

STATE OF MICHIGAN  
COURT OF APPEALS

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FREMONT INSURANCE COMPANY,  
Plaintiff-Appellant,

UNPUBLISHED  
November 27, 2012

v

No. 300825  
Kent Circuit Court  
LC No. 10-003010-CK

MICHAEL IZENBAARD and HALEY  
IZENBAARD,

Defendants-Appellees,

and

NATHAN KADAU,

Necessary Party Defendant-  
Appellee.

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ON REMAND

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

This case is back before us on remand from the Michigan Supreme Court. Previously, we reversed the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants because we concluded that the strip of land on which the accident at issue occurred was not a "premises" within the meaning of the insurance contract. *Fremont Ins Co v Izenbaard*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2011 (Docket No. 300825). Necessary party defendant, Nathan Kadau, sought leave to appeal with the Supreme Court. In lieu of granting leave to appeal, the Supreme Court reversed our earlier decision, holding that this Court "erred in concluding that the term 'premises' as used in the insurance provision at issue in this case must be defined as property that has a building on it," and remanded this case to this Court with instructions "to address the additional issue raised, but not decided, below: whether the location of the accident was used 'in connection with' the insured residence." *Fremont Ins Co v Izenbaard*, \_\_\_ Mich \_\_\_; 820 NW2d 902 (Docket No. 144728, decided September 26, 2012). We now remand to the trial court for further proceedings because we conclude that there is a genuine issue of material fact regarding whether the property on which the accident occurred was used "in connection with" the insured residence.

The facts of this case were set forth in detail in our previous opinion. *Fremont Ins Co*, unpub op at 1-2. As previously explained, defendants, Michael and Haley Izenbaard, purchased a homeowner's insurance policy from plaintiff providing coverage to two Michigan residences, respectively in Grand Rapids and Caledonia. While the policy was in effect, a bachelor party for Kadau was held at the Caledonia residence, commonly referred to as 8001 Patterson Avenue. That evening, Michael Izenbaard, Kadau, and two others went for a ride in Michael's all-terrain vehicle (ATV), with Michael driving and Kadau standing in the bed. Michael drove from the insured residence onto a path located on property owned by Consumers Energy Company, where, approximately 1,000 feet from the insured residence, a sharp turn caused the vehicle to flip, injuring Kadau. Following the accident, Kadau claimed personal injury damages against the Izenbaards.

Plaintiff, Fremont Insurance Company, brought an action for declaratory judgment, requesting a finding that it had no contractual obligation to defend the lawsuit or indemnify the Izenbaards. Kadau moved the trial court for summary disposition, arguing that the policy at issue covered bodily injuries occurring on the Izenbaards' property or any premises used in connection with that property. The Izenbaards joined Kadau's motion. Plaintiff's response maintained that the policy expressly excluded coverage for injuries arising from the use of motor vehicles, and that under the circumstances of the accident, none of the exceptions to that exclusion were applicable, on the grounds that Kadau was not injured on a "premises" used "in connection with" the insured location.

The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(10). Initially, the trial court declared, without any elaboration, that there was no question of fact that the accident took place on land used "in connection with" the insured residence. The trial court then proceeded to address the issue regarding whether the land was a "premises," which it considered to be the controlling question raised in the motion, and resolved that issue in favor of defendants.

As explained in our earlier opinion, the policy provided coverage for personal liability, but specifically excluded coverage for bodily injury arising out of "the ownership, operation, . . . use, . . . of motor vehicles or all other motorized land conveyances," but in turn exempted from that exclusion "a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and . . . owned by an insured and on an insured location." *Fremont Ins Co*, unpub op at 3. The parties did not dispute that the vehicle involved in the accident was a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration, and that it was owned by an insured. *Id.* At issue was whether the accident took place on an "insured location." *Id.*

As set forth in our earlier opinion in this case, the subject policy included the following definition of "insured location":

4. "insured location" means:
  - a. the residence premises

b. the part of other premises, other structures and grounds used by you as a residence and:

(1) which is shown in the Declarations; or

(2) which is acquired by you during the policy period for your use as a residence;

c. any premises *used by you in connection with a premises* in 4a or 4b above;

\* \* \*

8. “residence premises” means:

a. the one family dwelling, other structures, and grounds; or

b. that part of any other building; where you reside and which is shown as the “residence premises” in the Declarations. [Unpublished opinion p 3 (emphasis added).]

We review de novo a trial court’s decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In this case, defendants moved for summary disposition pursuant to MCR 2.116 (C)(8), and (C)(10), and the trial court did not indicate the grounds for its decision. However, we review the trial court’s grant of summary disposition under MCR 2.116(C)(10) because the record demonstrates that the trial court considered evidence outside the pleadings. *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

When a party moves the trial court for summary disposition pursuant to MCR 2.116(C)(10), the “moving party must specifically identify the matters that it believes have no disputed factual issues.” *St Clair Med, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006); MCR 2.116(G)(4).<sup>1</sup> “The moving party must support its position with affidavits,

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<sup>1</sup> MCR 2.116(G)(4) provides:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth

depositions, admissions, or other documentary evidence.” *Borgiel*, 270 Mich App at 264. If the moving party meets its burden of supporting its position that there is no factual dispute in regard to any relevant matter, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Id.*

Here, defendants’ motion for summary disposition claimed that there was no factual dispute regarding whether the property on which the accident occurred was used “in connection with” the residence premises. Defendants supported this claim by citing defendant Michael Izenbaard’s answer to plaintiff’s request for admissions in which he stated that the accident location and surrounding areas are routinely and repeatedly used for ATV purposes.<sup>2</sup> Plaintiff responded by maintaining that the area where the accident occurred is posted as not permitting the operation of motor vehicles. Given these competing representations, and the fact that neither party directly responded to the opposing claim, we conclude that questions remain regarding whether the property where the accident occurred was or could lawfully be used “in connection with” the insured property.

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

/s/ Kurtis T. Wilder  
/s/ Joel P. Hoekstra  
/s/ Stephen L. Borrello

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specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

<sup>2</sup> We note that this part of his answer was not responsive to the request for admission that was made.