STATE OF MICHIGAN

COURT OF APPEALS

INTEGON NATIONAL INSURANCE CO.,

Plaintiff-Appellee,

v

VINCENT LECARI BERRY and PATRICIA CAROL BERRY,

Defendants,

and

COZE ELISSA LONG,

Defendant-Appellant,

and

BRISTOL WEST INS CO.,

Intervening Defendant-Appellee.

UNPUBLISHED
March 25, 2010

No. 289320
Wayne Circuit Court
LC No. 08-103630-CK

INTEGON NATIONAL INSURANCE CO.,

Plaintiff-Appellee,

v

VINCENT LECARI BERRY II and PATRICIA CAROL BERRY,

Defendants,

and

ELISSA COZE LONG,

Defendant-Appellee,

No. 289366
Wayne Circuit Court
LC No. 08-103630-CK

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and

BRISTOL WEST INSURANCE COMPANY,

Intervening Defendant-Appellant.

COZE ELISSA LONG,

Plaintiff-Appellee,

v

VINCENT LECARI BERRY II and PATRICIA CAROL BERRY,

Defendants,

and

BRISTOL WEST AUTOMOBILE INS CO.,

Defendant-Appellant.

No. 291175
Wayne Circuit Court
LC No. 07-707389-NI

Before: M. J. KELLY, P.J., AND TALBOT AND WILDER, JJ.

PER CURIAM.

These consolidated appeals concern whether and to what extent automobile no-fault insurance policies issued by Integon National Insurance Company (Integon) and Bristol West Insurance Company (Bristol West) cover the injuries sustained by Coze Elissa Long in an automobile accident. In docket no. 289320, Long appeals as of right the trial court's order granting summary disposition in favor of Integon in its suit for declaratory relief. In docket no. 289366, Bristol West appeals as of right the same order. In docket no. 291175, Bristol West appeals as of right the trial court's order denying its motion for summary disposition in Long's suit for uninsured motorist benefits. On appeal, we conclude that the trial court did not err when it granted summary disposition in favor of Integon in docket nos. 289320 and 289366, and denied Bristol West's motion for summary disposition in docket no. 291175. For these reasons, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

According to Long, in June 2006 she was driving along a highway when traffic began to slow. Long indicated that Vincent Lecari Berry II (Vincent Berry) was driving behind her, failed to stop, and struck her car in the rear. At the time, Vincent Berry was driving a car owned by his

mother—Patricia Carol Berry (Patricia Berry). The police officer that prepared the accident report did not list an insurer for Patricia Berry's car.

In July and December 2006, Long's trial counsel sent letters to Vincent Berry asking him to notify his insurance carrier about the accident or verify that he had no insurance. Vincent Berry did not respond to either letter.

In March 2007, Long sued Patricia and Vincent Berry for damages arising from the automobile accident. She alleged that Vincent Berry negligently struck her and caused injuries that amounted to a serious impairment of body function. Long asked for both economic and non-economic damages.

Long also sued her no-fault insurer, Bristol West, alleging that it breached its insurance agreement with Long by failing to pay uninsured motorist benefits. She also alleged that Bristol West unreasonably refused or delayed payment of personal protection insurance benefits under the agreement.

Through a search of motor vehicle and postal records, Long verified that the address for both Patricia and Vincent Berry was the same address recorded on the accident report. Long tried to serve her complaint on Patricia and Vincent Berry via certified mail at that address, but was unsuccessful. Long hired a process server to serve notice in June 2007. However, the process server was unable to personally serve Patricia and Vincent Berry. In June 2007, the trial court granted Long permission to use substitute service at the address.

In July 2007, Vincent Berry sent a letter to Long's trial counsel indicating that he was unemployed and uninsured. Patricia and Vincent Berry did not otherwise answer Long's complaint. The clerk of the court entered a default against Patricia and Vincent Berry in August 2007.

Although Vincent Berry had asserted that he was uninsured at the time of the accident, Patricia Berry actually had insurance through Integon. The policy was in effect from May through November 2006. However, neither Patricia nor Vincent Berry ever contacted Integon about the accident or litigation. Several weeks after entry of default, but before entry of a default judgment, Bristol West contacted Integon and notified it about the litigation against Patricia and Vincent Berry.

Integon sent a letter to Patricia Berry in October 2007. In the letter, Integon stated that it would defend her while reserving its right to cease defending her should it determine, that there was no coverage as a result of her failure to cooperate or give notice of the accident. In November 2007, the trial counsel retained by Integon to represent Patricia and Vincent Berry moved to have the default set aside. Long's trial counsel opposed the motion and the trial court denied it in January 2008.

In February 2008, Integon sued Patricia Berry, Vincent Berry and Long. In its complaint, Integon asked the trial court to declare that it had no duty to provide coverage or defend Patricia or Vincent Berry against the claims made by Long. Integon alleged that Patricia Berry breached the terms of the insurance agreement when she failed to give notice of the accident, failed to give notice of the litigation, and failed to cooperate with Integon's investigation and defense of the

claims against her. Integon further alleged that these failings prejudiced it. Integon also alleged that Patricia Berry made a material misrepresentation when she failed to notify Integon that her son resided with her or otherwise regularly had access to the insured car. On the basis of these claims, Integon asserted that it had no obligation to defend Patricia or Vincent Berry or cover the claims against them. Patricia and Vincent Berry failed to answer Integon's complaint and the clerk of the court entered a default against them on April 24, 2008.

On April 29, 2008, Integon moved for summary disposition on its complaint for declaratory relief as to the only remaining defendant—Long. Bristol West then moved for permission to intervene as a defendant in the declaratory action, which the trial court granted in May 2008. Long also cross-moved for summary disposition and asked the trial court to declare that Integon had to cover her claims against Patricia and Vincent Berry.

The trial court held a hearing on Integon's motion for summary disposition in September 2008. At oral arguments, Long's trial counsel argued that, even if Integon were prejudiced by Patricia and Vincent Berry's failure to give notice and cooperate, Integon would still be liable for the $20,000 in minimum coverage required under the no-fault act because an innocent third party was involved. After hearing the parties' arguments, the trial court determined that Integon had been prejudiced by its insured's failure to give notice. For that reason, the trial court determined that Integon had no duty to defend or cover Patricia or Vincent Berry under its policy, even though an innocent third party was involved. The trial court entered an order granting Integon's motion for summary disposition and denying Long's motion on September 30, 2008.

In October 2008, Bristol West moved for reconsideration of the trial court's decision to grant Integon's motion for summary disposition. The trial court denied the motion in November 2008. Both Long and Bristol West appealed as of right the trial court's decision to grant summary disposition in favor of Integon in December 2008. This Court assigned docket no. 289320 to Long's appeal and assigned docket no. 289366 to Bristol West's appeal.

In December 2008, Bristol West moved for summary disposition on Long's claim for uninsured motorist coverage. Bristol West argued that it did not have to provide uninsured motorist coverage because Vincent Berry had coverage at the time of his accident and, for that reason, he was not an uninsured motorist under the terms of the policy. Bristol West also argued that Long forfeited her coverage by opposing Integon's attempt to set aside the default. The trial court denied Bristol West's motion in January 2009 and ordered the matter to binding arbitration.[1]

Bristol West applied for leave to appeal to this Court in March 2009. This Court granted leave to appeal in June 2009 and assigned docket no. 291175 to that appeal. This Court also consolidated that appeal with the appeals in docket nos. 289320 and 289366.[2]

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[1] In May 2009, Long and Bristol West stipulated to the dismissal of Long's claim for personal protection insurance benefits.

[2] See *Long v Berry*, unpublished order of the Court of Appeals, entered June 17, 2009 (Docket
(continued…)

II. THE APPEALS IN DOCKET NOS. 289320 AND 289366

A. STANDARD OF REVIEW

We shall first address Long's argument that the trial court erred when it concluded that Integon did not have to provide coverage to Patricia or Vincent Berry because they failed to give Integon notice of the accident or litigation. This Court reviews de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(10). *Barnard Mfg, Inc v Gates Engineering Co, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo questions of law such as the proper interpretation of statutes and contracts. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. NOTICE AND OPPORTUNITY TO DEFEND

As a matter of public policy, the Michigan Legislature has determined that every "motor vehicle liability policy" should be subject to certain provisions without regard to whether the provisions are actually a part of the policy. See MCL 257.520(f). One such provision limits an insurers liability for judgments rendered in suits where the insurer did not have notice and opportunity to defend the suit: "The insurance carrier shall not be liable on any judgment if it has not had prompt notice of and reasonable opportunity to appear in and defend the action in which such judgment was rendered . . . ." MCL 257.520(f)(6). This limitation on liability is absolute and bars an injured party from obtaining a recovery from the insurer where the insurer was not afforded notice and reasonable opportunity to appear and defend. *Kleit v Saad*, 153 Mich App 52, 57; 395 NW2d 8 (1985). Nevertheless, the insurer has the burden to prove that it "was prejudiced by the insured's failure to notify it of the lawsuit." *Id.* at 58. An insurer must prove prejudice because, "if the insurer was not prejudiced before it was notified of the action," it necessarily received sufficiently prompt notice within the meaning of MCL 257.520(f)(6). *Kleit*, 153 Mich App at 58. Whether an insurer was prejudiced is a question of fact. *Id.*

On appeal, Long argues that MCL 257.520(f)(6) does not relieve Integon of liability on a variety of grounds. She first argues that, although Integon's insurance contract required Patricia Berry to notify Integon of the accident at issue, the agreement did not state that the failure to give notice would result in a denial of coverage; it only provided that the failure to notify "may affect coverage" and "may result in denial of coverage." Long notes that the use of the word "may" in the agreement indicates that Integon's decision to revoke coverage is discretionary rather than mandatory. We agree that Integon could have decided, as a matter of discretion, to cover Patricia Berry notwithstanding her failure to comply with the notice requirements of the insurance agreement. But Integon clearly chose not to overlook the lack of notice. Instead, it exercised its discretion to deny coverage when it asked the trial court to declare its right to do so, in relevant part, under MCL 257.520(f)(6). To the extent that the statute protected it from liability for any judgment in favor of Long, Integon could properly exercise its discretion by invoking MCL 257.520(f)(6) and asking the trial court to declare its rights and liabilities under the insurance agreement at issue.

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No. 291175).

Long also states that, by its own terms, MCL 257.520(f)(6) applies only to "judgments" and she observes that a "judgment was never entered in the underlying tort case." These observations are entirely accurate, but we fail to see how they are relevant to our review of the trial court's decision to grant Integon's motion for summary disposition. Presumably, Long means to suggest that the decision to grant summary disposition on Integon's declaratory action was premature because there was as of that time no judgment in the underlying action. However, we do not agree that Integon had to wait until a judgment had been entered in order to assert its rights under MCL 257.520(f)(6).[3]

MCL 257.520(f)(6) clearly absolves an insurer of all liability to pay a judgment where the insurer was not provided with "prompt notice of and reasonable opportunity to appear in and defend the action in which such judgment was rendered." The key provision of this statute is the lack of notice and the concomitant loss of an opportunity to appear in and defend the action—not the entry of the judgment. Once an insurer has been deprived of notice and opportunity to defend—that is, suffered prejudice, the fact that a judgment has not yet been entered is irrelevant because the insurer cannot be held liable for any subsequently entered judgment in that action. MCL 257.520(f)(6). And if an insurer can establish the requisite prejudice prior to entry of the judgment, there is no reason that a trial court should delay in declaring the insurer's rights under MCL 257.520(f)(6). Accordingly, the trial court did not err to the extent that it determined Integon's rights under MCL 257.520(f)(6) before the entry of the judgment in the underlying tort action.

Long also argues that Integon failed to establish that it was actually prejudiced by the late notice and, to the extent that it did show some prejudice, whether there was sufficient prejudice was a question of fact for the jury. For that reason, Long further argues, the trial court erred when it granted Integon's motion for summary disposition.

There are few decisions addressing the prejudice that must be shown in order to establish a defense under MCL 257.520(f)(6). However, Michigan courts have addressed the nature of the prejudice that must be shown by an insurer in order to cut off responsibility on the ground that an insured did not comply with a contract provision requiring notice of suit.

In *Koski v Allstate Ins*, 456 Mich 439, 443-444; 572 NW2d 636 (1998), our Supreme Court addressed whether an insured's failure to comply with the notice-of-suit provision under its insurance agreement discharged Allstate from any liability. The Court noted that it was well settled that an insurer had to show actual prejudice to its position before it could be relieved of its obligation to cover a claim on the basis of lack-of-notice. *Id.* at 444. The Court explained that the insurer in that case, Allstate, had demonstrated clear prejudice:

> The evidence in the instant case established that Allstate received no notification of the suit brought against plaintiff until three months after the entry

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[3] We note that no party has argued that Integon had a continuing duty to defend Patricia or Vincent Berry under its policy. Rather, both Long and Bristol West argued that Integon should be obligated to pay Long's claims after they are reduced to judgment.

> of the default judgment. Moreover, nothing in the record indicates that Allstate would have refused to defend the suit, if asked, under a reservation of rights. Consequently, Allstate was deprived of any opportunity to engage in discovery, cross-examine witnesses at trial, or present its own evidence relative to liability and damages. [*Id.* at 445.]

Thus, the loss of an opportunity to conduct discovery, cross-examine witnesses, and present evidence can constitute sufficient prejudice. Moreover, our Supreme Court rejected the contention that Allstate did not suffer prejudice because it had an opportunity to take steps to have the default judgment set aside: "We believe that plaintiff overstates Allstate's ability to set aside the default judgment because it is far from certain that Allstate, standing in the shoes of plaintiff, could have established its entitlement to a new trial." *Id.* at 447. Because the extraordinary circumstances necessary to set aside a judgment were not present, our Supreme Court concluded that "the resulting prejudice suffered by Allstate is clear." *Id.* Accordingly, where an insurer receives notice after the underlying litigation has progressed to a point where the insurer will have little or no opportunity to protect its interests or that of its insured, the insurer can demonstrate actual prejudice.

In *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 761 NW2d 846 (2008), this Court also addressed the prejudice that must be shown in order to relieve an insurer of liability under its policy for failure to give notice. This Court first noted that an insurer does not need to show that, but for the delay in notice, it would have avoided liability in order to demonstrate prejudice. *Id.* at 448. Rather, an "insurer suffers prejudice when the insured's delay in providing notice materially impairs the insurer's ability to contest its liability to the insured or the liability of the insured to a third party." *Id.*, citing *West Bay Exploration Co v AIG Specialty Agencies of Texas, Inc*, 915 F2d 1030, 1036-1037 (CA 6, 1990). This Court explained that there were several factors that should be considered when determining whether an insurer has suffered actual prejudice:

> "In determining whether an insurer's position has actually been prejudiced by the insured's untimely notice, courts consider whether the delay has materially impaired the insurer's ability: (1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest liability of the insured to a third party; and (5) to contest liability to its insured." [*Tenneco*, 281 Mich App at 448-449, quoting *Aetna Cas & Surety Co v Dow Chem Co*, 10 F Supp 2d 800, 813 (ED Mich, 1998).]

Although the decisions in *Koski* and *Tenneco* dealt with contractual notice-of-suit provisions, we believe that the analyses in those cases are equally applicable to an insurer's burden to prove prejudice in order to establish a defense to liability under MCL 257.520(f)(6).

In this case, Integon presented evidence in its motion for summary disposition that it did not receive any notice of the accident or litigation until months after the accident. By that time, Long had already obtained a default against Patricia and Vincent Berry. As a result, during the early stages of the litigation, Integon did not have the opportunity to investigate the accident, participate in full discovery—including deposing Long, or negotiate a settlement. Moreover, the entry of default deprived Integon of the ability to contest liability or present defenses including

whether Long's injuries met the serious impairment threshold. See *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000) ("In Michigan, it is an established principle that 'a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue.'"), quoting *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). Accordingly, Integon presented significant evidence that, by the time it received any notice of the underlying action, the litigation had progressed to a point where it no longer had any reasonable opportunity to appear in or defend the action at issue—that is, it presented clear evidence of prejudice within the meaning of MCL 257.520(f)(6). See *Koski*, 456 Mich at 447.

Once Integon made a properly supported motion for summary disposition, Long was obligated to respond by presenting evidence that established a question of fact on the issue of prejudice. *Barnard Mfg*, 285 Mich App at 374. In response to Integon's motion, Long argued that Integon did not suffer prejudice because it had access to the discovery done before the default, had the opportunity to move to have the default set aside, and could still contest damages. But Long did not present any evidence concerning the nature and extent of the discovery actually conducted. Hence, there was no evidence from which a fact-finder could conclude that the relevant discovery so clearly established liability and a threshold injury that Integon would not have benefited from participation in discovery and had little likelihood of prevailing on the merits of the underlying claim. Accordingly, there was no question of fact concerning the nature and extent of the prejudice actually occasioned by the default.

Moreover, the fact that Integon had the opportunity to participate in the litigation after the default did not alter the significance of its loss of the opportunity to participate in discovery or to have a jury resolve liability and determine whether Long's injury met the serious impairment threshold. Absent a stipulation by the opposing party, a party moving to set aside a default bears a heavy burden. See MCR 2.603(D)(1) (stating that, in relevant part, a trial court may only set aside a default for good cause and with evidence of a meritorious defense); *Shawl v Spence Bros, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008) (stating that the policy of this state generally disfavors setting aside defaults). And, because there was no evidence that Patricia or Vincent Berry had good cause for failing to respond to Long's complaint, see *id.* at 223 (noting that negligence is not normally a ground for setting aside a default), once Long decided to contest Integon's motion, that motion was virtually guaranteed to, and actually did, fail. See *Koski*, 456 Mich at 447 (stating that prejudice is clear where the insurer had only a limited and likely futile ability to request that the judgment be set aside). Similarly, Integon's ability to participate in the damages phase of the litigation is no substitute for being able to participate in and develop discovery, for having the opportunity to have the trial court rule on motions for summary disposition, and for having a jury make findings of fact as to elements of a claim and the applicable defenses. Indeed, the right to have a jury decide liability is so fundamental to our system of law that, absent evidence of extraordinary circumstances showing that no reasonable jury could have found in favor of the insurer's position, the loss of the right to have a jury decide liability will generally be sufficient to establish prejudice.[4] See *Maldonado v Ford Motor Co*,

[4] We do not preclude the possibility that there will be situations where liability and a threshold injury are so clearly established that the entry of a default will not be sufficient to establish
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476 Mich 372, 402; 719 NW2d 809 (2006) (stating that "few, if any, interest are more fundamental than the right to a fair trial by an impartial jury."). Under these facts, there was no dispute that the late notice of the underlying tort action deprived Integon of any *reasonable* opportunity to appear in and defend the underlying tort action. For that reason, Integon could not be held liable for any judgment subsequently entered against Patricia and Vincent Berry. MCL 257.520(f)(6). The trial court did not err when it granted summary disposition in favor of Integon on this basis.[5]

C. RESIDUAL LIABILITY

Both Long and Bristol West contend that, even if the trial court properly determined that Integon established prejudice within the meaning of MCL 257.520(f)(6), the trial court nevertheless erred to the extent that it determined that Integon had no liability under the policy at issue. Long and Bristol West rely on the decision in *Coburn v Fox*, 425 Mich 300; 389 NW2d 424 (1986), for the proposition that Integon would nevertheless be liable for the statutory minimum coverage of $20,000. See MCL 257.520(b)(2); MCL 500.3009(1). We conclude that the decision in *Coburn* does not apply to the facts of this case.

In *Coburn*, our Supreme Court had to determine whether an insurer could be relieved of liability for claims by injured third parties on the basis of its insured's failure to cooperate with the investigation and defense of the third parties' claims. *Coburn*, 425 Mich at 306-307. The Court concluded that such a defense was not valid to the extent that the residual liability insurance is compulsory. *Id.* at 312. However, the Court in *Coburn* did not involve a situation where the insured failed to give the insurer notice such that the insurer was deprived of a reasonable opportunity to appear in and defend the underlying tort action. For that reason, the Court did not have to interpret and apply MCL 257.520(f)(6). Indeed, this Court has already distinguished the facts present in *Coburn* on this same basis. See *Kleit*, 153 Mich App at 57-58 (examining *Coburn v Fox*, 134 Mich App 190; 350 NW2d 852 (1984)).[6]

The court in *Kleit* noted that the Legislature has provided a specific statutory provision for situations where the insurer did not receive adequate notice, whereas there is no statutory provision governing situations where the insured fails to cooperate. *Id.* at 57 ("We note that the factual situation presented in *Coburn* (an insured's failure to cooperate in the insurer's defense of a claim) is not covered by a similar provision in the financial responsibility act."). And as the court in *Kleit* explained: "the Legislature has provided in the statute that failure to notify the insurer will bar recovery by the [injured third-party] from the insurer." *Id.* The court in *Kleit* correctly concluded that MCL 257.520(f)(6) governs cases involving the failure to give notice, as opposed to those cases where the insurer had proper notice, but where the insured failed to

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prejudice. However, this is not such a case.

[5] Bristol West also argued on appeal that Integon failed to present evidence that it suffered actual prejudice or, in the alternative, that whether there was actual prejudice should have been left to the finder-of-fact. However, for the same reasons already discussed, we reject these contentions.

[6] The decision in *Kleit* came out after this Court's decision in *Coburn*, but before our Supreme Court's decision in *Coburn*.

cooperate with the insurer to the insurer's prejudice. See *Kleit*, 153 Mich App at 57. According to its plain terms, MCL 257.520(f)(6) relieves the insurer of *any* liability to pay a judgment in an action where the insurer did not receive notice and did not have a reasonable opportunity to appear in and defend. Therefore, our Supreme Court's decision in *Coburn* is inapplicable to the facts of this case.[7]

Bristol West also argues that MCL 257.520(f)(6) does not apply to the facts of this case because it only applies to insured persons who have already had an accident and there is no evidence that Vincent Berry had a previous accident. Although the Financial Responsibility Act, MCL 257.501 *et seq.*, requires persons who have had judgments against them to maintain proof of financial responsibility, see MCL 257.513(a), there is nothing within the act that specifically limits application of MCL 257.520 to insurance policies issued to persons who have had a prior accident. And we will read no such limitation into the statute.[8] See *Paschke v Retool Industries*, 445 Mich 502, 511; 519 NW2d 441 (1994) ("Where the statutory language is clear, the courts should neither add nor detract from its provisions.").

We also do not agree with Bristol West's contention that the more recently enacted MCL 500.3131 and MCL 500.3009(1) take precedence over the financial responsibility act such that MCL 257.520(f)(6) does not apply to policies issued under the no-fault act. Although by its own terms the financial responsibility act does not apply to "policies of automobile insurance against liability which may now or hereafter be required by any other law of this state," MCL 257.522(a), with regard to residual liability, the no-fault act specifically incorporates the financial responsibility laws of the place in which the injury or damage occurs:

> Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. This insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs. In this state this insurance shall afford coverage for automobile liability retained by section 3135. [MCL 500.3131(1).]

On the basis of this language, Michigan Courts have looked to Michigan's financial responsibility act to determine the scope of coverage and public policy governing the terms of

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[7] For the same reason, Bristol West and Long's reliance on *Farm Bureau Ins Co v Abalos*, 277 Mich App 41; 742 NW2d 624 (2007), is unavailing. In *Abalos*, this Court had to determine, in relevant part, whether an insured's failure to cooperate could relieve the insurer of any obligation to cover the claims against the insured. *Id.* at 45. As was the case in *Coburn*, the facts in *Abalos* did not involve lack of notice or application of MCL 257.520(f)(6). For that reason, this Court concluded that the decision in *Coburn* applied and that the insurer would still be liable for the minimum coverage. *Abalos*, 277 Mich App at 45.

[8] We also disagree that the heading used for this chapter requires us to read such a limitation into the statutory language. See MCL 8.4b; *In re Lovell*, 226 Mich App 84, 87; 572 NW2d 84 (1997) (rejecting use of a heading to construe a statute and stating that courts "may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute.").

residual liability coverage for insurance policies under the no-fault act. See *State Farm Mut Auto Ins Co v Roe*, 226 Mich App 258, 268; 573 NW2d 628 (1997). Further, the 1978 amendment to MCL 500.3131 did not nullify the incorporation of these provisions into the no-fault act.

Prior to the enactment of the no-fault act, motorists could choose whether to carry liability insurance. See *Coburn*, 425 Mich at 308. If a motorist chose to purchase such a policy, that policy had to contain certain minimum coverage levels under MCL 500.3009(1). *Coburn*, 425 Mich at 308. However, MCL 257.520 governed the coverage required for compulsory automobile insurance policies. With the enactment of the no-fault act, the Legislature elected to incorporate the provisions of the financial responsibility act into the no-fault act for purposes of determining the level of coverage required for residual liability: the no-fault policy must provide coverage that is "equivalent" to that required "under the financial responsibility laws." See MCL 500.3131(1). Thus, a no-fault insurance policy had to include the contract provisions required under MCL 257.520(f).

In 1978, the Legislature amended MCL 500.3131 to add MCL 500.3131(2). 1978 PA 460; see also *Citizens Ins*, 448 Mich at 229 n 3. After that amendment, MCL 500.3131(2) provided: "This section shall not require coverage in this state other than that required by [MCL 500.3009(1)]." Accordingly, after this amendment, the coverage levels previously required for elective automobile insurance policies under MCL 500.3009(1) applied to the compulsory policies issued under Michigan's no-fault law. However, this amendment did not altogether eliminate application of Michigan's financial responsibility law to no-fault insurance policies. Had the Legislature wanted to eliminate application of the financial responsibility law altogether, it could have done so by stating that, for accidents that occur in Michigan, the insurance shall afford coverage "equivalent" to that required under MCL 500.3009(1). But it did not do so; rather, it retained the reference to the financial responsibility law in MCL 500.3131(1), but provided that the coverage required under the no-fault act "shall not" be "other" than that required under MCL 500.3009(1). See MCL 500.3131(2). We conclude that Legislature amended MCL 500.3131 in this way in order to retain the substantive provisions mandated under the financial responsibility act while ensuring that, to the extent that the coverage required under MCL 257.520 conflicted with the coverage required under MCL 500.3009(1), the latter statute would control. Accordingly, the mandatory provisions of Michigan's financial responsibility act still apply to insurance policies issued under Michigan's no-fault act to the extent that those provisions do not conflict with MCL 500.3009(1).[9] The provision required under MCL

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[9] We note that our Supreme Court has also stated that the financial responsibility act remains applicable in the no-fault context. See *Citizens Ins v Federated Mut Ins*, 448 Mich 225, 230-233; 531 NW2d 138 (1995) (stating that, although the financial responsibility had not been rendered meaningless by the enactment of the no-fault act, the financial responsibility act could not be used to sanction what is otherwise repugnant under the no-fault act); see also *Farmers Ins Exchange v Farm Bureau General Ins Co*, 478 Mich 880, 885; 731 NW2d 757 (2007) (Markman, J.) (noting that Michigan courts have traditionally looked to the financial responsibility act to determine the required scope of residual liability coverage under the no-fault act). Similarly, this Court has held that the no-fault act must be read *in pari materia* with the Michigan Vehicle Code, which includes the financial responsibility act. *Cason v Auto-Owners Ins Co*, 181 Mich App 600, 606; 450 NW2d 6 (1989). Finally, Michigan courts have applied the
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257.520(f)(6) does not conflict with MCL 500.3009(1). Therefore, MCL 257.520(f)(6) applies to the policy at issue.

Because Integon demonstrated that it was deprived of a reasonable opportunity to appear in and defend the underlying tort action within the meaning of MCL 257.520(f)(6), the trial court did not err when it concluded that Integon could not be held liable for *any* judgment in that action.

III. ISSUES IN DOCKET NO. 291175

A. STANDARD OF REVIEW

In docket no. 291175, Bristol West first argues that the trial court erred when it failed to grant summary disposition in its favor. Specifically, Bristol West agues that the car driven by Vincent Berry at the time of the accident was not an "uninsured motor vehicle" within the meaning of Long's insurance policy. For that reason, Bristol West further argues, it was not required to provide uninsured motorist benefits to Long, and the trial court should have granted its motion on that basis.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg*, 285 Mich App at 369. This Court also reviews de novo the proper interpretation of an insurance agreement. *Rory*, 473 Mich at 464.

B. DEFINITION OF UNINSURED MOTOR VEHICLE

Under the terms of the insurance agreement between Bristol West and Long, Bristol West agreed to pay "damages for bodily injury to an insured person" that is "caused by accident; and" "[a]rises out of the ownership, operation, maintenance or use of an uninsured motor vehicle." The agreement defines an uninsured motor vehicle to be:

> a. Not insured by a bodily injury liability bond or policy that is applicable at the time of the accident;

(…continued)

provisions of the financial responsibility act to the residual liability required under the no-fault act for more than 30 years. See, e.g., *Manier v MIC Gen Ins Corp*, 281 Mich App 485, 491-492; 760 NW2d 293 (2008); *Lake States Ins Co v Wilson*, 231 Mich App 327, 331-332; 586 NW2d 113 (1998); *State Farm Mut Auto Ins Co*, 226 Mich App at 268; *LeDuff v Auto Club Ins Ass'n*, 212 Mich App 13, 16; 536 NW2d 812 (1995); *Farmers Ins Exchange v Anderson*, 206 Mich App 214, 217; 520 NW2d 686 (1994); *League General Ins Co v Budget Rent-A-Car of Detroit*, 172 Mich App 802, 805; 432 NW2d 751 (1988); *Kleit*, 153 Mich App at 56; *State Farm Mut Auto Ins Co v Ruuska*, 90 Mich App 767, 772; 282 NW2d 472 (1979), citing *State Farm Mut Auto Ins Co v Sivey*, 404 Mich 51, 56; 272 NW2d 555 (1978). Given the weight of authorities applying the financial responsibility act in some way to the no-fault act, we conclude that—even if these authorities could be said to have improperly applied the financial responsibility act to the requirements for residual liability under the no-fault act after the 1978 amendment to MCL 500.3131—that determination must be left to our Supreme Court.

* * *

> c. Insured by a bodily injury liability bond or policy at the time of the accident issued by a company that is or becomes insolvent;
>
> d. Insured by a bodily injury liability bond or policy which provides less than the minimum limits required by the Financial Responsibility Law of the State of Michigan.
>
> e. Covered under a bodily injury liability bond or policy at the time of the accident, but the sum of all applicable limits of liability for bodily injury is less than the coverage limit for Underinsured Motorists Coverage shown on the Declarations Page.

On appeal, Bristol West argues that Long failed to establish that Vincent Berry was driving an uninsured motor vehicle within the meaning of any of these provisions. With regard to paragraph "a", Bristol West relies on the language defining an uninsured motor vehicle to be one that is not insured by a policy "that is applicable *at the time of the accident*" (emphasis added). Bristol West argues that, by referring to an insurance policy that "is applicable at the time of the accident," this definition excludes those situations where the motor vehicle was insured at the time of the accident, even if the insurer under that policy later denies coverage. That is, Bristol West essentially argues that this Court should construe "is applicable at the time of the accident" to mean that the motor vehicle was subject to an insurance policy that was "in existence" or "existing" at the time of the accident without regard to whether the policy actually "applied" to the accident at issue. We do not agree that this is the proper construction.

This Court must enforce an unambiguous contract provision as written. *Rory*, 473 Mich at 470. And when "ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id.* at 464.

If the policy at issue had defined an uninsured motor vehicle as a motor vehicle that is not insured by a bodily liability policy at the time of the accident, we might agree with Bristol West's preferred reading. However, the definition actually used does not define an uninsured motor vehicle to be one that is not insured by such a policy at the time of the accident, it defines it to be one that is not insured under a bodily liability policy "that is applicable at the time of the accident." That is, a motor vehicle is uninsured unless it is covered by a bodily injury policy *and* the policy "is applicable" at the time of the accident. Something "is applicable" if it is capable of being applied in the appropriate context. In the context of a motor vehicle accident, a liability policy "is applicable" if the insured is entitled to the protection afforded under the policy. See, e.g., *Lee v State Farm Mut Auto Ins Co*, 339 So2d 670, 671-672 (Fla App, 1976); *Hodges v Canal Ins Co*, 223 So2d 630, 633 (Miss, 1969) (stating that a policy is applicable when it is capable of being applied—that is, when the insured is entitled to its protection). Whether an insured is entitled to the protection afforded under the policy depends on the terms of the policy at issue and whether the insured complied with those terms. In the present case, Patricia Berry purchased a liability policy that covered the motor vehicle at issue, but that fact did not mean that the policy necessarily "applied" at the time of the accident. Rather, in order for the policy to be applicable, Patricia Berry had to perform all her obligations under the agreement. Until she met

those obligations, the policy was not applicable. Patricia Berry failed to provide the notice required under her agreement. Consequently, her insurance policy did not apply to the accident at issue. Because the motor vehicle driven by Vincent Berry was not insured by a bodily liability policy that was "applicable at the time of the accident," it was an uninsured motor vehicle within the meaning of the policy issued by Bristol West.[10]

The trial court properly denied Bristol West's motion for summary disposition on this basis.[11]

C. LOSS OF SUBROGATION RIGHTS

Bristol West next argues that the trial court should have granted summary disposition in its favor given the evidence that Long failed to comply with the insurance policy's requirement that she take no actions that prejudice Bristol West's subrogation rights. Specifically, Bristol West argues that Long destroyed its subrogation rights by contesting the motion to set aside the default, which in turn led to the denial of coverage under the Integon policy.

The policy issued by Bristol West provides that Bristol West has the right to recover payments:

> If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
>
> 1. Whatever is necessary to enable us to exercise our rights; and
>
> 2. Nothing after loss to prejudice them.

Under the plain terms of this provision, see *Rory*, 473 Mich at 464, Bristol West does not obtain any subrogation rights until it makes "a payment under this policy." There was no evidence that Bristol West made the payments necessary to trigger its subrogation rights. Because Bristol West had no subrogation rights, Long could not "prejudice" or otherwise take any action "to enable" Bristol West "to exercise" its non-existent rights. Therefore, the trial

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[10] We reject Bristol West's contention that *Topolewski v Detroit Automobile Inter-Ins Exchange*, 6 Mich App 286; 148 NW2d 906 (1967) and *Rousso v Mich Ed Employees Mut Ins Co*, 6 Mich App 444; 149 NW2d 204 (1967), support its preferred construction. Neither of those cases involved a situation where the insurer lawfully denied coverage. Rather, in each case, there was a valid insurance policy applicable to the car at issue, but the insurers that issued those policies later became insolvent. Because the policies were nevertheless applicable to the cars involved in the accidents, this Court determined in both cases that the cars were not uninsured. As we have noted, Patricia Berry had a policy that covered her car, but her failure to comply with the terms of that policy rendered it inapplicable to the accident at issue. For that reason, these authorities are inapplicable to the facts of this case.

[11] Given our resolution of this issue, we decline to address whether Vincent Berry's car might also have satisfied any of the remaining definitions of an uninsured motor vehicle.

court did not err when it refused to dismiss Long's claim for uninsured motorist benefits on the theory that Long somehow impaired Bristol West's subrogation rights.

IV. CONCLUSION

The trial court correctly determined that Integon was deprived of a reasonable opportunity to appear in and defend the underlying tort action. Because Integon could not be held liable for any judgment in that action under MCL 257.520(f)(6), the trial court did not err when it granted Integon's motion for summary disposition in its suit for declaratory relief. The trial court also correctly determined that Vincent Berry's car was uninsured within the meaning of the policy issued by Bristol West. Likewise, the trial court did not err when it failed to grant Bristol West's motion on the alternative ground that Bristol West could lawfully deny Long's claim for uninsured motorist benefits on the basis of her trial counsel's decision to contest the motion to set aside Patricia and Vincent Berry's default. Therefore, the trial court did not err when it denied Bristol West's motion for summary disposition.

Affirmed in all dockets. As the prevailing party in docket nos. 289320 and 289366, Integon may tax its costs; and, as the prevailing party in docket no. 291175, Long may tax her costs. See MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder