500.3101(1) mandates that "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." *Id* (emphasis added). Operation of a motor vehicle without requisite PIP, property damage and residual liability coverages constitutes a "misdemeanor." MCL 500.3102(2).

MCL 257.216 provides, in pertinent part, that "every motor vehicle ... when driven or moved upon a highway, is subject to the registration and certificate of title provisions of this act." MCL 500.3102 exempts maintenance of a Michigan PIP insurance policy only for vehicles owned by non-residents operated in Michigan less than 30 days. *Wilson v League Gen Ins Co,* 195 Mich App 705, 709-710; 491 NW2d 642 (1992). As a

Michigan resident, Zach Waller was required to maintain a Michigan PIP insurance policy on the vehicle. *Id*.

4. GEICO disregards the fact that, as a certified Michigan PIP insurer under MCL 500.3163, the No-Fault Act required it to provide Zach Waller mandatory Michigan PIP coverage.

The No-Fault Act requires all Michigan insurers to include mandated PIP coverage in auto policies except in one enumerated circumstance. MCL 500.3101(5) states, "[a]n insurer that issues a policy that provides the security required under subsection (1) may exclude coverage under the policy as provided in section 3017 (MCL 500.3017)." MCL 500.3017(1)(b) which, importantly, is part of the same Insurance Code Chapter as MCL 500.3012, allows insurers of "transportation network company vehicles" to exempt "[p]ersonal protection and property protection insurance required under section 3101." Otherwise, all auto insurance policies must include mandatory PIP coverage to Michigan residents under MCL 500.3101 and MCL 257.216. See also *Rohlman, supra; Bazzi, supra*.

As a certified Michigan insurer under MCL 500.3163, (GEICO application, p 4), because the subject policy covered a Michigan resident (and Plaintiff, his resident spouse) and was not issued on a "transportation network company vehicle," GEICO was required to tender Zach Waller mandatory coverage under the No-Fault Act. [18]

[18] Since MCL 500.3101(5) and MCL 500.3017(1)(b) permit auto insurers to exclude PIP coverage only under the enumerated exception – when the policy covers a "transportation network company vehicle" – the Legislature mandated that, in all other circumstances, insurers issue PIP policies to Michigan residents, like Zach Waller. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (stating that enumeration of exceptions or conditions "eliminates the possibility of [there] being other exceptions under the legal maxim *expressio unius est exclusio alterius*").

5. Chapters 30 and 32 of the Insurance Code, along with the Motor Vehicle Code, MCL 257.1, *et seq*, apply to the No-Fault Act.

GEICO's challenge to *Farm Bureau* and *Gordon* primarily rests on the mistaken premise that MCL 500.3012 governs only "liability insurance" policies and is not applicable to automobile insurance policies issued under the No-Fault Act. (GEICO application, p 18). As indicated above, MCL 500.3017(1)(b), which is part of the same Insurance Code Chapter as MCL 500.3012, addresses and exempts "[p]ersonal protection and property protection insurance required under section 3101" from policies issued by insurers of "transportation network company vehicles." See also MCL 500.3101(5). Even more, MCL 500.3009, another provision in Insurance Code Chapter 30, which sets forth the mandatory minimum limits for auto liability coverage, is incorporated into the No-Fault Act by MCL 500.3131(2). *Husted, supra*, 459 Mich at 508. These provisions confirm the recognition of our courts, long ago, that Chapter 30 of the Insurance Code "is part of an overall statutory plan" for auto insurance – including the Insurance Code, the Motor Vehicle Accident Claims Act, MCL 257.1101, *et seq*, and the motor vehicle responsibility law, MCL 257.520. *Woods v Progressive Mut Ins Co*, 15 Mich App 335, 340; 166 NW2d 613 (1968). With the statutory incorporation of MCL 500.3131(2), the provisions of Chapter 30 are also part of the No-Fault Act.

As demonstrated above, the No-Fault Act, MCL 500.3101, *et seq*, unquestionably is part of the Legislature's overall, comprehensive statutory plan to mandate and regulate auto insurance coverage. *Shavers, supra*, 402 Mich at 579; *Belcher v Aetna Cas and Surety Co*, 409 Mich 231, 240; 293 NW2d 594 (1980) (In passing the No-Fault Act, the "Legislature modified the prior tort-based system of reparation by creating a comprehensive scheme of compensation designed to provide

sure and speedy recovery of certain economic losses resulting from motor vehicle accidents."). The No-Fault Act redundantly intersects and functions with other statutes addressing auto insurance coverage. To reiterate, MCL 500.3131(2) incorporates the mandatory auto liability coverage requirements of MCL 500.3009 into the No-Fault Act. *Husted, supra*. Moreover, MCL 257.216, quoted above, which is part of the Motor Vehicle Code, repeats the mandatory PIP coverage requirement of MCL 500.3101. It is well established that provisions of the Motor Vehicle Code addressing vehicle registration must be read in *pari materia* with the No-Fault Act. *Clevenger v Allstate Ins Co,* 443 Mich 646, 660-662; 505 NW2d 553 (1993).

It is equally accepted that MCL 500.3220 which – like MCL 500.3009, MCL 500.3012 and MCL 500.3017 – is part of another Insurance Code Chapter (32) addressing "automobile liability policies," also must be read in *pari materia* with and is part of the No-Fault Act. *Titan Ins Co v Hyten*, 291 Mich App 445, 460; 805 NW2d 503 (2011), reversed on other grounds 491 Mich 547; 817 NW2d 562 (2012).[19] Since MCL 500.3220 governs both PIP and auto liability policies, *Hyten, supra*, 491 Mich at 566-567, and since, as shown, MCL 500.3009 and MCL 500.3017 are part of the No-Fault Act, GEICO's contention that MCL 500.3012 applies only to automobile "liability policies" is untenable.

GEICO's attempt to sequester the No-Fault Act from provisions relating to liability insurance policies not only ignores the above-cited statutes, but conspicuously disregards MCL 500.3135. MCL 500.3135, which is an integral part of the No-Fault Act,

[19] In *Hyten*, this Court agreed with the Court of Appeals' conclusion that the cancellation provisions of MCL 500.3220 govern PIP policies. *Id*, 491 Mich at 566-567. This Court disagreed with the Court of Appeals' holding on a different issue – that the defense of fraud to void a PIP is unavailable to bar coverage to an innocent third-party when the policyholder's fraud was "easily ascertainable." *Id* at 564-569.

sets forth, among other provisions, the "serious impairment of body function" and "permanent serious disfigurement" thresholds for recovery of noneconomic damages against a third-party tortfeasor. MCL 500.3135(1) and (2). The tort damage/immunity standards in MCL 500.3135, and the PIP liability/benefit statutes, principally MCL 500.3105 and MCL 500.3107, represent the yin-yang, public policy balance the Legislature created in partially abolishing the third-party tort remedy in exchange for ensuring an accident victim's receipt of "assured, adequate, and prompt" mandatory PIP benefits. *Shavers, supra*, 402 Mich at 578-579.

The intertwined synergy between the No-Fault Act, Insurance Code Chapters 30 and 32, and the Motor Vehicle Code conclusively rebuts GEICO's position that MCL 500.3012 applies only to automobile liability policies. *Farm Bureau* and the subsequent Court of Appeals decisions correctly ruled that, in appropriate circumstances, MCL 500.3012, the No-Fault Act and Michigan law authorize reformation of an out-of-state auto policy to include mandatory PIP coverage.

6. *Farm Bureau* and the subsequent cases correctly held that MCL 500.3012, the No-Fault Act and Michigan law allow for reformation of an out-of-state policy issued by a Michigan insurer certified under MCL 500.3163 to include mandatory PIP coverage when the insurer knew or should have known that the policyholder was a Michigan resident.

GEICO mistakenly argues that *Farm Bureau* and the four subsequent decisions, including the Court of Appeals in this case, erroneously held that MCL 500.3012, the No-Fault Act and Michigan law permits reformation of an out-of-state auto policy when the insurer is certified under MCL 500.3163 and knew or should have known that the insured was a Michigan resident. As established above, the provisions of Insurance

Code Chapter 30, like Chapter 32, are not strictly limited to auto liability policies. These statutes, including MCL 500.3012, must be read and applied in *pari materia* with the No-Fault Act.

GEICO's contention that MCL 500.3012 authorizes reformation only to include coverages mandated under Chapter 30, MCL 500.3004 through MCL 500.3012, is unavailing. Once again, along with the other statutes discussed above, Michigan law unambiguously incorporates MCL 500.3009 into the No-Fault Act. *Husted, supra*. Since mandatory liability coverage under MCL 500.3009 (and MCL 257.502(f)(1)) is not only part of the No-Fault Act, but integral to the Legislature's goal of balancing the partial tort immunity of MCL 500.3135(1) and (2) with mandatory PIP coverage under MCL 500.3101, MCL 500.3105(1), and MCL 500.3107(1), *Farm Bureau* correctly applied MCL 500.3012 as authorizing reformation to include that mandatory PIP coverage.[20] Contrary to GEICO's characterization, *Farm Bureau* did not engage in "judicial legislation." (GEICO application, p 24).

As the *Farm Bureau* majority correctly stated, "it is evident that the basic purpose of § 3012 is to treat an insurance policy that an insurer issues *purporting to be a Michigan policy that complies with Michigan law* as such even if the written terms of the policy are inconsistent with Michigan law." *Id*, 233 Mich App at 41 (original emphasis). In his dissent, Judge Griffin agreed, explaining that MCL 500.3012 must authorize reformation of an out-of-state policy to provide PIP coverage to a Michigan resident because:

[20] Indeed, in quoting MCL 500.3012, GEICO's own cited decision, *Auto-Owners v Integon, supra*, specified that MCL 500.3004 through MCL 500.3012 are part "of the no-fault act." *Id*, slip op, p 5 (Ex 16).

> her vehicle was required to be registered in Michigan, (and) her insurance must conform to the minimum requirements of the Michigan Insurance Code. Otherwise, the insurance contract violates public policy and subjects (the insured) to misdemeanor criminal liability.

Id at 49 (Griffin, J, dissenting).

Accordingly, contrary to GEICO's argument, *Farm Bureau* was not wrongly decided. *Farm Bureau* and the subsequent Court of Appeals cases apply the bedrock, public policy principle that, because PIP coverage under the No-Fault Act is compulsory, a PIP "policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements." *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525 n 3; 502 NW2d 310 (1993). GEICO's belated request that this Court "overrule" *Farm Bureau* and reverse the lower court's application of MCL 500.3012 is not only unpreserved, but meritless.

7. As Judge Griffin correctly concluded in *Farm Bureau*, Plaintiff is also entitled to reformation of the policy under long-standing Michigan law based on Michigan public policy and the "mutual mistake" between GEICO and Zach Waller. The policy is also subject to reformation for Mr. Waller's unilateral mistake and GEICO's fraud.

In challenging *Farm Bureau's* reliance on MCL 500.3012, GEICO disregards the fact that, under long-standing Michigan law, Plaintiff also is clearly entitled to reformation of the policy based on Michigan public policy, GEICO's and Zach Waller's mutual mistake, or Zach's unilateral mistake and GEICO's fraud.[21] It is universally-

[21] A potential argument by GEICO that Plaintiff did not raise public policy, mutual mistake or unilateral mistake/fraud in the trial court as a basis for reformation would belie the fact that GEICO's never challenged Plaintiff's right to seek reformation under

established that parties are free to employ any contractual terms they wish provided they do not conflict with pertinent statutes or public policy. *St Paul Fire & Marine Ins Co v American Home Assurance Co*, 444 Mich 560, 564; 514 NW2d 113 (1994), quoting *Auto-Owners Ins Co v Churchman,* 440 Mich 560, 566-567; 489 NW2d 431 (1992); see also *Rory v Continental Ins Co,* 473 Mich 457, 491; 703 NW2d 23 (2005) ("unambiguous contracts . . . are to be enforced as written unless a contractual provision violates law or public policy"). As established above, Michigan public policy necessitates enforcement of the mandatory requirements of the No-Fault Act. As such, this Court has repeatedly held that insurance policies in violation of the No-Fault Act must be reformed to provide mandatory PIP coverage. *State Farm Mut Auto Ins Co v Enterprise Leasing Co,* 452 Mich 25, 40–41; 549 NW2d 345 (1996) (reforming an invalid no-fault policy to comply with the no-fault act when the policy improperly shifted statutory responsibility for providing no-fault coverage); *Citizens Ins Co of America v Federated Mut Ins Co,* 448 Mich 225, 238; 531 NW2d 138 (1995) (reforming an invalid no-fault policy to provide coverage required by the no-fault act).

In *Farm Bureau*, both the majority and dissent concluded potential reformation under MCL 500.3012 would be necessary in certain cases to effectuate Michigan's strong public policy in mandating PIP coverage. *Id*, 233 Mich App at 41-42 (majority), 48 (dissent). Even if, as GEICO argues, MCL 500.3012 does not authorize reformation,

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Farm Bureau in either the trial court or its Court of Appeals application for leave. Should this Court consider GEICO's unpreserved request that *Farm Bureau* be overruled, the Court should also consider the alternative, meritorious grounds supporting the lower court's ruling authorizing reformation of the insurance policy. Moreover, because reformation is a remedy, rather than a claim, it need not be pled. See *Miller v Farm Bureau Mut Ins Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2016 (Docket No. 325885), lv den 500 Mich 997; 894 NW2d 606 (2017) (Ex C, p 6) (citation omitted). The fact that Plaintiff did not plead a claim for reformation is immaterial.

Michigan public policy still requires reformation of the subject policy to provide mandatory PIP coverage to Zach and Kaitlin, Michigan residents. GEICO's simultaneous focus on MCL 500.3012 and avoidance of Michigan public policy is entirely misplaced.

Furthermore, as Judge Griffin correctly concluded in *Farm Bureau*, "mutual mistake" is a universally-recognized ground to reform a contract. *Id*, 233 Mich App at 44-45 (Griffin, J, dissenting); *Lee State Bank v McElheny,* 227 Mich 322, 324, 327; 198 NW 928 (1924); *Theophelis v Lansing General Hosp*, 430 Mich 473, 492-493; 424 NW2d 478 (1988) (noting that a court will reform an instrument based on "a mutual mistake or a unilateral mistake coupled with fraud, shown by clear and convincing evidence …."). One of two things happened in this case. Either GEICO issued the subject policy omitting Michigan PIP insurance based on the parties' mutual mistake that this coverage was not required, or GEICO issued the policy based on Zach's unilateral mistake, despite fraudulently knowing the policy had to include Michigan PIP coverage.[22] In either event, whether or not MCL 500.3012 applies, Plaintiff has presented meritorious grounds for reformation of the policy – based on public policy, mutual mistake, or Mr. Waller's unilateral mistake and GEICO's fraud.

GEICO accordingly fails to raise an outcome determinate issue for review. Its application for leave should be denied.

[22] Any professed ignorance by GEICO about the requirements of Michigan law would be unfounded. Aside from being a certified Michigan insurer under MCL 500.3163, GEICO was the defendant in the 2012 *Gordon* decision. By April 2015, when it issued the subject policy, GEICO unquestionably knew it had to provide Michigan PIP coverage to a Michigan resident insured.

8. None of GEICO's equitable or policy arguments are meritorious.

GEICO's equitable and policy arguments in opposition to the lower courts' rulings are spurious and merit only brief consideration. GEICO's claim that the policy cannot be reformed because it was issued in compliance with North Carolina law skirts the issue and is irrelevant. GEICO concedes that the policy exclusively provided third-party liability coverage under North Carolina law. (GEICO application, p 4; Policy, Declarations, p 1 – Ex 5).[23] The policy undisputedly did not provide any first-party no-fault coverage – let alone PIP coverage mandated under Michigan law. As demonstrated above, Michigan law required GEICO to insure Zach Waller, as a Michigan resident, under mandatory PIP coverage. The fact that it issued only a third-party liability policy, consistent with both North Carolina and Michigan law, is totally irrelevant to the reformation issue presented.

Next, GEICO mistakenly argues that reformation under *Farm Bureau* improperly "imposes an affirmative duty on insurance agents to discern the insurance needs of their customers and advise them to purchase more or different coverage than provided by the (non-Michigan) policy they have selected" contrary to *Harts v Farmers Ins Exchange,* 461 Mich 1; 597 NW2d 47 (1999). As quoted above, the *Farm Bureau* majority unequivocally rejected the proposition that an insurer doing business in Michigan and other states must "routinely investigate every person who seeks automobile insurance outside Michigan while using a non-Michigan address to determine whether that person is a Michigan resident[,]" which would impose "an

[23] Coverage was up to a limit of $30,000, (Policy Declarations, p 1 – Ex 5), which also complied with Michigan law.

onerous burden on insurers." *Id*, 233 Mich App at 44. Michigan insurers, like GEICO, have absolutely no obligation under *Farm Bureau* to investigate or "discern" any needs of the insured. They only must provide Michigan PIP coverage when they know or should have known the insured was a Michigan resident.[24]

GEICO's complaints about the equity of reforming the policy to provide mandatory Michigan PIP coverage ring hollow. By its own concession, GEICO is a certified Michigan PIP insurer under MCL 500.3163. (GEICO application, p 4). For this reason alone, even before the Court of Appeals issued the *Gordon* decision, GEICO clearly knew the requirements of Michigan law. Yet, once GEICO lost the *Gordon* case on March 20, 2012, any excuse it may have raised that it did not know about the *Farm Bureau* reformation rule evaporated. *Id*, slip op, p 1 (Ex 15). In addition, the Court of Appeals in *Gordon* correctly dismissed concerns about any financial inequity in reforming GEICO's out-of-state policy when it knew or should have known the insured was a Michigan resident:

> When the insurer knows or has reason to know it is providing coverage to a Michigan resident, there is no risk that the Michigan resident is seeking an out-of-state policy for lower premiums. When the applicant's residency is known, there is no misrepresentation, and the insurer must provide the coverage it purports to provide. Therefore, if Geico had reason to know that Ms. Gordon was a Michigan resident and issued her a policy for no-fault insurance coverage in Michigan, we hold that MCL 500.3012 applies.

Id, p 4 (Ex 15). The lower courts' holdings were neither erroneous nor unfair to GEICO.

Finally, Plaintiff must emphasize that GEICO has completely ignored the unavoidable equitable dichotomy necessitating why the subject policy must be reformed to provide Michigan PIP coverage. As Judge Griffin correctly stated in *Farm Bureau*, it

[24] Moreover, *Harts*, which rejected an insurer's duty to advise a potential insured about the availability and desirability of non-mandatory, uninsured motorist coverage, is distinguishable from and inapplicable to this case.

is an utterly "incongruous result … that an automobile insurance policy issued to an out-of-state resident must be reformed to comply with Michigan law (under MCL 500.3163) while a policy issued to a Michigan resident need not." *Id*, 233 Mich App at 47 (Griffin, J, dissenting; emphasis added).

GEICO's unpreserved argument that *Farm Bureau* must be overruled is legally, factually and equitably meritless. GEICO's application for leave to appeal should be denied.

II. THE LOWER COURTS CORRECT HELD THAT EVIDENCE RAISES A GENUINE ISSUE OF MATERIAL FACT THAT THE POLICY MUST BE REFORMED TO PROVIDE MANDATORY MICHIGAN PIP COVERAGE TO PLAINTIFF BECAUSE GEICO KNEW OR SHOULD HAVE KNOWN THAT ZACH WALLER WAS A MICHIGAN RESIDENT. THE COURT OF APPEALS CORRECTLY HELD, IN ADDITION, THAT SUMMARY DISPOSITION WAS PREMATURE.

GEICO's preserved, MCR 7.305(B)(5)(a) issue challenging the lower courts' ruling on the fact is totally devoid of merit. As Judge Warren and the Court of Appeals correctly held, ample evidence raises a genuine issue of material fact that, at the time it issued the policy, GEICO knew or should have known that Zach Waller was a Michigan resident necessitating reformation of the policy to include mandatory PIP coverage. Moreover, the Court of Appeals also correctly held that summary disposition under MCR 2.116(C)(10) was premature.

Contrary to the MCR 2.116(C)(10) standard of review, GEICO challenges the lower courts' rulings while vexatiously omitting the crucial fact that the declaration pages of the subject policy repeatedly list Zach Waller's address as "5750 Saint John Road, Grass Lake MI 49240-9568." (Policy Declarations, pp 1, 3 – Ex 5; emphasis added). The redundant listing of Zach's Michigan residency "on the face of the policy," (COA

decision, p 5 – Ex 1), alone raises a material fact question of GEICO's notice. Indeed, in its amended motion for summary disposition, GEICO conceded both Plaintiff and Zach were Michigan residents. (11/3/16 amended MSD, p 3, ¶ 9).

GEICO additionally omits the undisputed fact that Zach had a Michigan driver's license. (Waller dep, 25:12-25:15 – Ex 11; Police report, p 1 – Ex 4). The lower courts correctly held that Zach's possession of an active Michigan license when the policy was issued further raises a material fact question GEICO knew or should have known he was a Michigan resident. (1/10/17 opinion & order, p 32 – Ex 2; COA decision, p 5 – Ex 1).

GEICO fails to present any meritorious arguments that the trial court erroneously denied summary disposition based on the material fact question that GEICO had notice of Zach's Michigan residency or that the Court of Appeals clearly erred in affirming and this its decision "will cause material injustice." MCR 7.305(B)(5)(a).

GEICO's reliance on the vague allegation that Zach's 2002 GMC Sierra was "garaged" in North Carolina is not only misplaced, but deceptive. GEICO omits that the declarations repeatedly list the Sierra's location at "Camp Lejeune NC 28542." (Id, pp 1, 4; emphasis added). With this, GEICO unquestionably knew Zach not only had a declared, Michigan address, but that his presence in North Carolina was for military service. As the Court of Appeals correctly stated, "an individual's temporary military address has little or no effect on one's place of domicile for purposes of the no-fault act. *Salinger v Hertz Corp*, 211 Mich App 163, 166-167; 535 NW2d 204 (1995). (COA decision, p 5 – Ex 1).

GEICO also mistakenly attempts to disclaim notice of Zach's Michigan domicile because the 2002 GMC Sierra was registered in North Carolina. Under North Carolina

law, registration of vehicles by members of the armed forces temporarily "stationed" in North Carolina does not alter the fact that they permanently reside in another "home state." NC Gen Stat § 20-52. As such, Judge Warren correctly rejected this argument:

> That the truck was registered in North Carolina and listed in Geico's policy as being located (garaged) at Waller's North Carolina military base proves nothing if the registration statutes in North Carolina require registration of a vehicle if a person moves there 'temporarily' for the purpose of any business, profession, employment and/or if a non-domiciled person operates a vehicle on the roads in the state for a certain number of days. (1/10/17 opinion & order, p 33 – Ex 2).

Next, GEICO falsely alleges that Zach "did not intend to return to Michigan during the policy period." (GEICO application, p 28). Nothing in the record supports this allegation. Actually, until he was discharged, Zach only intended to remain stationed in North Carolina, or at whatever post the Marines assigned him. Zach never testified that he never intended to drive his Sierra back to Michigan when he was on leave. Indeed, Zach did the Sierra back to Michigan in July 2015 – when Plaintiff was catastrophically injured.

GEICO erroneously argues that this case is analogous to decisions rejecting a fact question of the insurer's notice and distinguishable from *Gordon*, where the Court of Appeals found a material issue for the factfinder. This case is materially distinguishable from *Farm Bureau*, where there was no evidence the insurer knew or should have known the insured was a Michigan resident. *Id*, 233 Mich App 41, 43-44. In sharp contrast to *Farm Bureau*, where the insurer "had no way of knowing" the insured was a Michigan resident, Zach Waller specifically notified GEICO he was a Michigan resident – a fact repeatedly listed "on the face of the policy." (COA decision, p 5 – Ex 1).

This case is also materially distinguishable from *Auto-Owners v Integon, supra*, where the insured provided the insurer a North Carolina address and the insurer had no

absolutely no knowledge the insured intended to relocated, or actually relocated to Michigan. *Id*, slip op, pp 3-6. GEICO's reliance on the fact that the vehicles in *Auto-Owners* were garaged in North Carolina is untenable since, unlike Mr. Waller, those insured were not temporarily posted outside the domicile on military service.

GEICO's attempt to distinguish *Gordon, supra* from applying to this case is unavailing. The Court of Appeals in *Gordon* affirmed the summary disposition order dismissing GEICO's action against another insurer, based on a material fact question GEICO knew or should have known the insured was a Michigan resident, "even though (the insured) admitted that she told Geico that she lived in Mississippi … (and) provided a Mississippi address," because the insured "provided a Michigan driver's license and Michigan car registration[,] … told Geico she would be traveling back and forth to Michigan[,] (and) made claims with Geico, all of which were Michigan losses." *Id*, slip op, p 4 (Ex 15). The case at bar raises even more compelling evidence that, at the time the policy was issued, GEICO knew or should have known the insured was a Michigan resident. Unlike in *Gordon*, Zach Waller specifically notified GEICO he was a Michigan resident. Unlike in *Gordon*, GEICO repeatedly listed Zach's Grass Lake, Michigan address "on the face of the policy." (COA decision, p 5 – Ex 1). Moreover, unlike in *Gordon*, GEICO knew or should have known Zach was only temporarily living in North Carolina while stationed at Camp Lejeune on military service.

Finally, GEICO's application avoids the fact that the Court of Appeals alternately and correctly affirmed the January 10, 2017 because discovery was incomplete and summary disposition under MCR 2.116(C)(10) is premature. (COA decision, p 5 – Ex 1). Conspicuously, GEICO does not challenge this ruling.

GEICO utterly fails to demonstrate that the trial court erroneously denied its amended motion for summary disposition and that the Court of Appeals' decision affirming is "clearly erroneous and will cause material injustice." MCR 7.305(B)(5)(a). GEICO's application for leave to appeal should be denied.

RELIEF REQUESTED

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

Respectfully submitted,

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Dated: December 11, 2018

INDEX OF EXHIBITS TO PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT GEICO INDEMNITY COMPANY'S APPLICATION FOR LEAVE TO APPEAL

Exhibit A

2002 WL 992070
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Aaron WILLIAMS, by his Next Friend, Angela Williams, and Angela Williams, individually Plaintiffs-Appellants,
v.
ALLSTATE INSURANCE COMPANY, a/k/a Allstate Indemnity Company, Defendant-Appellee.

No. 229005.
|
May 10, 2002.

Before: HOLBROOK, Jr., and JANSEN and WILDER, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

This case originates from an automobile accident that occurred in Ohio on August 3, 1997. Rory Williams, now deceased, was driving a vehicle in which his wife, Angela Williams was in the passenger's seat, and their son, Aaron Williams, was in the rear seat. Upon entering an intersection, Rory Williams' vehicle stalled and was hit by a truck. At the time of the accident, plaintiffs had a Florida automobile insurance policy issued by defendant that had been in effect since 1995. In 1995, plaintiffs were residents of Florida, but moved to Michigan in the summer of 1996. Plaintiffs, however, did not obtain Michigan automobile insurance, Michigan driver's licenses, Michigan automobile registrations, or Michigan license plates.

Plaintiffs filed their complaint, seeking to have the Florida insurance policy reformed to be in accordance with Michigan no-fault automobile insurance law. The Florida policy was less expensive for plaintiffs, but Florida law is not as comprehensive in providing benefits as Michigan law. Defendant moved for summary disposition, which the trial court granted.

We review de novo the trial court's decision on the motion for summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). While the trial court failed to specify under which section it granted defendant's motion for summary disposition, based on the trial court's comments, it appears to have done so pursuant to MCR 2.116(C)(10). Summary disposition pursuant to MCR 2.116(C)(10) assesses the factual support for a claim. *Maiden, supra* at 120. When deciding a motion for summary disposition on the basis of MCR 2.116(C)(10), a court must consider all pleadings, affidavits, admissions, depositions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden,* supra at 120. Where the proffered evidence fails to establish a genuine issue of a material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs contend that they are entitled to have their Florida insurance policy reformed to comply with the requirements of Michigan's no-fault act under M.C.L. § 500.3012, which governs the issuance of a noncomplying insurance policy. MCL 500.3012 provides:

> Such a liability insurance policy issued in violation of sections 3004 through 3012 shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties and obligations of the insured, the policyholder and the injured person shall be governed by the provisions of such sections: Provided, however, That the insurer shall have all the defenses in any action brought under the provisions of such sections that it originally had against its insured under the terms of the policy providing the policy is not in conflict with the provisions of such sections.

***2** However, the insurance policy in this case was not issued in violation of the Michigan no-fault act because defendant did not purport to issue a policy in compliance with Michigan law, nor is there evidence indicating that defendant knew it was dealing with a Michigan resident. *Farm Bureau Ins Co v. Allstate Ins Co,* 233 Mich.App 38; 592 NW2d 395 (1998).

Contrary to plaintiffs' assertion that "Allstate knew without a doubt that its insureds were Michigan residents," there is absolutely no evidence in the record that defendant knew or had reason to know that plaintiffs were Michigan residents at the time of the accident. In fact, at the motion hearing, plaintiffs' counsel stated that he could not affirmatively state that defendant knew that plaintiffs were permanent residents of Michigan at the time of the accident. Therefore, this case is controlled by *Farm Bureau, supra* at 41, where this Court held that the defendant insurance company that issued an Indiana automobile policy to its insured who was a resident of Michigan did not violate Michigan law by issuing the Indiana insurance policy because there was no evidence that the defendant should have known that its insured was a Michigan resident.

At her deposition, plaintiff Angela Williams admitted to updating the registration of plaintiffs' vehicles in Florida at the time of their expiration, which was after plaintiffs had moved to Michigan. Moreover, at that time, plaintiffs represented to Florida authorities that they were residents of Florida, and only temporarily in Michigan. Plaintiffs never changed the license plates, registration, or driver's licenses in Michigan. Angela Williams testified that this was never done because they were unsure if they were going to remain in Michigan.

Additionally, under the policy, it is the obligation of the insured to notify defendant of any events that could impact their coverage. While defendant acknowledges that there was communication between plaintiffs and one of its Florida agents after plaintiffs moved to Michigan, in her deposition Angela Williams expressly stated that she did not remember any details about her contact with the Florida agent. Additionally, an affidavit from the Florida agent refers to documentation recorded under an endorsement for a temporary change in address after such communication, stating: "[I]nsured has policy here and in Michigan. Needs to keep Florida policy in force. Vehicle is here, meaning in Florida and they will be coming back. Just wants her bills to go to Michigan until they return to Florida." Alternatively, there is no evidence in the record, aside from a temporary change of address, that plaintiffs at any time advised defendant that they had changed their residence permanently.

Accordingly, the trial court did not err in granting summary disposition in favor of defendant because there is no evidence from which to conclude that defendant reasonably should have known that plaintiffs were Michigan residents. Defendant did not violate Michigan law by issuing the Florida automobile insurance and plaintiffs are not entitled to reformation of the insurance policy.

***3** In addition, in a companion (but not consolidated) case pending in the trial court, plaintiffs are seeking damages for the alleged negligence of Rory Williams. Defendant, in its motion for summary disposition, also argued for the application of a family exclusion clause to the companion case, which would absolve defendant of liability in that action. The trial court ruled on that issue and the parties now seek a review of that ruling. However, because the issue of the application of the family exclusion clause is pertinent exclusively to the companion case, this Court does not have jurisdiction to consider this issue. *Chapdelaine v. Sochocki,* 247 Mich.App 167, 177; 635 NW2d 339 (2001). The aggrieved party should have sought an appeal from that separate lower court action.

Affirmed.

All Citations

Not Reported in N.W.2d, 2002 WL 992070

Exhibit B

2010 WL 11519507
Only the Westlaw citation is currently available.
United States District Court, C.D.
California, Western Division.

AUTO CLUB INSURANCE ASSOCIATION Plaintiff,
v.
PROGRESSIVE WEST INSURANCE COMPANY; and Does 1 through 10, inclusive Defendants.

Case No. CV 09–5368 CAS (AGRx)
|
Signed 09/13/2010

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CHRISTINA A. SNYDER, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** On July 23, 2009, plaintiff Auto Club Insurance Association ("Auto Club") filed the instant action for declaratory relief concerning their respective rights and duties to provide benefits pursuant to insurance policies issued by each of them. Defendant Progressive West Insurance Company ("Progressive West") filed an answer to the complaint on September 25, 2009.

On July 14, 2010, Progressive West filed a motion for summary judgment. On July 26, 2010, Auto Club filed an opposition; Auto Club filed a notice of errata with respect to that opposition the following day. On July 30, 2010, Auto Club filed the Declaration of Michele Spencer in support of Auto Club's opposition. On August 2, 2010, Progressive West filed its reply. After carefully considering the arguments set forth by both parties, the Court finds and concludes as follows.

II. FACTUAL BACKGROUND

In or about May 2008, Jackwynsk Posumah ("Posumah") purchased a California automobile insurance policy from Progressive West. Complaint at ¶ 8. The purchase was made with the assistance of Harold S. Frans. Def.'s Statement of Uncontroverted Facts ("SUF") at ¶ 4. The parties disagree as to whether, at this time, Mr. Frans would more accurately be characterized as an "agent" or as a "broker" of Progressive West with respect to the purchase of Posumah's policy. Statement of Genuine Issues in Opposition to Defendant's Motion for Summary Judgment ("SGI") at ¶ ¶ 4, 5. Posumah's application for this policy listed a California address, and included a California driver's license. SUF at ¶¶ 8, 9. He did not request personal injury protection coverage ("PIP") or any other coverage required under Michigan law. Id. at ¶ 10. Progressive West is not licensed or authorized to issue auto insurance policies in Michigan, though there are other affiliates of Progressive West that are authorized to do so. SGI at ¶ 12. The policy was issued in compliance with California law, included the coverages required under California law, and did not include personal injury protection coverage. SUF at ¶¶ 14, 15.

On or about July 23, 2008, Posumah was a passenger in a vehicle insured by Auto Club, a Michigan insurer, when that vehicle was involved in an automobile accident in Michigan. Complaint at ¶ 11, SUF at ¶¶ 1, 2. "As a result of injuries sustained by Mr. Posumah in the accident, Auto Club paid Personal Injury Protection benefits ('PIP') to Mr. Posumah as required by the terms of its policy and Michigan law." SUF at ¶ 3.

Auto Club contends that "[t]he insurance policy issued by Defendant to Posumah was also required by the Michigan No–Fault Act to provide personal protection insurance coverage to Posumah and Defendant's personal protection insurance is deemed by Michigan law to provide coverage before the any [sic] coverage that may be provided by Plaintiff's policy is applicable." Complaint at ¶ 12. Plaintiff has paid in excess of $200,000 in benefits, anticipates that further benefits will be required on this claim. Id. at 15. Plaintiff seeks a judicial declaration that Progressive West is obligated to provide personal protection insurance coverage under Pasumah's policy, that defendant "is primarily responsible for the payment of all benefits that are obligated to be paid as a result of the bodily injuries sustained by Posumah in the July 23, 2008 automobile accident," and that Progressive West must reimburse Auto Club for "all benefits that Plaintiff has provided as a result of the bodily injuries sustained by Posumah." Id. at 17–18.

III. LEGAL STANDARD

***2** Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the movant is entitled to a judgment as a matter of law."

Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. See Fed. R. Civ. P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Celotex, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

IV. DISCUSSION

Defendant first argues that plaintiff "lacks standing to assert a claim that the California Auto Policy issued to Mr. Posumah must include PIP and comply with the Michigan No–Fault Act." Id. at 2. According to Progressive West, Auto Club, as a "stranger to the policy" cannot seek to reform the contract between Progressive West and Posumah because "[r]eformation of a policy may be sought only be the contracting parties, their assignees or the intended beneficiaries of the insurance contract." Id. at 7. Progressive West goes on to posit that the only way that Auto Club could have standing would be through the doctrine of equitable subrogation. Id. at 8. This theory would give Auto Club derivative standing through Posumah, and Auto Club would "stand in his shoes," subject to all defenses to which Posumah would be subject. Id.

Auto Club argues in opposition that it is "entitled to seek a declaratory judgment" under 28 U.S.C. § 2201, citing First Colony Life Co. v. Sanford, 480 F. Supp. 2d 870 (S.D. Miss. 2007). Opp. at 7. Plaintiff further argues that it is not seeking to reform the policy, but rather a declaration by this Court that the policy "should comply with Michigan law." Id. at 7–8. Defendant also explicitly states that it is not asserting standing on the basis of subrogation, as it "does not stand in the shoes of Posumah" because it "does not have an insurer/insured relationship with Posumah." Id. at 8.

***3** Since the express terms of the insurance contract between Progressive West and Posumah do not provide PIP coverage, the only way the Court could issue the declaration plaintiff seeks is if the contract could be reformed to include such a term. SUF ¶ 15. Therefore, the Court agrees with defendant that, as a third party seeking reformation of a contract, Auto Club lacks independent standing to bring this motion. Authorities cited by plaintiff do not support a different conclusion. With respect to equitable subrogation, plaintiff has explicitly stated that it does not seek recovery based on a subrogation theory.

Even if, however, plaintiff's claims were to be analyzed based on a subrogation theory, defendant would still prevail in this motion. The only theory Auto Club offers as to why the insurance contract should be reformed to include PIP coverage is that it must "comply with Michigan law." Opp. At 7. Defendant in reply argues that none of the Michigan authority presented by plaintiff supports this theory. Reply at 7. First, defendant argues, Michigan Compiled Laws ("MCL") § 500.3012 on its face applies only to policies issued "by a Michigan insurer." Reply at 7, MCL § 500.3004. Plaintiff does not dispute this, but argues that the requirements of Michigan no-fault insurance law also apply a policy issued by "an out-of-state insurer if the out-of-state insurer represented that it was issuing a policy that complied with Michigan no-fault laws or if it knew that it was dealing with a

Michigan resident," relying on Farm Bureau Insur. Co. v. Allstate Insur. Co., 233 Mich. App. 38, 42 (1998). Opp. at 7. The Court, however, agrees with defendant that Farm Bureau does not support plaintiff's argument. Farm Bureau did not deal with an out-of-state insurer. Farm Bureau, 233 Mich. App. at 47 ("There is no dispute that defendant Allstate is a Michigan-authorized insurer") (dissent). Moreover, plaintiff's allegation that "Progressive insurance companies do business in all fifty states including the State of Michigan" does not change the undisputed fact that the named defendant "is not licensed or authorized to issue policies in Michigan." SGI ¶ 12. Moreover, defendant has at no time represented that the policy here at issue complies with Michigan law. Because defendant is not a Michigan insurer, and there is no authority for the allegation that Michigan no-fault laws would require reformation of an insurance contract issued by an out-of-state insurer not authorized to issue policies in Michigan, there is no basis on which to reform the contract. [1] Therefore, even if plaintiff were a subrogee of Posumah, plaintiff's failure to offer any authority that would justify the reformation of the contract provides alternative grounds on which defendant is entitled to summary judgment. [2]

1 The Court therefore need not reach the issues of whether Mr. Frans was an agent or a broker, what knowledge Mr. Frans had at the time that Posumah purchased his Progressive West Policy, or the defenses to which Auto Club would be subject.

2 Because the Court does not rely on the Declaration of Michele Spencer in reaching its decision, it denies as moot defendant's objections thereto.

V. CONCLUSION

In accordance with the foregoing, the Court GRANTS defendant's motion for summary judgment.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2010 WL 11519507

End of Document

Exhibit C

2016 WL 4129165
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Robert MILLER and Diane Miller,
Plaintiffs–Appellants/Cross–Appellees,
v.
FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,
Defendant–Appellee/Cross–Appellant.

Docket No. 325885.
|
Aug. 2, 2016.

Tuscola Circuit Court; LC No. 12–027312–CK.

Before: JANSEN, P.J., and SERVITTO and M.J. KELLY, JJ.

Opinion

PER CURIAM.

***1** In this insurance dispute following a house fire, plaintiffs Robert and Diane Miller appeal as of right the trial court's order directing a verdict in favor of defendant, Farm Bureau General Insurance Company, following the presentation of plaintiffs' proofs at a jury trial. Defendant cross-appeals, challenging the trial court's order granting reformation of the insurance contract to list plaintiff Diane Miller as a named insured under the policy. We reverse and remand for further proceedings.

Plaintiffs first argue that the trial court abused its discretion when it refused to allow plaintiffs to reopen proofs for the purpose of formally admitting the relevant insurance policy into evidence. This issue arose after defendant moved for a directed verdict. During arguments on the motion, the trial court commented that the insurance policy had not been admitted into evidence, which prompted plaintiffs to move to reopen proofs for the purpose of admitting the policy. The trial court ultimately granted defendant's motion for a directed verdict in part because the policy had not been introduced, and summarily stated that it was denying plaintiffs' motion to reopen proofs.

We review a trial court's decision whether to allow a party to reopen proofs for an abuse of discretion. *Bonner v. Ames,* 356 Mich. 537, 541; 97 NW2d 87 (1959). "The trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes." *Patrick v. Shaw,* 275 Mich.App 201, 204; 739 NW2d 365 (2007).

We review a trial court's decision to direct a verdict de novo. *Meagher v. Wayne State Univ,* 222 Mich.App 700, 708; 565 NW2d 401 (1997). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party." *Id.* "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Id.*

When evaluating a motion to reopen proofs, a trial court should consider whether the adverse party would be "deceived or prejudiced" by reopening the proofs, and whether there would be inconvenience or surprise to the court, parties, or counsel. *Bonner,* 356 Mich. at 541. Other relevant factors include, "whether conditions have changed or undue advantage would result, whether newly discovered and material evidence is sought to be admitted, whether surprise would result, and the timing of the motion during the trial." *People v. Moore,* 164 Mich.App 378, 383; 417 NW2d 508 (1987), mod in part on other grounds 433 Mich. 851 (1989).

The trial court abused its discretion when it refused to allow plaintiffs to reopen proofs to formally admit the insurance contract. In *Bonner,* which involved an automobile-pedestrian accident, the plaintiff moved to reopen proofs to introduce evidence of the distances involved in terms of feet rather than city "blocks." The trial court denied the motion, and then granted the defendant's motion for a directed verdict. Our Supreme Court reversed that decision, stating:

> ***2** In thus denying plaintiff's motion to reopen to establish the meaning of 'block' in terms of length in feet the court was in error. We recognize, of course, and have often held, that a motion to reopen proofs is a matter within the discretion of the court. But the discretion must be a sound judicial discretion.

> Here the case had not proceeded to such a point, nor had conditions so changed, that any undue advantage would be taken by plaintiff. The principles involved were well stated in *Bommer v. Stedelin,* [237 S.W.2d 225, 229 (Mo App)], wherein the court held:
>
> > "There was no showing of surprise to defendants or of inconvenience to the court, parties, counsel, or jury or that the adverse party would have been deceived or prejudiced in any manner by granting the leave. The ruling on the motion for a directed verdict had not yet been made. The court denied plaintiff the opportunity to offer evidence to prove that defendants owned and operated the parking facility, while at the same time directing a verdict against plaintiff for failure to prove such fact. This constituted an abuse of discretion." [*Bonner,* 356 Mich. at 541 (footnote omitted).]

The same is true in this case. There was no question of fact in this case whether the policy existed, was valid, and was current. In addition, defense counsel acknowledged in opening statement that the policy covered replacement costs, but limited the initial amount paid to actual cash value, which involved a calculation of depreciation. There would have been no surprise, inconvenience, or prejudice to defendant from the formal introduction of the document, which both parties were relying on throughout the case. There was no principled reason for not allowing plaintiffs to reopen proofs for the limited purpose of admitting the policy. Accordingly, the trial court abused its discretion by denying plaintiffs' request to reopen their proofs for that limited purpose.

Plaintiffs also argue that the trial court erred in directing a verdict in favor of defendant on the ground that plaintiffs failed to present sufficient evidence concerning the damages to their home. We agree.

At trial, plaintiffs presented the voir dire testimony of Ross Poorman, an owner of Michigan Fire Claims, Inc., the firm that plaintiffs' hired to assist them in completing their sworn statement of proof of loss for the damage to the home's structure and Diane's personal property inventory listing items damaged or destroyed by the fire, as foundation for introduction of their inventory. Although offered as a lay witness because of his assistance in the preparation of the documents, Poorman also provided testimony concerning the methodology used in determining the replacement cost value of the structure and the means by which Poorman and his employees calculated depreciation, to arrive at the actual cash value of the home. An employee of the firm, Jason Marx, was permitted to testify about the replacement cost value of the property. However, the trial court denied plaintiffs' request to have Marx also testify about depreciation, on the ground that Marx's testimony about his role in preparing the depreciation amount differed from what Poorman had described. The trial court then found that plaintiffs could not offer any competent testimony concerning depreciation, thus rendering their evidence concerning actual cash value without an adequate foundation, and therefore directed a verdict in favor of defendant on this issue.

***3** "A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo[.]" *Albro v. Drayer,* 303 Mich.App 758, 760; 846 NW2d 70 (2014). The trial court's determination of the qualifications of an expert witness is also reviewed for an abuse of discretion. *Id.*

Both parties agree that, as in this case, where no repairs had been made, the insurance policy provides for an award of "actual cash value" for the structural loss of plaintiffs' home, which is less than the full replacement cost of the home. The policy defines "actual cash value" as "replacement cost minus depreciation and obsolescence." Therefore, to prove actual cash value according to the policy, plaintiffs were required to present some evidence about the "replacement cost" as well as "depreciation and obsolescence," neither of which is specifically defined in the policy.

In determining what constitutes the "actual cash value" of an item at the time of loss, this Court has held that a trier of fact may consider "any evidence logically tending to the formation of a correct estimate of the value of the destroyed or damaged property[.]" *Davis v. Nat'l American Ins Co,* 78 Mich.App 225, 233; 259 NW2d 433 (1977) (quotation marks and citation omitted). Under this so-called "broad evidence rule," "courts have not abandoned consideration of either market or reproduction or replacement values in arriving at 'actual cash value,' but view them merely as guides in making that determination, rather than shackles compelling strict adherence thereto." *Id.* at 233–234 (citation omitted). "Although damages based on speculation or conjecture

are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result [may] be only approximate." *Berrios v. Miles, Inc,* 226 Mich.App 470, 478; 574 NW2d 677 (1997) (citations omitted). A lack of precise proof of damages does not preclude recovery. *Id.* "Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages." *Hofmann v. Auto Club Ins Ass'n,* 211 Mich.App 55, 108; 535 NW2d 529 (1995). "[W]here injury to some degree is found, we do not preclude recovery for lack of precise proof [of damages]. We do the best we can with what we have." *Purcell v. Keegan,* 359 Mich. 571, 576, 103 NW2d 494 (1960); see also *Hofmann,* 211 Mich.App at 111.

In this case, the fact that plaintiffs suffered damages was established because there was no dispute that a fire destroyed plaintiffs' home. Thus, the certainty requirement is relaxed given that only the amount of damages was in dispute. With respect to the amount of damages due to the loss of the home, the parties agree that the policy provided for an award of actual cash value, unless actual repair or replacement is completed, in which case plaintiffs would be entitled to the replacement cost. Defendant argues that it was entitled to a directed verdict in part because plaintiffs did not present evidence that any part of the home had been repaired or replaced. Neither party presented any evidence that any work has been done on the home. To the contrary, attorneys for both parties admitted that no work had been done. Therefore, defendant's argument that plaintiffs were required to have someone specifically testify that the home had not been repaired or replaced in order to support a claim for damages is without merit. This was not a contested issue at trial. Likewise, any claim that the replacement cost exhibit was not accurate because it included items for the basement is without merit. The exhibit contained line items. The fact that the evidence contained more information than necessary to determine a "replacement value," should that be the proper measure of damages, does not render the evidence inadmissible or Marx's testimony incompetent. Defendant would have been free to present competing evidence of what it considered to be the proper replacement value, or argue to the jury that it should disregard the line items concerning the basement when arriving at its own determination of the proper replacement value.

***4** The trial court erred in refusing to admit Marx's testimony concerning depreciation because of Marx's statements concerning his involvement in preparing the depreciation portion of plaintiffs' damages evidence. First, while the trial court appears to have found that Marx's statements concerning his involvement were inconsistent with Poorman's, this is not the case. Poorman was asked by defense counsel whether he made the decisions about depreciation and actual cash value, and replied that he did. But when asked how the depreciation was calculated, Poorman stated, among other things, that he spoke with Marx, and later admitted that all of his information about the file came from Marx. Later, he again stated that, based on the information that had been provided to him, including the quality of materials, he thought that it was a fair depreciation amount. Marx's testimony was not inconsistent with this. Marx stated that he was involved in calculating the depreciation in this case, and that he had made the initial determination concerning depreciation. He then discussed it with Poorman and explained the basis for his decision to Poorman. While Poorman had the ability to overrule Marx's decision, he did not do so "to [Marx's] knowledge." Had Poorman testified, the jury could reasonably have found that both were involved in arriving at the depreciation amount, especially considering that Poorman was in a supervisory role and based his determination on Marx's experience as well.

Second, even if this were not the case, there is no basis for concluding that a trial court can simply refuse to allow a witness to testify because his testimony might differ from, or even directly contradict another witness's testimony. To the contrary, Marx was competent to testify under MRE 601. Marx testified that he had personal knowledge of preparing, or assisting Poorman in preparing, the depreciation and thus was competent to testify about its preparation under MRE 602. Defendant could certainly have cross-examined Marx concerning his actual participation in the depreciation calculation.

Although plaintiffs did not offer Poorman as an expert witness on depreciation, he arguably presented an adequate foundation to be qualified. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand

> the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Poorman's testimony provided a sufficient basis to find that he met these qualifications. Nevertheless, in his explanation for how he arrived at an appropriate depreciation amount, he stated that depreciation is not an exact science. Decisions from this Court and other jurisdictions support this assertion. See *Salesin v. State Farm Fire & Cas Co,* 229 Mich.App 346, 368; 581 NW2d 781 (1998), and *Louisiana DOTD v. McKeithen,* 976 So2d 832, 840 (La App, 2008). Poorman also explained how depreciation is calculated generally, including review of the building materials used and the overall condition of the structure. Marx could have provided a similar explanation to the jury.

***5** Marx testified about his experience, which included several years of expertise in providing property estimates, and he stated that he had written between 2,500 and 3,000 estimates for insurance carriers, and had written 1,000 estimates for Michigan Fire Claims, Inc. Marx also testified that Michigan does not require estimators be licensed. Defendant has presented nothing to dispute this. The underlying fact, i.e., the valuation of the home, was in evidence and the trial court had found that the methods and the program Marx used to arrive at this valuation were generally used in the industry. In addition, "MRE 703 does not preclude an expert from basing an opinion on the expert's personal knowledge." *Morales v. State Farm Mut Auto Ins Co,* 279 Mich.App 720, 735; 761 NW2d 454 (2008).

In sum, given the recognition that depreciation testimony is both inherently subjective and that the court is supposed "to do the best we can with what we have," *Purcell,* 359 Mich. 576, Marx could certainly have been qualified as an expert witness on depreciation and testified thereto if the trial court had not erred in refusing to allow him to testify about depreciation at all.

For these reasons, particularly where plaintiffs had already demonstrated that they had suffered a loss, thus lessening their burden here, *Unibar Maintenance Servs, Inc,* 283 Mich.App at 634; *Hofmann,* 211 Mich.App at 108, the trial court erred when it granted a directed verdict on the basis of the evidence plaintiffs presented regarding the amount of damage to their home.

Plaintiffs similarly argue that the trial court erred in directing a verdict based on its conclusion that plaintiffs failed to present adequate evidence concerning damages to Diane's personal property. As with the loss involving the home itself, the fact of plaintiffs' damages was established because it was undisputed that a fire in plaintiffs' home damaged Diane's personal property. Moreover, Diane's testimony included detailed descriptions of the property items she owned and the damage to them, which were accompanied by the presentation of relevant photographs. Hence, the certainty requirement is relaxed, given that only the amount of damages was in dispute. *Unibar Maintenance Servs, Inc,* 283 Mich.App at 634; *Hofmann,* 211 Mich.App at 108.

During Diane's testimony, plaintiffs sought to introduce the itemized list of personal property Diane prepared in conjunction with Billy Ray SaintMarie, a former employee of Michigan Fire Claims, Inc. In addition, Diane testified both at trial and at her earlier deposition that she participated in arriving at the values for some of the items and, after the other valuations were made by SaintMarie, she had the opportunity to review and correct them, and did correct some of the values. Despite this testimony, the trial court initially determined that the document contained inadmissible hearsay "as to the columns that would have been prepared by others" and only conditionally admitted it into evidence.

***6** Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "As used in the definition of hearsay, the term "statement" means "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." MRE 801(a). Generally, hearsay is not admissible. MRE 802. However, MRE 803(6), also known as the business record exception, provides the following exception:

> Records of Regularly Conducted Activity. A memorandum, report, record, or *data compilation,* in any form, of acts, transactions, occurrences, events, conditions, *opinions,* or diagnoses, made at or near the time *by, or from information transmitted by, a person with knowledge,* if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [Emphasis added.]

Because the personal property inventory was prepared in the regular course of Michigan Fire Claims' business, the list itself falls within the business records exception. Moreover, the trial court erred to the extent that its decision relied on any claim that hearsay within hearsay prevented introduction of the inventory. Because the valuations were "data compilations" and "opinions" made in the course of that business activity, made "by, or from information transmitted by, a person with knowledge," these valuations were themselves admissible under this exception. Diane testified, both at trial and in an earlier deposition, that she participated in arriving at the values for some of the items and, after the other valuations were made by SaintMarie, she had the opportunity to correct them, and did correct some of the values. She thus demonstrated that values were compiled by, or from information transmitted by, persons with actual knowledge. Similarly, while Kelly Bridgewater, another former employee, prepared depreciation calculations, these were also data compilations and opinions made in the course of business, by or with input from someone with knowledge.

Moreover, Poorman's testimony, had the trial court not found him incompetent to testify, would have been offered in part to show that the records were accurate and were prepared in the course of Michigan Fire Claims, Inc.'s business. When discussing his participation with respect to the personal property claim, Poorman stated that the personal property team prepared documents for the personal property adjuster, and Poorman "ultimately" oversaw the entire file. This satisfies the "custodian" element of the exception. See *People v. Vargo,* 139 Mich.App 573, 580–581; 362 NW2d 840 (1984) (providing that the individual must have "[k]nowledge of the business involved and its regular practices" to qualify). This inventory was therefore admissible under the business records exception. The trial court abused its discretion in ruling otherwise.

***7** In addition, the trial court admitted into evidence plaintiffs' proof-of-loss submission. This exhibit contained a summary of both the loss and damage to the structure, as well as the calculations of actual cost. During her deposition, Diane Miller testified that this proof-of-loss statement was accurate, and stated that she estimated that it would take between $100,000 and $200,000 to replace the personal property. She again adopted this proof of loss as an accurate assessment of the actual value of the personal property at trial. While the trial court later ordered the proof of loss redacted to remove the estimates contained therein, which we conclude she should not have done, Diane's testimony still stood. The proof of loss itself, along with Diane's testimony concerning the actual items lost in the fire and her own estimate of the value of the personal property, provided sufficient evidence of the amount of the loss to provide a reasonable basis for computation of a permissible recovery under the relaxed standard appropriate here, even without the admission of the inventory. *Unibar Maintenance Servs, Inc,* 283 Mich.App at 634; *Berrios,* 226 Mich.App at 478; *Hofmann,* 211 Mich.App at 108.

We thus conclude that the trial court abused its discretion when it granted a directed verdict concerning plaintiffs' proof of damages for the loss of Diane Miller's personal property.

In its cross-appeal, defendant argues that the trial court erred in both entertaining plaintiffs' motion to reform the insurance contract, and in granting reformation. We disagree.

Interpretation and application of court rules are questions of law, which we review de novo. *In re Sanders,* 495 Mich. 394, 404; 852 NW2d 524 (2014). We review for an abuse of discretion the trial court's determination whether a mutual mistake justifies granting the equitable remedy of reformation of a contract. *Lenawee Co Bd of Health v. Messerly,* 417 Mich. 17, 26, 31; 331 NW2d 203 (1982).

"A court of equity has power to reform the contract to make it conform to the agreement actually made." *Casey v. Auto Owners Ins Co,* 273 Mich.App 388, 398; 729 NW2d 277 (2006), quoting *Raymond v. Auto–Owners' Ins Co,* 236 Mich. 393, 396; 210 NW 247 (1926). Reformation is an equitable remedy available for contracts where the writing "fails to express the intentions of the parties ... as the result of accident, inadvertence, mistake, fraud, or inequitable conduct...." *Najor v. Wayne Int'l Life Ins Co,* 23 Mich.App 260, 272; 178 NW2d 504 (1970); see also *Holda v. Glick,* 312 Mich. 394, 403–404; 20 NW2d 248 (1945). Where the basis for a proposed reformation is mistake, the mistake must be mutual. *Id.; Retan v. Clark,* 220 Mich. 493, 496; 190 NW 244 (1922). In addition, the person seeking reformation due to mistake must present clear and convincing evidence of the mistake and the mutuality "proof to warrant reformation must be clear and convincing." *Holda,* 312 Mich. at 403–404. And, a mistake in law, i.e., a mistake by one side or the other regarding the legal effect of an agreement, is not a basis for reformation. *Schmalzriedt v. Titsworth,* 305 Mich. 109, 119–120; 9 NW2d 24 (1943); *Olsen v. Porter,* 213 Mich.App 25, 29; 539 NW2d 523 (1995).

***8** Citing *Anderson v. Mollitor,* 223 Mich. 159, 163; 193 NW 851 (1923), defendant argues that reformation must be pleaded in the complaint before it can be granted. However, *Anderson* involved the somewhat unique circumstance in which the plaintiffs had asked in their initial complaint for reformation of a deed in order to have it comply with a land contract for the property that had preceded the deed, and *defendants,* who claimed that the deed was correct and the land contract incorrect, did not ask for reformation of the underlying land contract until a later hearing. *Id.* at 161–162. The trial court did not allow *defendants* to seek reformation at that juncture. That case is distinguishable on its facts.

Moreover, amendment was not strictly required because reformation is a remedy, not a claim. *Holda,* 312 Mich. at 403–404. As demonstrated in *Corwin v. DaimlerChrysler Ins Co,* 296 Mich.App 242; 819 NW2d 68 (2012), a party need not necessarily "plead" reformation in order to have this remedy applied. *Corwin* involved a priority dispute among three automobile insurance companies—none of which plead or sought reformation. A panel of this Court determined that one of the insurance company's policies contravened the Michigan no-fault act and allowed the company to avoid and shift its statutory responsibilities. *Id.* at 247. The Court thus reformed the insurance company's policy to comply with Michigan law by including certain persons as "named insureds" in the policy. *Id.* at 247–248.

Defendant also cites MCR 2.112(B)(1), which provides:

> (B) Fraud, Mistake, or Condition of Mind.
>
> (1) In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity.

However, defendant ignores MCR 2.112(D), which provides:

> (D) Action on Policy of Insurance.
>
> (1) In an action on a policy of insurance, it is sufficient to allege
>
> (a) the execution, date, and amount of the policy,
>
> (b) the premium paid or to be paid,
>
> (c) the property or risk insured,
>
> (d) the interest of the insured, and
>
> (e) the loss.

In addition, plaintiff's complaint did include a request that the trial court issue a judgment of damages, along with "costs, interest and attorney fees as well as other relief to which they may be entitled." Even if plaintiffs should have pleaded reformation initially, MCR 2.118(A)(2) provides that "[l]eave [to amend] shall be freely given when justice so requires." See also *Tisbury v. Armstrong,* 194

Mich.App 19, 21; 486 NW2d 51 (1991) ("the policy of this state favor[s] the meritorious determination of issues"), and MCR 2.118(C)(1). For these reasons, defendant has not established that the trial court erred in entertaining plaintiffs' motion for reformation of the contract.

Defendant has also failed to show that the trial court abused its discretion in granting plaintiffs' request to reform the insurance contract to list Diana as an insured. Our Supreme Court's decision in *Heath Delivery Serv v. Mich. Mut Liability Co,* 257 Mich. 482; 241 NW 191 (1932), refutes defendant's argument that plaintiffs were precluded from asking for reformation on the ground that they were charged with reading the contract language, which provided that only Robert Miller was a named insured. In *Heath Delivery Serv,* the plaintiff and the defendant insurance company entered into an agreement for the defendant to provide insurance coverage on 20 of the plaintiff's vehicles. The policy inadvertently failed to list two of the plaintiff's trailers, one of which was subsequently involved in a collision. *Id.* at 484–485. The Court determined that reformation of the contract was proper because it was undisputed that the parties had agreed that the policy should cover all 20 vehicles. *Id.* at 485. While noting the duty of an insured to read the insurance policy, the Court nevertheless held that "[w]here through fault of the insurer an insurance policy does not cover the person or property intended, it may be reformed." *Id.* at 486. In response to the defendant's argument that the plaintiff was not entitled to reformation because he was negligent in failing to read the policy and ensure that it covered the intended vehicles, the Court stated that failure to read the policy does not always prevent reformation of a contract. *Id.* The Court noted that, were this the case, then "there would be few, if any, cases where a policy is reformed." *Id.* The Court then stated that the rule requiring a party to read a contract cannot apply where the undisputed testimony evidences the parties' agreement and the executed contract does not reflect that agreement. *Id.;* see also *Whitney v. Nat'l Fire Ins Co,* 296 Mich. 38, 43; 295 NW 551 (1941), and *Mantua v. Auto Club Ins Ass'n,* 206 Mich.App 274, 280; 520 NW2d 380 (1994).

***9** Plaintiffs presented evidence that defendant's agent Soper specifically told Diane that the policy would provide "complete coverage" for her home and both her and her husband's personal property, and that it would cover both Robert and herself. Diane stated that Soper never asked about excluding her from coverage or told her or indicated that she would not be a named insured under the policy. Diane also averred that she never expressed any intent that she not be covered. Nothing in the application contradicts Diane's testimony about her discussion with Soper and the understanding that they had when she applied for the homeowners' policy. In contrast, the application supports her assertion that the parties intended for both plaintiffs to be insureds. While Robert Miller's name was written in the section for "applicant information," Diane signed as an "applicant." In addition, Soper's subsequent statements after learning of Diane and Robert's separation that Diane should not worry and that she was still "completely covered" also supports the trial court's determination that both parties understood that Diane would be a named insured under the policy.

To the extent that defendant suggests that Soper could not bind defendant through his actions, we disagree. Soper was a "captive" agent, who worked for one insurer, and thus is the agent of that insurer, i.e., defendant. And notwithstanding the general no-duty-to-advise rule, see *Harts v. Farmers Ins Exch,* 461 Mich. 1, 7; 597 NW2d 47, 50 (1999), our Supreme Court also concluded in *Harts* that "when an event occurs that alters the nature of the relationship between the agent and the insured," a special relationship may result, creating a duty on the part of the agent to advise an insured in some respect regarding insurance issues. *Id.* at 10. The change in the agent-insured relationship arises when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. *Id.* at 10–11. When a special relationship exists, an agent assumes a duty to advise the insured regarding the adequacy of insurance coverage. *Id.*

Here, when Diane sought advice from his office, Soper's later reassurances that the policy would remain effective and cover her even during plaintiffs' separation acted as an affirmation of that fact by defendant to which it is bound and provides supporting evidence that the agent who initially prepared the policy acted under a mutual mistake when doing so. See *Bleam v. Sterling Ins Co,* 360 Mich. 208, 213; 103 NW2d 466 (1960) (the mistakes of a corporation's agents and employees are the mistakes

of the corporation, warranting reformation of a resulting contract). Although defendant maintains that the trial court placed an unwarranted burden upon it by noting that it had not presented any evidence to contradict plaintiffs' evidence, we instead conclude that the trial court's remarks were a comment on the strength of the evidence supporting reformation, not improper burden-shifting.

***10** Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

JANSEN, P.J. (concurring in part and dissenting in part). I concur with the majority in all respects except with regard to its determination that the trial court properly granted reformation of the insurance contract. I do not believe that the circumstances of this case warrant reformation on the basis of a mutual mistake. Therefore, I would reverse the trial court's order granting plaintiffs' motion for reformation of the insurance contract and remand for further proceedings.

"Michigan courts sitting in equity have long had the power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise." *Johnson Family Ltd Partnership v. White Pine Wireless, LLC,* 281 Mich.App 364, 371–372; 761 NW2d 353 (2008).

> Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. [*Olsen v. Porter,* 213 Mich.App 25, 29; 539 NW2d 523 (1995).]

In other words, "[t]o obtain reformation, a plaintiff must prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence." *Casey v. Auto–Owners Ins Co,* 273 Mich.App 388, 398; 729 NW2d 277 (2006). A unilateral mistake by itself is not sufficient for the court to grant reformation. *Id.* Similarly, "[a] mistake in law—a mistake by one side or the other regarding the legal effect of an agreement—is not a basis for reformation." *Id.* A party seeking reformation on the basis of a mutual mistake must prove the mistake by clear and satisfactory evidence. *Johnson,* 281 Mich.App at 379. A mutual mistake may be a mistake of law or a mistake of fact. *Id.* A mistake of fact is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v. Woodhaven,* 475 Mich. 425, 442; 716 NW2d 247 (2006). "[M]istakes of law are divided into two classes: mistakes regarding the legal effect of the contract actually made and mistakes in reducing the instrument to writing." *Johnson,* 281 Mich.App at 379–380.

> In the former, * * * the contract actually entered into will seldom, if ever, be relieved against unless there are other equitable legal features calling for the interposition of the court; but in the second class, where the mistake is not in the contract itself, but terms are used in or omitted from the instrument which give it a legal effect not intended by the parties, and different from the contract actually made, equity will always grant relief unless barred on some other ground, by correcting the mistake so as to produce a conformity of the instrument to the agreement. [*Id.* at 380 (citations and quotation marks omitted).]

***11** I believe that the trial court improperly granted plaintiffs' request to reform the insurance contract to list Diane as a named insured because plaintiffs failed to establish a mutual mistake. Instead, the evidence establishes that the parties intended for the insurance policy to cover Diane, and the insurance policy covered Diane for over five years. The insurance policy listed Robert as the named insured. The insurance policy provided, in relevant part, that an "insured person" under the policy included the named insured, as well as residents of the named insured's household, including the named insured's spouse. The policy also provided, in relevant part:

> We cover personal property owned by an **insured** while it is anywhere in the world. After a covered loss and at your request, we will cover personal property owned by:

> 1. others while the property is on the part of the **residence premises** occupied by an **insured;**

Accordingly, defendant contended that Diane's personal property was not covered by the insurance policy at the time of the fire because she was not an insured person. This was because she was neither a named insured nor a member of the named insured household, and her property was not on the residence premises occupied by the named insured. In addition, the policy only provided for dwelling, loss of use, and landscaping coverage for the "residence premises" in which the named insured resides. Defendant contended that because Robert did not reside at the home, it was not a residence premises for the purpose of coverage under the policy. Defendant therefore argued that the damage to the house was not covered.

The November 17, 2003 application reflects that Robert was listed as the first named insured, and there are no additional named insured parties. Diane signed the application as the applicant in two different places. The majority concludes that the fact that Diane signed as the applicant indicates a mutual mistake regarding whether she was a named insured. However, the parties may have decided to list Robert as the only named insured for a number of reasons, and there is no indication in the document that the failure to name Diane as a named insured constituted a mutual mistake. Instead, the application reflects that the parties intended for both Robert and Diane to be covered under the policy, but also intended for Robert to be the only named insured.[1] Subsequent communications between defendant and plaintiffs over the next several years listed Robert as the only named insured. There is no indication that plaintiffs ever raised the issue that Robert was the only named insured listed on the documents they received from defendant, which further shows that there was no mistake of fact or law.

[1] Plaintiffs point out in their brief on cross-appeal that defendant produced two versions of the application, including one in which Diane was listed as a qualifying named insured or spouse, and one in which her name was crossed out. Regardless of when or why the altered version of the application was created, the application listed Diane as a qualifying named insured *or spouse,* which is consistent with the remainder of the application listing Robert as the only named insured. Furthermore, the section at issue involved whether the named insured or spouse qualified for various credits and did not determine which persons were insured under the policy.

The majority concludes that Diane's affidavit also provides evidence of a mutual mistake, but Diane's affidavit supports defendant's argument that the insurance agreement reflected the parties' intent. Diane stated in her affidavit that she went to the local Farm Bureau office in 2003 in order to apply for a policy to cover her home. She stated that she advised Soper that she "wanted complete coverage for [her] husband and [her] home and belongings." She further stated, "I made clear my intentions to Mr. Soper to obtain coverage for both the home and personal property for *both* my husband and myself." According to Diane, Soper informed her that the policy "would provide complete coverage for our home and our personal property." The insurance policy did just that. Diane was completely covered as the spouse of the named insured at the time the insurance policy went into effect. In fact, Diane remained covered until Robert moved out of the home five years later. Therefore, defendant issued the policy the parties agreed to at the time they entered into the insurance agreement. Although Diane was not covered after Robert moved out of the home, this subsequent change of circumstances does not establish that the instrument did not express the true intent of the parties at the time they entered into the agreement. Furthermore, Diane's unilateral mistake regarding the legal effect of the insurance agreement does not constitute a mutual mistake warranting reformation. Instead, Diane's affidavit evidences the parties' mutual intent for the policy to cover Diane, and the insurance agreement reflected that agreement because Diane was covered under the policy at the time it was executed.

***12** I also do not believe that Diane's statements in her affidavit regarding her discussion with Soper in 2009 establish a mutual mistake at the time the parties entered into the insurance agreement. Diane stated in her affidavit that she went to Soper's office in January 2009 or February 2009 following her separation from Robert in order to make a premium payment. She asked his support staff if she was still covered under the policy even though her husband was no longer living with her in their home, and Soper replied that she was completely covered. However, Soper's statements to Diane over five years after defendant issued the insurance policy are of no moment because they do not establish a mutual mistake of fact or law at the time the insurance agreement was entered into. See

Lenawee Co Bd of Health v. Messerly, 417 Mich. 17, 24; 331 NW2d 203 (1982) ("The erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed."). Instead, plaintiffs contend that Diane intended for her and Robert to be covered by the policy, and Diane was covered by the policy after it went into effect. Therefore, I do not believe that plaintiffs established a mutual mistake by clear and satisfactory evidence.

Accordingly, I would reverse the order granting plaintiffs' motion for reformation of the insurance contract and remand for further proceedings.

All Citations

Not Reported in N.W.2d, 2016 WL 4129165

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