

STATE OF MICHIGAN  
COURT OF APPEALS

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RAYMOND HENRY ANDRES, by and through  
his guardian MARK KEVIN PHILLIPS,

UNPUBLISHED  
December 2, 2008

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

No. 279608  
Wayne Circuit Court  
LC No. 04-411019-NF

Defendant-Appellant.

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Before: Zahra, P.J., and Cavanagh and Meter, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. I would hold that the lower court erred in concluding “the agreement is enforceable regardless of whether Swagler and Silverman engaged in fraud.” Defendant presented to the lower court a federal district court judgment finding that Swagler and Silverman had committed fraud in procuring the very contract of the instant case. Regardless whether Lori or Raymond Andres were involved in the alleged fraudulent conduct, there “is an old saying[;] ‘Fraud vitiates everything.’” *Grigg v Hanna*, 283 Mich 443, 278 NW 125 (1938). Further, “[a]ssuming that [a] transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation.” *Roek v Board of Educ of Chippewa Valley School Dist*, 430 Mich 314, 422 NW2d 680 (1988), quoting *Herpolsheimer v Herpolsheimer Realty Co*, 344 Mich 657, 666, 75 NW2d 333 (1956), quoting 3 Pomeroy, *Equity Jurisprudence* (5th ed), § 910, p. 578. I conclude the lower court plainly erred in concluding that “the agreement is enforceable regardless of whether Swagler and Silverman engaged in fraud.”

I reject the majority’s position that defendant waived any affirmative defense of fraud. Plaintiff did not raise this argument below and it should not be considered on appeal. Issues first raised on appeal need not be addressed by the appellate court. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). The lower court did not consider the issue waived, and indeed expressly addressed the issue of fraud. Plaintiff did not object to the lower court’s consideration of defendant’s claim of fraud and plaintiff certainly cannot maintain defendant’s claim of fraud was a surprise. Also, as mentioned at oral argument, had the issue of waiver been raised below, defendant could readily have requested an amendment under MCR 2.118. Last, although plaintiff claims that defendant failed to plead fraud with

sufficient specificity, I would merely note that defendant submitted the 110-page federal district court complaint detailing the alleged fraud along with the ensuing favorable judgment.

I would reverse.

/s/ Brian K. Zahra