INSURANCE LAW

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I. INTRODUCTION

Insurance touches us all in many ways, whether obvious or not. For example, it facilitates commerce and allows us to shift risk from fire, accident, property loss, personal and bodily injury, and the financial loss associated with death. Insurance is an ever-present part of people's daily lives. These shifts have a cost felt by most individuals on at least a yearly basis. Michigan is currently the home of the highest average automobile insurance premium in the United States, at $2,551 per year.[1] Further, most Michigan citizens will likely see nearly 10% increases in health insurance premiums for 2015.[2] Court decisions regarding insurance matters, therefore, have a real effect on Michigan citizens, even if most individuals only consider insurance as a yearly premium.

II. DECISIONS OF THE MICHIGAN SUPREME COURT

A. The No-Fault Act, MCL Sections 500.3101 et seq.[3]

Automobiles are a part of everyday life, and it is therefore little wonder that No-Fault Act cases frequently find themselves before the appellate courts of this state.

1. MCL 500.3113: Exclusion for "A Motor Vehicle or Motorcycle Which He or She Had Taken Unlawfully"[4]

For the second time in two years, the Michigan Supreme Court considered the issue of joyriding and the "taken unlawfully" No-Fault exclusion.[5] Lejuan Rambin, who did not own a motor vehicle, was

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1. Barbara Marquand, *Car Insurance Rates by State, 2014 Edition*, INSURE.COM, http://www.insure.com/car-insurance/car-insurance-rates.html (last updated Feb. 21, 2014).

2. *Michigan Health Insurers Propose Higher 2015 Rates*, MLIVE (Jun. 27, 2014, 8:00 AM), http://www.mlive.com/lansing-news/index.ssf/2014/06/michigan_health_insurers_propo.html.

3. MICH. COMP. LAWS ANN. §§ 500.3101–500.3179 (West 2015).

4. *Id.* § 500.3113.

5. Rambin v. Allstate Ins. Co., 495 Mich. 316, 319, 852 N.W.2d 34, 35 (2014). The Michigan Supreme Court stated in *Rambin* that in a previous case:

> [w]e held a person injured while driving a motor vehicle that was taken contrary to the express prohibition of the vehicle owner cannot receive PIP benefits. We further held "that any person who takes a vehicle contrary to a provision of the Michigan Penal Code—including MCL 750.413 and MCL

operating a motorcycle owned and registered to Scott Hertzog when he was involved in an accident with an uninsured motor vehicle.[6] Mr. Rambin asserted that he was entitled to No-Fault benefits from either Mr. Hertzog's No-Fault insurer, Allstate Insurance Company, or from Titan Insurance Company, which was assigned the claim by the Michigan Assigned Claims Facility; both insurers claimed that Mr. Rambin was barred from benefits because he had taken the motorcycle unlawfully.[7] Mr. Rambin had joined a motorcycle club and was loaned a motorcycle by another member, Andre Smith, for use in a club ride.[8] In reality, the motorcycle provided by Mr. Smith had been stolen from Mr. Hertzog weeks prior.[9] The trial court granted summary disposition to the No-Fault insurers, but the Michigan Court of Appeals reversed, concluding that from the point of view of Mr. Rambin, there had not been an unlawful taking of the motorcycle.[10]

There was no question that MCL section 500.3113(a) precludes a person from No-Fault benefits if "[t]he person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle."[11] The situation at issue did not fit within precedent because Mr. Rambin "claims he did not knowingly lack authority to take the motorcycle because he believed that the person who gave him access to the motorcycle was the rightful and legal owner of it."[12] The question was whether MCL section 750.414 was a strict liability crime, which is generally disfavored because it presumes mens rea.[13] Though the statute applied "without an intent to steal," that did not totally dispense with a mens rea requirement.[14] The phrase only dispensed with "the specific intent to permanently deprive the owner of his or her property" and did not dispense with an intent to take or use without authority.[15] Mr. Rambin was entitled to present evidence that he "did not knowingly lack

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750.414, informally known as the 'joyriding' statutes—has taken the vehicle unlawfully for purposes of MCL 500.3113(a)."

Rambin, 495 Mich. at 319, 852 N.W.2d at 35 (quoting Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co. of Mich., 492 Mich. 503, 509, 821 N.W.2d 117, 120 (2012)).

6. *Rambin*, 495 Mich. at 320–321, 852 N.W.2d at 36.

7. *Id.* at 321–22, 852 N.W.2d at 36–37.

8. *Id.* at 322–23, 852 N.W.2d at 37.

9. *Id.*

10. *Id.* at 324–25, 852 N.W.2d at 38.

11. *Id.* at 326, 852 N.W.2d at 39 (quoting MICH. COMP. LAWS ANN. § 500.3113(a) (West 2015)).

12. *Id.* at 327, 852 N.W.2d at 39.

13. *Id.* at 327–28, 852 N.W.2d at 39–40.

14. *Id.* at 330, 852 N.W.2d at 41.

15. *Id.* at 331, 852 N.W.2d at 42.

authority to take the motorcycle," and, if true, that he had not taken the motorcycle unlawfully.[16] The Michigan Supreme Court was highly skeptical of Mr. Rambin's assertions but remanded for further proceedings on that question of fact.[17]

2. MCL 500.3114(1): "A Relative of Either Domiciled in the Same Household"[18]

In consolidated cases, the Michigan Supreme Court considered the "domicile" of minor children of divorced parents for purposes of the No-Fault Act.[19] The first case involved a deceased minor, Josalyn, where "[t]he judgment of divorce granted Lawrence and Rosinski joint legal custody . . . but Rosinski was given 'primary physical custody . . . .'"[20] Lawrence was granted liberal parenting time.[21] Josalyn was in a vehicle driven by Rosinski when another driver ran a stop sign and struck the Rosinski vehicle, killing Josalyn.[22] Farm Bureau General Insurance of Michigan ("Farm Bureau") insured Rosinski, while Grange Insurance Company ("Grange") insured Lawrence; Grange denied coverage.[23] In the declaratory action between Farm Bureau and Grange, the trial court concluded that Josalyn had two domiciles and therefore determined that Farm Bureau and Grange were in the same order of priority.[24] The Michigan Court of Appeals affirmed, concluding that "domicile" and "residence" for purposes of the No-Fault Act were "legally synonymous."[25]

The second case also involved a deceased minor, Sarah, with a judgment of divorce that granted joint legal custody to both parents but awarded physical custody to the father, Francis Campanelli; the mother, Tina Taylor, was permitted reasonable visitation.[26] Campanelli subsequently moved the family to Tennessee and obtained an order allowing him to change the children's domicile to Tennessee, without changing the joint legal custody.[27] In 2007, sixteen-year-old Sarah stayed

16. *Id.* at 333, 852 N.W.2d at 43.
17. *Id.* at 336, 852 N.W.2d at 44.
18. MICH. COMP. LAWS ANN. § 500.3114 (West 2015).
19. Grange Ins. Co. v. Lawrence, 494 Mich. 475, 481, 835 N.W.2d 363, 365–66 (2013).
20. *Id.* at 482, 835 N.W.2d at 366.
21. *Id.*
22. *Id.*
23. *Id.* at 483, 835 N.W.2d at 367.
24. *Id.* at 483–84, 835 N.W.2d at 367.
25. *Id.* at 485, 835 N.W.2d at 368.
26. *Id.* at 486, 835 N.W.2d at 368–69.
27. *Id.*

with her mother for the summer and, with Campanelli's permission, remained with her mother in Michigan for the fall to attend school.[28] In November 2007, Sarah sustained fatal injuries while a passenger in a friend's automobile that was insured by State Farm Mutual Automobile Insurance Company ("State Farm").[29] In a declaratory action between State Farm and Automobile Club Insurance Association (ACIA), the insurer of Sarah's uncle (with whom Sarah resided), the trial court granted summary disposition to State Farm.[30] The court of appeals reversed, finding that a question of fact existed as to Sarah's domicile.[31]

The Michigan Supreme Court determined that "domicile" is a legal term of art.[32] The court noted:

> For over 165 years, Michigan courts have defined "domicile" to mean "the place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." . . . In this regard, the Court has recognized that "[i]t may be laid down as a settled maxim that every man must have such a national domicile somewhere. It is equally well settled *that no person can have more than one such domicile, at one and the same time.*"[33]

A person may have multiple residences but only one "domicile."[34] "Domicile" is primarily a question of intent, when considering all facts.[35] There was no indication that the legislature intended to depart from the common law meaning when using "domicile" in the No-Fault Act.[36] A prior Michigan Supreme Court decision had concluded that "the terms 'domicile' and 'residence' are legally synonymous (except in special circumstances)."[37] The court clarified that phrase as recognizing that "residence" has sometimes been given the same meaning as "domicile" but did not establish an absolute rule and, further, did not endorse the

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28. *Id.* at 487, 835 N.W.2d at 369. Taylor was living with her great uncle, Terry Graville, who was insured by Automobile Club Insurance Association (ACIA). *Id.*

29. *Id.*

30. *Id.* at 488, 835 N.W.2d at 369–70.

31. *Id.* at 488–89, 835 N.W.2d at 370.

32. *Id.* at 493, 835 N.W.2d at 372.

33. *Id.* at 493–94, 835 N.W.2d at 372 (quoting *In re* High, 2 Doug. 515, 523 (Mich. 1847)).

34. *Id.* at 494, 835 N.W.2d at 372.

35. *Id.* at 495, 835 N.W.2d at 373.

36. *Id.* at 496, 835 N.W.2d at 373–74.

37. *Id.* at 498, 835 N.W.2d at 375 (emphasis omitted) (quoting Workman v. Detroit Auto. Inter–Ins. Exch., 404 Mich. 477, 495, 274 N.W.2d 373, 379 (1979)).

corollary that "domicile" is to be given the same meaning as "residence."[38] In fact, the corollary is untrue.[39]

Three ways exist to acquire a "domicile": "(1) domicile of origin or of nativity; (2) domicile of choice; and (3) domicile by operation of law."[40] A child cannot attain a domicile of choice because a child lacks capacity to make any such choice.[41] Therefore, the child's intent is simply irrelevant.[42] Divorce can complicate matters, but Michigan courts have long held that "a child's domicile, upon the divorce or separation of the child's parents, is the same as that of the parent to whose custody *he has been legally given* pursuant to a custody order."[43] "A person's domicile for one purpose is his domicile for all purposes."[44] The Child Custody Act, MCL sections 722.21 et seq., is consistent with these common law principles.[45] Further, "[b]ecause parents are legally bound by the terms of the custody order, the order therefore negates the parents' legal capacity, which is necessary to establish a domicile of choice for the minor child that is different from that established in the custody order."[46] Accounting for all of these principles, "courts presiding over an insurance coverage dispute involving the minor child of divorced parents must treat a custody order as conclusive evidence of a child's domicile," and the pertinent inquiry is which parent has been given physical custody of the minor.[47] Therefore, the court concluded that the domicile of Joslyn was with Rosinski, not Lawrence, and consequently, Lawrence's insurer was not liable.[48] Regarding Sarah, her "domicile" remained in Tennessee with her father, pursuant to the custody order, and therefore, the insurer of her mother's household was not liable for No-Fault benefits.[49]

38. *Id.* at 498–99, 835 N.W.2d at 375–76.
39. *Id.* at 499, 835 N.W.2d at 375.
40. *Id.* at 501, 835 N.W.2d at 377.
41. *Id.* at 503, 835 N.W.2d at 377–78.
42. *Id.* at 503, 835 N.W.2d at 377.
43. *Id.* at 504, 835 N.W.2d at 378; *see In re* Volk, 254 Mich. 25, 31–32, 235 N.W.2d 854, 856 (1931), *overruled in part on other grounds by* Hentz v. Hentz, 371 Mich. 335, 123 N.W.2d 757 (1963).
44. *Grange*, 494 Mich. at 505, 835 N.W.2d at 379.
45. *Id.* at 506, 835 N.W.2d at 379.
46. *Id.* at 508–09, 835 N.W.2d at 380–81.
47. *Id.* at 511, 835 N.W.2d at 382.
48. *Id.* at 513–14, 835 N.W.2d at 383.
49. *Id.* at 514–15, 835 N.W.2d at 384.

3. MCL Section 500.3114(5): "Double Dipping"[50]

"Double dipping" refers to a situation where a claimant's medical expenses are paid by both a No-Fault provider and another insurer, with the claimant being permitted to retain the extra payment for his own use.[51] The No-Fault Act permits insurers to offer coordinated benefits to prevent a double recovery, and the insurance-purchasing public will be given a reduced rate in return.[52] The Michigan Supreme Court addressed "double dipping" involving a motorcyclist, Brent Harris, who was struck by a motor vehicle while operating his motorcycle.[53] Mr. Harris maintained health insurance with Blue Cross Blue Shield of Michigan (BCBSM), and as Mr. Harris was operating a motorcycle at the time of the accident, he would be entitled to any No-Fault benefits from the "insurer of the owner or registrant of the motor vehicle involved in the accident," ACIA, pursuant to MCL section 500.3114(5)(a).[54] Mr. Harris sought to recover from both BCBSM and ACIA, expecting the former to pay his medical bills and the latter to pay him directly, for the exact same amounts.[55] BCBSM's coverage was coordinated, so it denied coverage, and ACIA paid Mr. Harris's medical providers.[56] Mr. Harris filed a complaint, naming BCBSM and ACIA, and the trial court ultimately determined that ACIA was the primary insurer and that because the BCBSM policy was coordinated, BCBSM did not owe anything.[57] The court of appeals reversed as to BCBSM because Mr. Harris had incurred the expenses—even though the No-Fault insurer ultimately paid them—and because the trial court erred in determining that the BCBSM policy coordinated with the No-Fault policy.[58]

The Michigan Supreme Court acknowledged that prior decisions permitted a party electing uncoordinated No-Fault coverage the

50. MICH. COMP. LAWS ANN. § 500.3114 (West 2015).

51. Nasser v. Auto Club Ins. Ass'n, 435 Mich. 33, 61–62, 457 N.W.2d 637, 650–51 (1990).

52. MICH. COMP. LAWS ANN. § 500.3109a.

53. Harris v. Auto Club Ins. Ass'n, 494 Mich. 462, 464–45, 835 N.W.2d 356, 357–58 (2013).

54. *Id.* at 465–66, 835 N.W.2d at 357–58 (quoting MICH. COMP. LAWS ANN. § 500.3114(5)(a)).

55. *Id.* at 466, 835 N.W.2d at 358.

56. *Id.* The Blue Cross policy provided, "We do not pay for the following care and services: Those for which you legally do not have to pay or for which you would not have been charged if you did not have coverage under this certificate." *Id.* at 468, 835 N.W.2d at 358.

57. *Id.* at 466–67, 835 N.W.2d at 358–59.

58. *Id.* at 468–69, 835 N.W.2d at 359–60.

possibility of a double recovery.[59] However, the case at issue was different because "Harris [was] not claiming benefits under a no-fault insurance policy that he or anyone else procured. . . . Rather, Harris's right to PIP benefits [arose] solely by statute."[60] Thus, it was not the uncoordinated ACIA policy, but operation of MCL 500.3114(5), which created the entitlement to No-Fault.[61] As a matter of law, not contract, ACIA was liable for Mr. Harris's medical expenses, and

> [t]his conclusion is consistent with [the court's] holding in *Smith* [*v. Physicians Health Plan, Inc.*, 444 Mich. 743, 514 N.W.2d 150 (1994)], where we concluded that an insured must pay a premium to obtain insurance policies that provide for double recovery. Harris has simply not shown that he paid the necessary premiums to receive a double recovery.[62]

As Mr. Harris bore no legal liability related to the payment of the medical expenses paid by ACIA, the contractual coordination of benefits provision in the BCBSM policy applied and precluded double recovery.[63]

B. Statutory Appraisal and Case Evaluation Sanctions

Acorn Investment Company ("Acorn") purchased insurance for property in Detroit through Michigan Basic Property Insurance Association ("Michigan Basic") with an effective period of April 2007 to April 2008.[64] A fire damaged the property on May 27, 2007, and Michigan Basic denied coverage because the policy was canceled as of May 16, 2007.[65] Acorn filed a declaratory judgment action based on an Installment Payment Notice received May 11, 2007; Michigan Basic responded that cancellation notices were sent April 16, 2007 and May 16, 2007 stating that the policy would be canceled May 16, 2007 because the property was not eligible for coverage.[66] Acorn was awarded $11,000 during case evaluation, which Acorn accepted and Michigan Basic rejected.[67] Acorn was granted summary disposition based on the

59. *Id.* at 470, 835 N.W.2d at 360–61.
60. *Id.* at 471–72, 835 N.W.2d at 361.
61. *Id.* at 472, 835 N.W.2d at 361.
62. *Id.*
63. *Id.* at 473, 835 N.W.2d at 362.
64. Acorn Inv. Co. v. Mich. Basic Prop. Ins. Ass'n, 495 Mich. 338, 343, 852 N.W.2d 22, 24 (2014).
65. *Id.*
66. *Id.* at 343–44, 852 N.W.2d at 24.
67. *Id.* at 344, 852 N.W.2d at 25.

cancellation notices being statutorily deficient.[68] Acorn moved to have the issue of damages referred to a three-person appraisal panel, as allowed by the policy and MCL section 500.2833(1)(m); the trial court granted the motion.[69] The appraisal panel awarded $20,877, and Acorn objected that the amount failed to account for debris removal costs, as permitted by the policy.[70] Acorn moved for judgment based on the appraisal amount plus interest, as permitted by statute, together with case evaluation sanctions and the cost of debris removal not reflected in the appraisal award.[71] Michigan Basic did not contest the request for judgment plus interest but challenged the imposition of case evaluation sanctions and the cost of debris removal.[72] The trial court denied the request for case evaluation sanctions and for the cost of debris removal and entered judgment for the appraisal amount plus $8,391.96 in interest.[73] The Michigan Court of Appeals affirmed.[74]

The Michigan Supreme Court accepted application for leave to appeal to determine whether the judgment entered upon the appraisal award constituted a "verdict" for purposes of case evaluation sanctions.[75] For case evaluation purposes, "verdict" is defined as: "(a) a jury verdict, (b) a judgment by the court after a nonjury trial, [or] (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation."[76] The court noted that the dispute arose out of whether the judgment entered came within subsection (c).[77] The court listed three factors that would entitle Acorn to case evaluation sanctions: "(1) the action proceeded to a judgment, (2) the judgment entered as a result of a ruling on a motion, and (3) the judgment occurred after Michigan Basic rejected the case evaluation."[78] The court concluded that the case met all three prongs of the test, entitling Acorn to its costs.[79] Though the judgment was not the result of a motion for summary disposition, it was nonetheless the result of a motion, i.e., a motion for entry of judgment.[80] The judgment, not the appraisal, resulted in final resolution of the rights

68. *Id.*
69. *Id.* at 344–45, 852 N.W.2d at 24–25.
70. *Id.* at 345, 852 N.W.2d at 25.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 346, 852 N.W.2d at 25.
75. *Id.* at 348, 852 N.W.2d at 27.
76. MICH. CT. R. 2.403(O)(2).
77. *Acorn Inv. Co.*, 495 Mich. at 349, 852 N.W.2d at 27.
78. *Id.* at 350, 852 N.W.2d at 28.
79. *Id.* at 350–51, 852 N.W.2d at 28–29.
80. *Id.*

and liabilities of the parties.[81] The appraisal was not akin to a settlement because the circuit court retained authority to overturn the appraisal award.[82] Additionally, unlike a stipulated order of dismissal, the judgment was a final determination of the rights and obligations by the circuit court.[83] When the judgment entered, the parties still did not agree as to the proper amount of the appraisal award, so the action was not a settlement.[84] As to the debris removal expenses, there is a colorable argument as to whether the appraisal panel was empowered to consider such expenses as part of its award and, if it did have such authority, whether it was error not to include those expenses in the award.[85] The court remanded the case for consideration of the debris removal issue.[86]

C. "Legally Responsible" in the Definition of an "Insured"

The Michigan Supreme Court peremptorily reversed the Michigan Court of Appeals in a case involving a personal injury sustained in a boating accident based on the definition of an "insured" in a policy issued by Farm Bureau Mutual Insurance Company of Michigan.[87] Nicholas Bowers was injured in a boating accident.[88] The boat, owned by Mr. Bowers' parents, was being piloted by Mr. Bowers' wife; the policy excluded coverage for injury to individuals "legally responsible" for the boat.[89] The circuit court ruled in favor of Mr. Bowers.[90] The Michigan Court of Appeals noted that injury to any "insured" was excluded by the policy, and "insured" was a defined term: "(3) Any person or organization (a) *legally responsible* for animals or watercraft owned by an insured . . . but only in so far as . . . . that person or organization has the custody or use of the animals or watercraft with the owner's permission."[91]

The policy did not define "legally responsible."[92] The Michigan Court of Appeals looked to the commonly used meaning of the term;

81. *Id.* at 351–52, 852 N.W.2d at 29.
82. *Id.* at 351–52, 852 N.W.2d at 29.
83. *Id.* at 355–56, 852 N.W.2d at 30–31.
84. *Id.* at 356, 852 N.W.2d at 31.
85. *Id.* at 358–59, 852 N.W.2d at 32–33.
86. *Id.* at 359, 852 N.W.2d at 32–33.
87. Farm Bureau Mut. Ins. Co. of Mich. v. Bowers, 495 Mich. 905, 839 N.W.2d 492 (2013).
88. Farm Bureau Mut. Ins. Co. of Mich. v. Bowers, 2013 WL 3455499 at *1 (Mich. Ct. App. July 9, 2013).
89. *Id.*
90. *Id.*
91. *Id.* at *2.
92. *Id.* at *3.

relying on Michigan Supreme Court precedent and a Kentucky Supreme Court case that it found persuasive, the court concluded that "'legally responsible' embraces liability imposed or arising according to law."[93] While the driver of the boat had a legal responsibility to operate the boat in a reasonable manner, Mr. Bowers was a passenger and bore no duty of care relative to the boat.[94] The insurer argued that Mr. Bowers was a bailee and therefore legally responsible for the boat, but the Michigan Court of Appeals determined that a question of law remained as to whether a bailment existed.[95] Further, even if Mr. Bowers was a bailee when he took possession of the boat, a question of fact remained as to whether he was "legally responsible" for the boat at the time of the accident.[96]

The Michigan Supreme Court determined that a "bailment existed as a matter of law between the boat's owners and the defendant Nicholas Bowers. . . . He also had, as a matter of law, custody or use of the watercraft at the time of the incident."[97] Therefore, Mr. Bowers was an "insured" within the meaning of the policy.[98]

III. DECISIONS OF THE MICHIGAN COURT OF APPEALS

The vast majority of cases decided by the Michigan Court of Appeals are not officially "published" decisions. "Unpublished" decisions are not binding on the Michigan Court of Appeals or circuit courts under the principles of stare decisis, and therefore, such decisions are beyond the scope of this survey.[99]

A. The No Fault Act: MCL Sections 500.3101 et seq.[100]

In a case that was primarily about the jurisdiction of the Michigan Judicial District Courts, the Michigan Court of Appeals considered several No-Fault cases brought by claimants and medical providers.[101] In short, the claimants and medical providers filed separate complaints in

93. *Id.* (citing Nationwide Mut. Ins. Co. v. Nolan, 10 S.W.3d 129, 132 (Ky. 1999); Bailey v. Oakwood Hosp. & Med. Ctr., 472 Mich. 685, 696, 698 N.W.2d 374, 381 (2005)).

94. *Id.* at *4.

95. *Id.*

96. *Id.*

97. Farm Bureau Mut. Ins. Co. of Mich. v. Bowers, 495 Mich. 905, 839 N.W.2d 492 (2013).

98. *Id.*

99. MICH. CT. R. 7.215(C).

100. MICH. COMP. LAWS ANN. §§ 500.3101–500.3179 (West 2015).

101. Moody v. Home Owners Ins. Co., 304 Mich. App. 415, 849 N.W.2d 31 (2014).

the 36th District Court seeking No-Fault benefits from Home Owners Insurance Company, which moved to consolidate the cases, without objection.[102] While the complaint by the claimant alleged benefits of less than $25,000, after discovery the claimant offered proof of damages greatly exceeding the jurisdictional limit; the claims of the providers were less than $25,000.[103] The trial court refused to dismiss or transfer the actions; instead, it simply decided that whatever the jury awarded would be reduced to the jurisdictional limit of $25,000.[104]

The Michigan Court of Appeals noted that while it is true that the medical providers can bring an independent cause of action against a No-Fault insurer, their claims are dependent on the claimant being able to establish:

> "accidental bodily injury arising out of the . . . use of a motor vehicle," MCL 500. 3105(1), that they provided "reasonably necessary products, services and accommodations for [Moody's] care, recovery, or rehabilitation," MCL 500.3107 (1)(a), and that at the time of the accident, Moody was "domiciled in the same household" as his father who was insured by Home Owners, MCL 500.3114 (1).[105]

Because the claims with respect to the No-Fault insurer's liability were identical and were consolidated for trial, the court "consider[ed] them merged for the purpose of determining the amount in controversy under MCL 600.8301(1)."[106] In fact, the claimant could have brought all the claims in a single case, and it is the claimant's entitlement to benefits that medical providers are allowed to assert.[107] A claimant may waive a claim for No-Fault benefits, and the medical provider is bound by that waiver, with the provider's remedy being an action against the claimant.[108] In this case, because the total of all claims of the claimant and the providers exceeded the jurisdictional limit of the district court, the entire judgment was void, and the providers' claims could not be severed.[109] The court further found that it was reversible error for a plaintiff's counsel to make comments regarding the assigned claims

102. *Id.* at 420, 849 N.W.2d at 36.
103. *Id.* at 420–21, 849 N.W.2d at 36–37.
104. *Id.* at 420–26, 849 N.W.2d at 36–39.
105. *Id.* at 440–41, 849 N.W.2d at 46.
106. *Id.* at 441, 849 N.W.2d at 46–47.
107. *Id.* at 442, 849 N.W.2d at 47.
108. *Id.* at 442–43, 849 N.W.2d at 47–48.
109. *Id.*

facility, which were incorrect and irrelevant during opening argument.[110] Such comments warranted a new trial.[111]

1. MCL Section 500.3114(5): Injuries from a Motorcycle Accident Where a Motor Vehicle Was "Involved in the Accident"[112]

While traveling nearly 100 miles per hour, a motorcyclist saw headlights near an intersection and, in applying his brakes to avoid a collision, lost control of the motorcycle.[113] The Detroit Medical Center (DMC), which treated the motorcyclist, brought suit against Progressive Michigan Insurance Company, the No-Fault insurer of the owner of the motorcycle and, after a bench trial, judgment was entered in favor of DMC.[114]

The Michigan Court of Appeals began with the frequent conclusion that a motorcycle is not within the definition of a "motor vehicle" for purposes of No-Fault and that motorcyclists are only entitled to coverage for injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."[115] While proximate causation between an injury and a motor vehicle is not required, there must still be causation which "is more than incidental, fortuitous or but for."[116] Further, the motor vehicle "must actively, as opposed to passively, contribute to the accident . . . ."[117] The court concluded that the connection was insufficient, as it was "incidental, fortuitous, or but for."[118] There was no evidence the motorcyclist needed to take evasive action to avoid the vehicle associated with the headlights, but rather:

> that the motorcyclist was startled when he saw the approaching headlights and overreacted to the situation. And while fault is not a relevant consideration in determining whether a motor vehicle is involved in an accident for purposes of no-fault benefits, we believe that principle is limited to not considering fault in the

110. *Id.* at 446–47, 849 N.W.2d at 49–50.

111. *Id.* at 447, 849 N.W.2d at 50.

112. MICH. COMP. LAWS ANN. § 500.3114(5) (West 2015).

113. Detroit Med. Ctr. v. Progressive Mich. Ins. Co., 302 Mich. App. 392, 393–94, 838 N.W.2d 910, 912–13 (2013).

114. *Id.* at 394, 838 N.W.2d at 913.

115. *Id.* at 394–95, 838 N.W.2d at 913 (quoting MICH. COMP. LAWS ANN. § 500.3105(1)).

116. *Id.* at 395, 838 N.W.2d at 913 (quoting Kangas v. Aetna Cas. & Sur. Co., 64 Mich. App. 1, 17, 235 N.W.2d 42, 50 (1975)).

117. *Id.* at 396 (quoting Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 39, 528 N.W.2d 681, 689 (1995)).

118. *Id.* at 397, 838 N.W.2d at 914.

> cause of the accident, not whether the motor vehicle was actually involved in the accident. That is, had the motorcycle actually collided with the motor vehicle, we would not consider whether the motorcyclist or the motor vehicle driver was at fault in causing the accident, nor would we consider whether the motorcyclist could have taken evasive action and avoided the accident. But, where there is no actual collision between the motorcycle and the motor vehicle, we cannot say that the motor vehicle was involved in the accident merely because of the motorcyclist's subjective, erroneous perceived need to react to the motor vehicle.[119]

Subjective need would not suffice.[120]

2. MCL Section 500.3163: Certification Regarding Automobile Liability Policy Protections for Nonresidents[121]

James Perkins, a Kentucky resident, was riding his motorcycle on a Michigan highway when he collided with a motor vehicle operated by Michigan resident Sarah Kaplan.[122] State Farm insured Mr. Perkins' motor vehicles in Kentucky; his motorcycle was insured with Progressive Northern Insurance Company ("Progressive Northern"), and Auto-Owners Insurance Company ("Auto-Owners") insured Ms. Kaplan's vehicle.[123] The trial court granted State Farm and Progressive Northern summary disposition and ruled that Auto-Owners was obligated to provide Michigan No-Fault benefits to Mr. Perkins.[124]

Auto-Owners' sole argument was that Mr. Perkins was not entitled to No-Fault benefits because his motorcycle insurer had not filed a certificate in compliance with MCL section 500.3163, and consequently, MCL section 500.3113(c) applied;[125] the statute excludes a person from No-Fault benefits if "[t]he person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and was not insured by an insurer which has filed a certification in

119. *Id.* at 398, 838 N.W.2d at 915 (citations omitted).

120. *Id.* at 399, 838 N.W.2d at 915.

121. MICH. COMP. LAWS ANN. § 500.3163 (West 2015).

122. Perkins v. Auto-Owners Ins. Co., 301 Mich. App. 658, 660, 837 N.W.2d 32, 33 (2013).

123. *Id.* at 660–61, 837 N.W.2d at 33.

124. *Id.* at 661, 837 N.W.2d at 33.

125. *Id.* at 661–63, 837 N.W.2d at 34–35 (quoting MICH. COMP. LAWS ANN. §§ 500.3163, 500.3113(c)).

compliance with section 3163."[126] Mr. Perkins' motor vehicle insurer, State Farm, had filed the certification required by MCL section 500.3163.[127]

The Michigan Court of Appeals noted that the purpose of MCL section 500.3113(c) "is to 'prevent benefits provided by Michigan's scheme from going to someone who has not paid a premium for the same.'"[128] Precedential case law failed to address the situation where the out-of-state injured party owned, but was not occupying, his certified vehicle at the time of the accident.[129] In short, Mr. Perkins paid into the system through the motor vehicle he insured with State Farm, thereby satisfying the purpose of the exclusion.[130] Also, on a more basic level, motorcycles are, by definition, not "motor vehicles" subject to the No-Fault Act, but riders may still be entitled to No-Fault benefits if injured in an accident involving a "motor vehicle."[131] The motorcycle insurer is never required to pay No-Fault benefits through its policy.[132] MCL section 500.3163 does not require that the motor vehicle being operated by the non-resident be the one that is covered under the terms of a foreign insurance policy.[133]

3. MCL 500.3148: Attorney Fees[134]

In the same case involving Mr. Perkins, supra, the Michigan Court of Appeals also addressed the propriety of awarding attorney fees.[135] Auto-Owners argued that its refusal to pay benefits was not unreasonable, as it presented a legitimate issue of statutory construction regarding MCL section 500.3113(c).[136] Though a court may ultimately decide that an insurer is obligated to provide benefits, that does not, per se, make the initial refusal to pay benefits unreasonable so as to trigger attorney fees

126. *Id.* at 661–62, 837 N.W.2d at 33–34 (quoting MICH. COMP. LAWS ANN. § 500.3113(c)).

127. *Id.* at 663–64, 837 N.W.2d at 34–35.

128. *Id.* at 664, 837 N.W.2d at 35 (quoting Gersten v. Blackwell, 111 Mich. App. 418, 424, 314 N.W.2d 645, 648 (1981)).

129. *Id.*

130. *Id.* at 665, 837 N.W.2d at 35.

131. *Id.* at 665, 837 N.W.2d at 35–36.

132. *Id.* at 665–66, 837 N.W.2d at 35–36 (citing MICH. COMP. LAWS ANN. § 500.3114(5) (West 2015)).

133. *Id.* at 666–67, 837 N.W.2d at 36–37 (quoting Transport Ins. Co. v. Home Ins. Co., 134 Mich. App. 645, 651, 352 N.W.2d 701, 704 (1984)).

134. MICH. COMP. LAWS ANN. § 500.3148.

135. Perkins v. Auto-Owners Ins. Co., 301 Mich. App. 658, 667–68, 837 N.W.2d 32, 36–37 (2013).

136. *Id.* at 668, 837 N.W.2d at 38.

pursuant to MCL section 500.3148(1).[137] However, in this case, none of the cases relied upon by Auto-Owners were on point, and nothing in the statutory language requires that the out-of-state vehicle occupied by the claimant must be the vehicle for which an insurer has filed certification, pursuant to MCL section 500.3163.[138] Auto-Owners failed to provide any support for its interpretation of the statute at issue, and the presentation of an issue of first impression alone will not suffice.[139] Therefore, an award of attorney fees against Auto-Owners was proper.[140]

B. FOIA and the Insurance Code

The Michigan Court of Appeals considered whether the records of the Michigan Catastrophic Claims Association (MCCA) were public records.[141] A private group sought to inspect the records of the MCCA pursuant to the Michigan Freedom of Information Act (FOIA), MCL sections 15.231 et seq.,[142] seeking information related to ages of claimants, dates of injuries, dates of claim closures, and total amounts paid.[143] The MCCA was created by statute to reimburse No-Fault insurers for certain substantial losses.[144] The MCCA denied the request, citing MCL section 500.134, which exempts a " record of an association or facility" from disclosure pursuant to FOIA, and which defines "an association or facility," in part, as "[t]he catastrophic claims association."[145] The trial court ordered the records disclosed.[146]

The Michigan Court of Appeals concluded that even if the MCCA was a "public body," as defined by FOIA, its records are expressly exempt from disclosure by MCL section 500.134.[147] The trial court failed to apply the plain statutory language.[148] The fact that the exemption states "a record" while FOIA refers to "records" is of no import, as the use of the indefinite article "'*a*' . . . clearly indicates its intent to exempt all of the MCCA's records in general."[149] MCL section 500.134 did not

137. *Id.* at 668, 837 N.W.2d at 37–38.
138. *Id.* at 668–69, 837 N.W.2d at 37–38.
139. *Id.* at 669, 837 N.W.2d at 38.
140. *Id.*
141. Coal. Protecting Auto No-Fault v. Mich. Catastrophic Claims Ass'n, 305 Mich. App. 301, 304, 852 N.W.2d 229, 232–33 (2014).
142. MICH. COMP. LAWS ANN. § 15.231–15.246 (West 2015).
143. *Coal. Protecting Auto No-Fault*, 305 Mich. App. at 304, 852 N.W.2d at 232–33.
144. *Id.*
145. *Id.* at 305, 852 N.W.2d at 233 (quoting MICH. COMP. LAWS ANN. § 500.134).
146. *Id.* at 307, 852 N.W.2d at 234.
147. *Id.* at 309, 852 N.W.2d at 235.
148. *Id.* at 310, 852 N.W.2d at 235–36.
149. *Id.* at 311, 852 N.W.2d at 236 (citations omitted).

alter FOIA, as FOIA itself "contemplates statutory exemptions," eliminating any need to reenact and republish FOIA as part of the exemption.[150] Further, the decision in *Shavers v. Kelley*,[151] which addressed the constitutionality of the No-Fault Act, was inapplicable as the defects identified in *Shavers* had long since been corrected, and the concerns raised were not present on these facts.[152] Furthermore, *Shavers* does not grant policyholders access to every constituent part of the premium paid, but just requires disclosure related to certain ratemaking criteria to ensure fairness.[153] The court further determined that FOIA and MCL section 500.134 preempt any common law right to access records.[154] Further, the case law relied upon by the record seeker, *Nowack v. Fuller*,[155] addressed a common law right to private, not public, records; therefore, even if MCCA is a private entity, there is no right to access its records.[156] Further, the court rejected theories of resulting and constructive trusts as inapplicable to the MCCA's records.[157]

C. Insurance Payments and Discounts as "Collateral Sources"

Makenzie Greer sustained a traumatic injury at birth, resulting in injury to her and derivative injury to her mother and father.[158] At trial, medical invoices of $425,533.75 were introduced, were not disputed, and formed the basis for the jury's award of past medical care damages.[159] Prior to entry of judgment, the defendants moved to reduce the damage award by the amounts paid by a settling defendant and to reduce the amounts for past medical expenses to the amounts insurance actually paid, and for which a lien was asserted, not the amounts billed by the providers.[160] The trial court denied the motion relative to the reduction based on the amounts actually paid by insurance and permitted only a partial common law set off for the amounts paid by the settling co-

150. *Id.* at 313–14, 852 N.W.2d at 237.

151. Shavers v. Kelley, 402 Mich. 554, 267 N.W.2d 72 (1978).

152. *Coal. Protecting Auto No-Fault*, 305 Mich. App. at 317, 852 N.W.2d at 239–40. Further, unlike *Shavers*, the MCCA's premiums are paid by member insurers, not the public, and the MCCA is already subject to detailed regulations. *Id.* at 317–18, 852 N.W.2d at 239–40.

153. *Id.* at 318, 852 N.W.2d at 240.

154. *Id.* at 319, 852 N.W.2d at 240.

155. Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928).

156. *Coal. Protecting Auto No-Fault*, 305 Mich. App. at 322, 852 N.W.2d at 242.

157. *Id.* at 325–26, 852 N.W.2d at 243–44.

158. Greer v. Advantage Health, 305 Mich. App. 192, 196, 852 N.W.2d 198, 200 (2014).

159. *Id.* at 196–97, 852 N.W.2d at 200–01.

160. *Id.* at 197, 852 N.W.2d at 201.

tortfeasor because that settlement was paid to Makenzie and her parents as co-plaintiffs, and the verdict as to the remaining defendants was only for injury to Makenzie.[161]

The court of appeals determined that the trial court erred in permitting the partial common law set off because the complaint was brought against all defendants concerning a single incident, the birth of Makenzie, and did not apportion the settlement among the separate claims of the plaintiffs.[162] Where liability is joint and several, as would be the case on these facts, any settlement must be offset against the amount of injury determined to represent all of the plaintiffs' damages.[163] "[A]pportionment of an indivisible lump-sum settlement into partial, severable settlements" for each plaintiff is not permitted.[164] Additionally, if apportionment was necessary, it should be in accord with the determination of the jury, valuing the parents' claims at $0, which would make their portion of the settlement $0 as well.[165]

As to the insurance discounts, those amounts do fit within the definition of "collateral source," but an exception exists "if the contractual lien [of the collateral source] has been exercised."[166] The statute does not specify that the exception is limited to the amount of the lien exercised or the amount actually paid by the collateral source.[167] The collateral source statute is in partial derogation of the common law rule and is therefore strictly construed so as to make the least change to the common law.[168]

> It is undisputed that each insurance company that discharged plaintiffs' medical expenses, in part by cash payment and in part by an insurance discount, also was "entitled by contract to a lien against the proceeds" of plaintiffs' civil action and "exercised [the lien] pursuant to subsection (3)." MCL 600.6303(4). Thus, applying the plain terms of the last sentence of § 6303(4) compels the conclusion that both the cash payments and discount, i.e., the "benefits received or receivable from an insurance policy," are excluded as statutory collateral source benefits. This reading of the statute's plain terms makes "the

161. *Id.* at 197–98, 852 N.W.2d at 201–02.
162. *Id.* at 203, 852 N.W.2d at 204.
163. *Id.* at 203–04, 852 N.W.2d at 204–05.
164. *Id.* at 204, 852 N.W.2d at 205.
165. *Id.* at 206, 852 N.W.2d at 205–06.
166. *Id.* at 206–07, 852 N.W.2d at 206 (emphasis omitted) (quoting MICH. COMP. LAWS ANN. § 600.6303(4) (West 2014)).
167. *Id.* at 207, 852 N.W.2d at 206.
168. *Id.*

> least change in the common law." *Velez* [*v. Tuma*], 492 Mich 1, 17; 821 N.W.2d 432 (2011). The Legislature could have, but did not, write the statute to say that the § 6303(4) collateral source exclusion is limited to the "amount of" a validly exercised lien.[169]

Thus, regardless of the lien amount actually exercised, the exclusion applies to all amounts "paid or payable," which includes both amounts the insurer actually paid and amounts realized as a discount obtained by the insurer with the medical provider.[170]

D. "Reciprocal States" Within the Insurance Code

In May 2002, Allstate Painting and Contracting contracted with the Michigan Department of Transportation (MDOT) to perform certain Mackinac Bridge maintenance work.[171] American Motorists Insurance Company (AMICO) provided a performance bond for the work, which included a two-year warranty period.[172] One month prior to the expiration of the warranty period, an inspection determined the work was deficient, and the defects were not corrected, resulting in a lawsuit.[173] AMICO moved to stay the proceedings because its parent was the subject of an order for rehabilitation in an Illinois state court, and AMICO was to be the subject of a separate order for rehabilitation to be entered shortly thereafter.[174] AMICO moved to dismiss based on the order of rehabilitation, which prohibited parties from bringing or further prosecuting claims against AMICO's parent, except as they arise in or are brought into the rehabilitation proceedings.[175] The motion was denied, and while an application for leave was pending with the Michigan Court of Appeals, "the Illinois state court entered an order of liquidation against AMICO."[176]

The Michigan Court of Appeals granted the application for leave to appeal.[177] It concluded that MCL section 500.8156(1) controlled the case: "In a liquidation proceeding in a reciprocal state against an insurer

169. *Greer*, 305 Mich. App. at 212, 852 N.W.2d at 209.
170. *Id.* at 213, 852 N.W.2d at 209.
171. Dep't of Transp. v. Am. Motorists Ins. Co., 305 Mich. App. 250, 251, 852 N.W.2d 645, 646 (2014).
172. *Id.*
173. *Id.* at 252, 852 N.W.2d at 646–47.
174. *Id.*
175. *Id.* at 252–53, 852 N.W.2d at 646–47.
176. *Id.* at 253, 852 N.W.2d at 647.
177. *Id.* at 253–54, 852 N.W.2d at 647.

domiciled in that state, claimants against the insurer who reside within this state may file claims either with the ancillary receiver, if any, in this state or with the domiciliary liquidator."[178] The issue was whether Illinois qualified as a "reciprocal state," as used in MCL section 500.8156(1), and if it did so qualify, MDOT's only claim would be in Illinois, as no ancillary receiver was appointed in Michigan.[179] A "reciprocal state" must meet three factors:

> (i) In substance and effect [MCL 500.8118(1), 8152, 8153, 8155, 8156, and 8157] are in force.
>
> (ii) Provisions requiring that the commissioner or equivalent official be the receiver of a delinquent insurer are in force.
>
> (iii) Some provision for the avoidance of fraudulent conveyances and preferential transfers are in force.[180]

In this case, Illinois has a statute substantively similar to that of Michigan for the first requirement; Illinois provides that the director of insurance is the receiver, satisfying the second requirement; and Illinois prohibits fraudulent conveyances and preferential transfers as voidable.[181] Therefore, Illinois is a "reciprocal state," and all claims must be filed with the Illinois liquidator because there is no ancillary receiver in Michigan.[182]

E. Performance Bonds

The Livingston County Board of Public Works ("County") engaged Northline Excavating, Inc. ("Northline") to complete a sanitary sewer project in 2007 and required a liquidated damages provision of $1,000 per day for tardy completion, as well as a performance bond in the contract amount of $251,035.[183] Northline encountered difficulties in construction, and the County rejected Northline's plans of action as to how to complete the contract.[184] The County declared that Northline was

178. *Id.* at 254, 852 N.W.2d at 647–48.

179. *Id.* at 254–55, 852 N.W.2d at 648.

180. *Id.* at 255, 852 N.W.2d at 648 (quoting MICH. COMP. LAWS ANN. 500.8103(l) (West 2015)).

181. *Id.* at 255–56, 852 N.W.2d at 648–49.

182. *Id.* at 257, 852 N.W.2d at 649.

183. Northline Excavating, Inc. v. Livingston Cnty., 302 Mich. App. 621, 622–23, 839 N.W.2d 693, 694–95 (2013).

184. *Id.* at 626, 839 N.W.2d at 696–97.

in default, terminated the contract, and notified the bond insurer, Hanover Insurance Company.[185] Hanover denied liability, and the County brought suit against Northline and Hanover.[186] Hanover moved for, and was granted, a limitation of its liability to the penal sum recited in the bond, as to all damages, including actual, liquidated, and attorney fees.[187]

The Michigan Court of Appeals noted that the performance bond at issue is required by MCL section 129.201.[188] Pursuant to a long line of cases, Michigan recognizes that the surety is liable for the amount of the bond.[189] Therefore, the court "will not presume that Hanover's liability is greater than the amount of the bond unless the contract language plainly expresses the parties' intent to expand Hanover's liability contrary to the general interpretation and understanding of performance bonds."[190] Though the performance bond entitles the owner to "any available remedy," this does not expand the liability of the surety beyond the amount of the bond, for to do so would conflate the term "remedy" with the term "damages."[191] No language of the bond explicitly extends the liability of the surety beyond the face value of the bond, and the trial court did not err in so concluding.[192]

F. Independent Medical Examinations and Medical Records' Access

Though the case arose in the context of a Workers' Compensation Act claim, the Michigan Court of Appeals has addressed when an insurance claimant must be given access to records regarding an independent medical examination (IME).[193] The court of appeals concluded that the purpose of an IME differs from the typical relationship between physician and patient, as the physician's goal is to gather information for a third party, not to diagnose or treat a patient.[194] Where the purpose of an examination is not "some sort of diagnostic or treatment service for the treatment and betterment of the patient," the

185. *Id.*
186. *Id.* at 626, 839 N.W.2d at 696.
187. *Id.* at 627, 839 N.W.2d at 697.
188. *Id.* at 628, 839 N.W.2d at 697–98 (citing MICH. COMP. LAWS ANN. § 129.201 (West 2015)).
189. *Id.* at 629, 839 N.W.2d at 698.
190. *Id.*
191. *Id.* at 630–31, 839 N.W.2d at 698–99.
192. *Id.* at 631, 839 N.W.2d at 699.
193. Paul v. Glendale Neurological Assocs., 304 Mich. App. 357, 848 N.W.2d 400 (2014).
194. *Id.* at 364–65, 848 N.W.2d at 404.

examinee is not entitled to records pursuant to the Medical Records Access Act, MCL sections 333.26261 et seq.[195]

G. Homeowners Insurance

Toni Hall was killed when a trailer, being towed by a van driven by Thomas Dells, separated and crashed into Ms. Hall's vehicle.[196] Pioneer State Mutual Insurance Company ("Pioneer") issued a policy of homeowners insurance to Mr. Dells, which excluded coverage related to the use of motor vehicles or trailers, but contained an exception for a "trailer not towed."[197] The trailer, with the hitch, separated from the van and careened into oncoming traffic, striking Ms. Hall's vehicle and killing her.[198] Pioneer commenced an action for a declaratory judgment, asserting that there was no coverage under its policy.[199] The trial court granted Pioneer summary disposition, concluding that the exclusion applied where the injury occurred due to a collision with a trailer that had broken free from the towing vehicle.[200]

The Michigan Court of Appeals began with the familiar rules of contract interpretation, such as unambiguous contracts are to be applied as written, the plain and ordinary meaning of words is to be applied, and an insurance policy is ambiguous if it is capable of conflicting interpretations.[201] The insured bears the burden of proof related to the coverage afforded by the policy, while the insurer must prove the applicability of exclusions.[202] The court determined:

> Under the exclusions in the homeowner's policy, the personal liability coverage enjoyed by Dells does not apply to bodily injury "arising out of . . . the . . . use . . . of any motor vehicle or all other motorized land conveyances, including trailers[.]" Although there is an exception to this exclusion relative to "a trailer not towed by or carried on a motorized land conveyance," we conclude that it is not even necessary to reach this exception in order to resolve the appeal.

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195. *Id.* at 366, 839 N.W.2d at 405 (citing MICH. COMP. LAWS ANN. §§ 333.26261–333.26271 (West 2015)).

196. Pioneer State Mut. Ins. Co. v. Dells, 301 Mich. App. 368, 370–71, 836 N.W.2d 257, 259 (2013).

197. *Id.* at 371, 836 N.W.2d at 259.

198. *Id.* at 372, 836 N.W.2d at 259–60.

199. *Id.* at 373, 836 N.W.2d at 260.

200. *Id.* at 376, 836 N.W.2d at 261–62.

201. *Id.* at 377–78, 836 N.W.2d at 262–63.

202. *Id.* at 378, 836 N.W.2d at 263.

> While it is certainly accurate to state that Hall's death arose out of the use of a trailer, it is equally accurate to state that her death arose out of the use of a motor vehicle, i.e., Dells's van, whether the use was driving the van with the trailer in tow or the act of connecting the van to the trailer in the first place. Absent the use of the van to connect to and tow the trailer that early October day, there would have been no bodily injury. . . . For purposes of the exclusion, and under the circumstances presented, one cannot logically dismiss the van's use as playing an indispensable and integral role in giving rise to Hall's bodily injury. While it was the trailer itself that directly struck Hall, the use of the trailer simply cannot stand on its own, independent of the van's use, as having been the cause of Hall's bodily injuries because it was the use of the trailer in unison with the use and operation of the van that gave rise to Hall's death.[203]

The court went on to consider the "trailer not towed" exception "for the sake of argument" and concluded that if the trailer was not being towed, there would have been no accident or injury, as a trailer cannot propel itself.[204] The court also applied a common-sense approach reasoning that the exclusion addresses situations where the trailer was sitting in a driveway and somehow caused injury to a person due to the negligence of the trailer owner.[205] The court buttressed its decision with case law from other jurisdictions of situations similar to those at issue in the case.[206]

H. Releases and Insurance Agents

On December 17, 2005, a fire occurred in the engine compartment of Walter Radu's vehicle, but there were no witnesses to the events leading up to the fire, other than Mr. Radu.[207] The local authorities did not consider the fire suspicious, and Mr. Radu proceeded to file a claim with his insurer, ACIA, which hired an investigative firm to look into the fire.[208] The investigator concluded the fuel line had been severed, and because he determined the fire to be incendiary in nature, he contacted

203. *Id.* at 379–80, 836 N.W.2d at 263–64.
204. *Id.* at 380, 836 N.W.2d at 264.
205. *Id.* at 381, 836 N.W.2d at 264.
206. *Id.* at 381–83, 836 N.W.2d at 264–65.
207. Radu v. Herndon & Herndon Investigations, Inc., 302 Mich. App. 363, 366–67, 838 N.W.2d 720, 723 (2013).
208. *Id.* at 367, 838 N.W.2d at 723.

the Oakland County Sheriff's Office.[209] The Sheriff's Office requested that ACIA provide information related to the vehicle and its investigation; as a result of the Sheriff's Office investigation, a decision was made to prosecute Mr. Radu, though, ultimately, the charges were dropped with a nolle poseequi.[210] Mr. Radu brought suit against ACIA related to its denial of his claim, and that matter ultimately resolved with a settlement and release, which was executed in favor of ACIA, its employees, and representatives.[211] Mr. Radu and his wife commenced litigation against the investigator hired by ACIA, related to the investigation that led to the prosecution of Mr. Radu.[212] The investigator brought two motions for summary disposition, arguing that it was entitled to immunity pursuant to MCL section 29.4(6)[213] and MCL section 500.4509(2)[214] and because of the release language applying to all of ACIA's "representatives."[215] The trial court granted both motions in favor of the investigator.[216]

The Michigan Court of Appeals turned to a dictionary to define "representatives," as the term was not defined in the release, and concluded that standing in the place of or speaking/acting by delegated authority were the touchstones of a "representative."[217]

> In this case, it is undisputed that the Herndon defendants were hired by ACIA to investigate plaintiffs' insurance claim. That is, with regard to the investigation of the vehicle fire, the Herndon defendants represented ACIA's interests. In that capacity, Herndon went to the storage lot where plaintiffs' vehicle was located and conducted his investigation on behalf of ACIA. Herndon also contacted the OCSO's fire investigation unit to report the vehicle fire on behalf of ACIA and then consulted with Farley during his investigation of the vehicle fire. Thus, we conclude that the Herndon defendants spoke and acted on behalf of ACIA by delegated authority with regard to the investigation of the vehicle fire. Accordingly, the Herndon defendants were

209. *Id.*
210. *Id.* at 368, 838 N.W.2d at 723.
211. *Id.* at 368, 838 N.W.2d at 724.
212. *Id.* at 368–69, 838 N.W.2d at 724.
213. MICH. COMP. LAWS ANN. § 29.4(6) (West 2015).
214. *Id.* § 500.4509(2).
215. *Radu*, 302 Mich. App. at 370–71, 838 N.W.2d at 724–25.
216. *Id.* at 371, 838 N.W.2d at 725.
217. *Id.* at 375, 838 N.W.2d at 727.

"representatives" of ACIA within the plain meaning of the release language.[218]

Further, MCL section 29.4(6) immunizes an insurance company or a person furnishing information on behalf of an insurer from liability related to providing information to a fire investigator, absent fraud or malice, while MCL section 500.4509(3) also provides immunity to agents of insurers who provide information regarding suspected insurance fraud to proper authorities, unless the furnishing of information was with malice or the information was knowingly false.[219] "Malice" within the meaning of these statutes requires knowledge of falsity, or reckless disregard of truth or falsity.[220] A failure to adequately investigate, or a difference of opinion, is insufficient to establish a reckless disregard.[221] The trial court was correct that there was insufficient evidence of malice.[222]

I. Burden of Proof on an Insurer's Affirmative Defenses to a Breach of Contract Action

A plaintiff made a claim for a fire loss to a modular home under a policy issued to him by Home-Owners Insurance Company ("Home-Owners").[223] The policy contained exclusions for actions intended to cause a loss, as well as for dishonesty regarding the insurance.[224] A fire investigator concluded that the fire was intentionally set by an amateur arsonist, and Home-Owners denied coverage after it determined that the arson occurred with the plaintiff's knowledge or consent and that during the investigation, the plaintiff made material misrepresentations.[225] The trial court instructed the jury that Home-Owners needed to prove its affirmative defenses related to the misrepresentations and intentional acts by clear and convincing evidence.[226] The jury returned a verdict in favor of the plaintiff.[227]

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218. *Id.* at 375–76, 838 N.W.2d at 727–28.

219. *Id.* at 377, 838 N.W.2d at 728 (citing MICH. COMP. LAWS ANN. §§ 29.4(6), 500.4509(2) (West 2015)).

220. *Id.* at 378–79, 838 N.W.2d at 729.

221. *Id.* at 380–81, 838 N.W.2d at 729–30.

222. *Id.* at 381, 838 N.W.2d at 730.

223. Stein v. Home-Owners Ins. Co., 303 Mich. App. 382, 383–84, 843 N.W.2d 780, 780 (2013).

224. *Id.* at 384, 843 N.W.2d at 780–81.

225. *Id.* at 384, 843 N.W.2d at 781.

226. *Id.* at 385–86, 843 N.W.2d at 781–82.

227. *Id.* at 386, 843 N.W.2d at 782.

The Michigan Court of Appeals concluded that simply because a contract provision references fraud, that does not increase the burden of proof for a defense based on that contract provision.[228] The defense asserted was not the fraud that traditionally permits a contract to be avoided, but a contractual exclusion from coverage related to fraudulent conduct.[229] Therefore, the burden is a preponderance of the evidence, as it would be for any other affirmative defense.[230] Further, as to the application of the higher burden of proof for the intentional acts, the trial court articulated no reasoning for elevating the burden of proof, which remains a preponderance of the evidence even if the defense relates to the commission of a criminal act by the party against whom the defense is asserted.[231]

J. Property Insurance

In 2009, a fire destroyed a residence on which Wells Fargo Bank, N.A. ("Wells Fargo") held a mortgage, and which was insured by Auto-Owners.[232] The home had been purchased by Lonnie Null, who subsequently agreed to sell the home to his sister-in law, Elizabeth Null, but the mortgage and homeowners policies were never assigned to Elizabeth.[233] Lonnie had not lived in the home for several years, and at the time of the fire, he had been incarcerated since the previous year.[234] Wells Fargo was notified of the claim related to the fire by Auto-Owners, which stated that Lonnie, as the named insured, sustained damages in the fire, and that the bank, as mortgagee, would be included on any insurance checks.[235] Auto-Owners denied Elizabeth's claim on the grounds that Lonnie did not reside there, as required by the policy.[236] Elizabeth brought suit against Auto-Owners and Wells Fargo in March 2010.[237] The court entered summary disposition in favor of Wells Fargo, which then attempted to intervene as a counter-plaintiff in 2011 based on a claim derivative of the policy held by Lonnie, but the trial court denied the motion.[238] After a bench trial, the trial court granted summary

228. *Id.* at 387–88, 843 N.W.2d at 782–83.
229. *Id.* at 388, 843 N.W.2d at 783.
230. *Id.* at 388–89, 843 N.W.2d at 783.
231. *Id.* at 390–91, 843 N.W.2d at 784.
232. Wells Fargo Bank, N.A. v. Null, 304 Mich. App. 508, 510, 847 N.W.2d 657, 662 (2014).
233. *Id.*
234. *Id.* at 510–11, 847 N.W.2d at 662.
235. *Id.* at 511, 847 N.W.2d at 662.
236. *Id.*
237. *Id.* at 512, 847 N.W.2d at 663.
238. *Id.* at 512–13, 847 N.W.2d at 663.

disposition in favor of Auto-Owners, and Elizabeth appealed.[239] The Michigan Court of Appeals affirmed, concluding that the residence fell outside the policy's definition of covered property because Lonnie no longer resided there.[240] While Elizabeth's case was proceeding, Wells Fargo filed its own action against Auto-Owners and Elizabeth, asserting it was entitled to any insurance proceeds Elizabeth may recover, and for breach of contract against Auto-Owners.[241] The policy contained a separate mortgage clause, giving rise to a separate contract with the mortgagee.[242] The trial court granted Auto-Owners summary disposition, concluding that the policy did not provide coverage to Wells Fargo for damages to the structure at issue, and further that the summary disposition granted to Wells Fargo from Elizabeth's case operated as a dismissal of all claims Wells Fargo may have had related to the fire.[243]

The issue as to whether the policy provided coverage to the residence at issue was not properly preserved, but was addressed by the Michigan Court of Appeals nonetheless.[244] The issue was raised in Elizabeth's lawsuit, and collateral estoppel barred its relitigation.[245] In Elizabeth's lawsuit, the trial court determined that the residence was not covered, and that matter was affirmed on appeal.[246] Further, Wells Fargo was a party to the prior action, had the opportunity to contest coverage in that action, was dismissed on its own motion, and as a named party, could have participated in the previous appeal.[247]

As to the mortgage clause, there are two such types used in insurance policies, "ordinary" and "standard."[248] With an "ordinary" clause, there is no privity of contract between mortgagee and insurer, and "the lienholder is simply an appointee to receive the insurance fund to the extent of its interest, and its right of recovery is no greater than the right of the insured."[249] With a "standard clause," an independent agreement exists between mortgagee and insurer, such that the mortgagee is "not subject to the exclusions available to the insurer against the insured."[250] The

239. *Id.* at 513, 847 N.W.2d at 663.
240. *Id.* at 513–14, 847 N.W.2d at 663–64.
241. *Id.* at 514, 847 N.W.2d at 664.
242. *Id.* at 515, 847 N.W.2d at 664.
243. *Id.* at 516, 847 N.W.2d at 665.
244. *Id.* at 520, 847 N.W.2d at 667.
245. *Id.*
246. *Id.* at 521, 847 N.W.2d at 667–68.
247. *Id.* at 522, 847 N.W.2d at 668.
248. *Id.* at 523, 847 N.W.2d at 669.
249. *Id.* (quoting Foremost Ins. Co. v. Allstate Ins. Co., 439 Mich. 378, 383, 486 N.W.2d 600, 602 (1992)).
250. *Id.* at 524, 847 N.W.2d at 669 (quoting *Foremost Ins. Co.*, 439 Mich. at 384, 486 N.W.2d at 602–03).

parties do not dispute that the policy at issue contains a "standard clause," and the court concluded that the language that in the event Auto-Owners denied the insured's claim "such denial will not apply to a valid claim of the mortgagee" is consistent with the "standard clause."[251] The "standard clause" provides coverage to Wells Fargo under the circumstances of this case.[252] Relying on prior case law, the Michigan Court of Appeals determined:

> [T]he Court indicated that the standard mortgage clause was an independent contract of insurance meant to prevent loss of coverage for the mortgagee for *any act or neglect* between the insured and the insurer. While the case may have involved denial of coverage to the insured pursuant to an exclusion, rather than a finding that no coverage existed, the Court did not make a distinction between acts that precluded coverage and acts that excluded coverage when setting forth the rule of law.[253]

The clause operates to protect the mortgagee for any act or neglect of the insured, even where the act or neglect "falls within a policy exclusion or causes there to be no coverage under the policy under the first instance."[254]

Here, when Lonnie ceased to reside at the property, the exclusion was triggered.[255] Furthermore, the policy itself imposes a condition on the mortgagee to notify the insurer of any change in occupancy or ownership of which the mortgagee has knowledge to preserve coverage, and this requirement would be unnecessary if change in occupancy or ownership, alone, negated the coverage.[256] The court further relied on several cases from other jurisdictions that have considered whether the mortgagee has a valid claim pursuant to the mortgage clause even where the insured's claim would be excluded.[257] Finally, the prior dismissal of Wells Fargo in Elizabeth's lawsuit does not bar its proceedings here because Wells Fargo's position is not wholly inconsistent with its position at present.[258] The Michigan Court of Appeals remanded for

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251. *Id.* at 526–27, 847 N.W.2d at 670–72 (quoting *Foremost Ins. Co.*, 439 Mich. at 389–90, 486 N.W.2d at 605).
252. *Id.* at 527, 847 N.W.2d at 671.
253. *Id.* at 529, 847 N.W.2d at 672.
254. *Id.* at 531, 847 N.W.2d at 673.
255. *Id.*
256. *Id.* at 532, 847 N.W.2d at 673–74.
257. *Id.* at 533–36, 847 N.W.2d at 674–76.
258. *Id.* at 537–38, 847 N.W.2d at 676–77.

consideration of whether Wells Fargo complied with the requirement of the policy so as to permit a claim pursuant to the mortgage clause.[259]

K. Insurance Agents and Business Coverage

In 2003 the primary building of Zaremba Equipment, Inc. ("Zaremba") was destroyed by a fire; the building was insured by Harco National Insurance Company ("Harco"), with limits of $525,000 for the building and $700,000 for the contents, which were insufficient amounts to replace the building and its contents.[260] Zaremba contended that the insurance agent, employed solely by Harco, provided erroneous advice, misrepresented the coverage being purchased, and performed an appraisal which undervalued the property.[261] A jury awarded Zaremba far in excess of the policy limits, but the Michigan Court of Appeals, in 2008, reversed in a published opinion, concluding that the jury was not properly instructed regarding the duty to read the insurance policy.[262] A properly instructed jury subsequently found the agent negligent and concluded he made innocent misrepresentations but did not find responsibility for fraud; the jury awarded a number generally in line with the policy limits.[263]

The Michigan Court of Appeals determined that because the previous appellate decision decided that any failure to read the policy was to be assessed as comparative fault regarding the agent's negligence, further argument regarding the failure to read the policy being a complete bar to recovery is precluded by the law of the case doctrine.[264] The same is true of the innocent misrepresentation claim as being limited to the appraisal of the building.[265]

Next, the court considered the sufficiency of evidence relative to a "special relationship" between the agent and Zaremba, so as to create a duty owed by the agent of Harco to Zaremba.[266] Generally, an insurance agent who is the servant of the insurance company does not owe a duty to advise an insured about coverage, as the agent is really an "order

259. *Id.* at 540, 847 N.W.2d at 678.

260. Zaremba Equip., Inc. v. Harco Nat'l Ins. Co., 302 Mich. App. 7, 10, 837 N.W.2d 686, 690 (2013).

261. *Id.* at 10–11, 837 N.W.2d at 690.

262. *Id.* at 11, 837 N.W.2d at 690.

263. *Id.*

264. *Id.* at 15–16, 837 N.W.2d at 693.

265. *Id.* at 16–17, 837 N.W.2d at 693–94.

266. *Id.* at 17, 837 N.W.2d at 693–94.

taker," not an insurance counselor.[267] This general rule yields where a "special relationship" exists, as 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.[268]

Here, the agent stepped into the role of an insurance advisor (as he purported to be an expert in insuring motor vehicle dealers), made recommendations as to the insurance Zaremba needed, conceded that Zaremba requested insurance in an amount sufficient to replace the building, and performed an appraisal and survey at Zaremba's request on which Zaremba relied.[269] Thus, the court affirmed the trial court's decision.[270]

The trial court also addressed alleged attorney misconduct related to "speaking objections," comparative negligence inconsistencies, and case evaluation sanctions, but those discussions are not related to any insurance aspect.[271] Likewise, Zaremba's cross appeal was unrelated to insurance issues.[272]

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267. *Id.* at 18, 837 N.W.2d at 694. This is to be contrasted with an independent insurance agent, who is the agent of the insured, not the insurer. *See* Genesee Foods Servs., Inc. v. Meadowbrook, Inc., 279 Mich. App. 649, 654, 760 N.W.2d 259, 262 (2008).

268. *Zaremba Equip., Inc.*, 302 Mich. App. at 18, 837 N.W.2d at 694 (quoting Harts v. Farmers Ins. Exch., 461 Mich. 1, 10–11, 597 N.W.2d 47, 52 (1999)).

269. *Zaremba Equip., Inc.*, 302 Mich. App. at 18, 837 N.W.2d at 694.

270. *Id.* at 20, 837 N.W.2d at 695.

271. *Id.* at 20–31, 837 N.W.2d at 695–701.

272. *Id.* at 31–33, 837 N.W.2d at 701–02.