STATE OF MICHIGAN

COURT OF APPEALS

BEN MCKENZIE, JR., Plaintiff-Appellant,	UNPUBLISHED September 23, 2014
v CITY OF DETROIT and PROGRESSIVE MARATHON INSURANCE COMPANY, Defendants-Appellees.	No. 312984 Wayne Circuit Court LC No. 11-003730-NF

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

In this no-fault priority case, plaintiff appeals as of right an order granting summary disposition in favor of defendant Progressive Marathon Insurance Company ("Progressive"). Plaintiff also challenges the trial court's order granting summary disposition in favor of the City of Detroit ("City"), and a subsequent order denying plaintiff's motion for reconsideration of the order granting the City's motion. We affirm the summary disposition in favor of Progressive, reverse the summary disposition in favor of the City, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

On January 7, 2010, plaintiff was injured when he was struck by a bus operated by defendant City. Plaintiff did not have his own policy of no-fault insurance. On February 23, 2010, plaintiff filed an application with the City for no-fault benefits. In this application, he stated that his address was the address where his sister, LaRonda McKenzie ("LaRonda"), resided.

On March 29, 2011, plaintiff filed suit against the City, seeking no-fault benefits for his injuries. On December 8, 2011, the City filed a motion for summary disposition, arguing that plaintiff was domiciled with LaRonda and that her insurer, Progressive, was the responsible insurer under the no-fault act. On December 13, 2011, plaintiff filed an amended complaint, naming the City and Progressive as defendants. On January 13, 2012, Progressive moved for summary disposition, arguing that plaintiff's claim was barred under the no-fault act's statute of limitations for personal injury claims, MCL 500.3145(1).

Plaintiff filed a response to both motions on February 6, 2012. Attached to this motion was an affidavit of plaintiff, dated January 26, 2012. On February 24, 2012, the trial court heard

arguments on the motions. The City argued that, through his deposition and through a number of other documents where plaintiff stated that he lived at LaRonda's address, plaintiff had admitted he was domiciled with LaRonda at the time of his accident. Plaintiff, relying primarily on his affidavit, argued that he was not domiciled with LaRonda at the time of his accident. The trial court granted the City's motion, agreeing that plaintiff's deposition statements and other assertions of his address amounted to an admission that he was domiciled with LaRonda. The trial court then heard arguments on Progressive's motion. The trial court did not decide Progressive's motion at the hearing and requested additional briefing from both parties.

On March 1, 2012, Progressive filed a second motion for summary disposition pursuant to MCR 2.116(C)(10). Relying upon plaintiff's affidavit and LaRonda's deposition, Progressive argued that plaintiff was not domiciled with LaRonda, and accordingly, Progressive could not be responsible for plaintiff's no-fault benefits. At the hearing on the motion, plaintiff argued that the trial court had previously ruled that plaintiff was domiciled with LaRonda at the time of the accident. However, plaintiff was unable to produce a transcript of the prior motion hearing. The following colloquy occurred:

> *The Court:* This is [d]efendant Progressive's motion for summary disposition. The issue before me, and there may be some other issues that I'm not aware of, but right now the only issue that's before me is whether or not [plaintiff] was a resident relative of his sister[] and in his own affidavit he says he wasn't. He says, you know, it's my mailing address that I had a place for my mail pick up and it was my official legal address and on my driver's license but he didn't keep personal or clothing items there. On January 7th, at the time of the accident, he kept his clothing at this girlfriend's house, [Khahila Adger ("Adger")]. I don't know how much more explicit it could be.
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> *Plaintiff's Counsel:* We had the same affidavit and the same evidence before on [sic] us on February 24th and you ruled that his domicile, legal domicile, was with his sister.
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> *Progressive's Counsel:* That was not ruled, your Honor.
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> *Plaintiff's Counsel:* If we get the transcript you'll see that that's why I'm waiting for the transcript.
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> *The Court:* If I see the transcript and I somehow misread an affidavit or this affidavit or made a mistake I'll correct it but right now I'm looking at a document that says, "I was not a resident relative of my sister. I was staying with my girlfriend and I just basically had mail delivered to my sister's address". Motion granted.

In an order entered on May 11, 2012, the trial court granted Progressive's motion for summary disposition for the reasons stated on the record. The trial court denied plaintiff's motion for reconsideration of its order granting summary disposition in favor of the City on October 10, 2012. Plaintiff filed a claim of appeal in this Court. In an order dated August 2, 2013, this Court closed plaintiff's appeal without prejudice in regard to the City because of the

City's recent bankruptcy filing. *McKenzie, Jr v Detroit*, unpublished order of the Court of Appeals, entered August 2, 2013 (Docket No. 312984). On June 23, 2014, the City filed a motion to reopen the case, and on July 1, 2014, this Court granted the motion. *McKenzie, Jr v City of Detroit*, unpublished order of the Court of Appeals, entered July 1, 2014 (Docket No. 312984).

II. SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

Plaintiff first argues that the trial court erred when it granted summary disposition in favor of the City, and later in favor of Progressive, because he presented evidence creating a question of fact regarding plaintiff's domicile at the time of his accident. We agree that the trial court erred when it granted the City's motion for summary disposition, but disagree with respect to the trial court's order granting Progressive's motion for summary disposition.

A. STANDARD OF REVIEW

As our Supreme Court explained in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

A grant or denial of summary disposition is reviewed de novo on appeal. *Walters v Nadell*, 481 Mich 377, 382; 751 NW2d 431 (2008). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden*, 461 Mich at 121.

B. DISCUSSION

1. THE NO-FAULT ACT AND DOMICILE

Generally, when an individual suffers personal injuries as the result of a motor vehicle accident, that person looks first to their own no-fault policy, or to a no-fault policy issued to a relative if the injured party and the insured relative are domiciled in the same household. MCL 500.3114(1); see also *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 262; 819 NW2d 68 (2012). However, if neither the injured party nor any relatives domiciled with the injured party are covered by a no-fault policy, the injured party may then look to recover from "[i]nsurers of owners or registrants of motor vehicles involved in the accident." MCL 500.3115(1)(a). Here, plaintiff did not have his own policy of insurance. Thus, if plaintiff was domiciled in the same household as LaRonda he may recover from Progressive, her no-fault insurer. MCL 500.3114(1). If he was not domiciled with LaRonda, he could look to the City for benefits, as the City is apparently a self-insured entity. MCL 500.3115(1)(a). "A domicile determination is generally a question of fact; however, where the underlying material facts are not in dispute, the

determination of domicile is a question of law for the circuit court." *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 490; 835 NW2d 363 (2013).

In *Grange Ins Co*, our Supreme Court discussed the concept of "domicile" as that term is used in the no-fault act:

> Notably, the no-fault act does not define the term "domiciled." The unambiguous language of MCL 500.3114(1) simply states that "a personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same house-hold . . . ." When construing this statutory language, our main objective is to discern the Legislature's intent through the language plainly expressed. Normally, this Court will accord an undefined statutory term its ordinary and commonly used meaning. However, where the Legislature uses a technical word that has acquired a particular meaning in the law, and absent any contrary legislative indication, we construe it "according to such peculiar and appropriate meaning." The term "domicile" is just such a word that has a precise, technical meaning in Michigan's common law, and thus must be understood according to that particular meaning.
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> 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." Similarly, a person's domicile has been defined to be "'that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.'" 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." From this settled principle, it follows that
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>> a man retains his domicile of origin [upon his birth] until he changes it, by acquiring another; and so each successive domicile continues, until changed by acquiring another. And it is equally obvious that the acquisition of a new domicile does, at the same instant, terminate the preceding one.
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> In this way, our common law has recognized that from the time of a person's birth—from childhood through adulthood—a person can only have a single domicile at any given point in time. Indeed, there are few legal axioms as established as the one providing that every person has a domicile, and that a person may have one—and only one—domicile.
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> * * *

> [A] person may have only one domicile, but more than one residence. For purposes of distinguishing "domicile" from "residence," this Court has explained that "domicile is acquired by the combination of residence and the intention to reside in a given place . . . . If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile." The traditional common-law inquiry into a person's "domicile," then, is generally a question of intent, but also considers all the facts and circumstances taken together. [*Id*. at 492-495 (citations omitted)].

In *Workman v Detroit Auto Inter-Ins Exchange*, 404 Mich 477, 496-497; 274 NW2d 373 (1979), our Supreme Court articulated a four-factor test to determine a person's domicile under the no-fault act:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; [and] (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household[.] [Citations omitted.]

When applying this test, "no one factor is, in itself, determinative; instead, each factor must be balanced and weighed with the others." *Id*. at 496.

In *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675; 333 NW2d 322 (1983), this Court "had the opportunity to consider the particular problems posed by young people departing from the parents' home and establishing new domiciles as part of the normal transition to adulthood and independence." *Dairyland Ins Co*, 123 Mich App at 681. This Court articulated an additional five factors relevant to a determination of domicile:

> Other relevant indicia of domicile include such factors as whether the claimant continues to use his parents' home as his mailing address, whether he maintains some possessions with his parents, whether he uses his parents' address on his driver's license or other documents, whether a room is maintained for the claimant at the parents' home, and whether the claimant is dependent upon the parents for support. [*Id*. at 682.]

This Court has since applied the *Dairyland* factors in cases where the parent-child relationship was not present. See *Cervantes v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 410; 726 NW2d 73 (2006). "The *Workman–Dairyland* multifactored framework comprises the one now commonly employed by Michigan courts when a question of fact exists as to where a person is domiciled." *Grange Ins Co*, 494 Mich at 497 n 41. "Typically, . . . an adult acquires a new domicile by choosing one of his or her choice, which makes the question of intent a preeminent concern in determining an adult's domicile." *Id*. at 502.

2. THE CITY'S MOTION

The City moved for summary disposition on the basis that plaintiff was domiciled with LaRonda at the time of the accident, and accordingly, was required to look to LaRonda's insurer, Progressive, as his source of recovery. When ruling on the City's motion, the trial court stated:

> It is true that in many cases there is a question of fact if someone says, okay, this is my address on my driver's license, my tax return, my blah, blah, blah, but in reality I didn't have any clothes there, I didn't really and truly live there. Here though we have the plaintiff who testified at deposition that he lived there. He didn't have to understand what domicile meant. If he said at deposition, well, technically that's my address, but I use it because I have tickets or because it's an easy place to receive mail or for some other reason. If the plaintiff himself admits that he lives with his sister and that's language that is commonly understood by a reasonably intelligent person, if the plaintiff himself says, I live with my sister under oath that's an 8019(D)(2) [sic, MRE 801(d)(2)] admission. Motion granted.

Plaintiff called the court's attention to the fact that LaRonda had testified in her deposition that he never lived at her address. The trial court further explained its ruling, stating:

> And it is the rare situation where I have not only all of these instance[s] with the Medicare and Aflac and registration forms and driver's license and so forth, but an admission by the plaintiff that he lived with, not just used the address, and that's what makes a difference in this particular case. As I indicated a minute ago, the city's motion is granted.

The court then moved on to Progressive's motion. While arguing this motion, the following exchange occurred:

> *Plaintiff's Counsel:* . . . And [LaRonda] takes the position in her deposition that, well, he never lived with me. The [c]ourt has decided just now that he did, all right. So—
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> *The Court:* I didn't decide that he did but that the evidence based on his admission reflects that he did. I don't know the actual truth or voracity [sic] of what was said. I just know what was said.
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> *Plaintiff's Counsel:* Okay. So we have a credibility question—
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> *The Court:* Well—
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> *Plaintiff's Counsel:* —that's going to have to go to trial.
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> *The Court:* No, I'm not saying it's a credibility problem. I'm saying a person may make an admission under 801([d])(2) and only that person knows whether or not—well, there may be some others, but most of the time the person who makes the admission knows whether or not it's true, so I'm not saying it's a credibility issue. Under 801([d])(2), and I'm referring to admission by a party opponent, it says, a statement is not hearsay, and then it [sic] on to sub two, if the

statement is a party's own statement in either an individual or a representative capacity. He made that statement in the context of a deposition, so that's not a credibility issue.

The trial court's conclusion that plaintiff's deposition testimony was a binding, conclusive admission that he was domiciled with LaRonda at the time of his accident was erroneous. Admissions made pursuant to MCR 2.312 are "judicial" admissions, while admissions of a party opponent under MRE 801(d)(2) are "evidentiary" admissions. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996). "A judicial admission differs dramatically from an evidentiary admission with respect to the effect of the admission." *Id*. A judicial admission is conclusive unless the court permits its withdrawal, "whereas the evidentiary admission is not conclusive but is always subject to contradiction or explanation." *Id*. at 421 (quotation omitted). The trial court found that, in his deposition, plaintiff made an admission pursuant to MRE 801(d)(2). However, the trial court erred by treating this admission as a judicial admission, one that was binding on plaintiff and one that was not subject to contest. *Id*. at 419-421. As the trial court noted, plaintiff's deposition testimony was an evidentiary admission pursuant to MRE 801(d)(2). Because plaintiff's deposition testimony was an evidentiary admission, it was not conclusive and could be contradicted or explained. *Id*. at 421.

The question remains whether plaintiff submitted evidence creating a question of fact regarding domicile. Plaintiff relied primarily on two pieces of evidence to contest his deposition testimony and the multitude of documentary evidence tending to demonstrate that plaintiff resided with LaRonda. First, defendant relied on his own affidavit, which he claimed would explain his deposition testimony. This affidavit did not create a question of fact. "'[P]arties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition.'" *Mitan v Neiman Marcus*, 240 Mich App 679, 683; 613 NW2d 415 (2000), quoting *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). However, to contest the City's motion, plaintiff also presented the trial court with LaRonda's deposition testimony. In her deposition, LaRonda unequivocally testified that plaintiff had not, at any point in time, resided with her in her home. When asked about plaintiff's contradictory deposition testimony, LaRonda agreed that plaintiff lied at his deposition. LaRonda's testimony created a question of fact regarding whether plaintiff resided in her home. See *Grange Ins Co*, 494 Mich at 492-495. Accordingly, the trial court erred when it granted the City's motion for summary disposition pursuant to MCR 2.116(C)(10).

3. PROGRESSIVE'S MOTION

After the trial court decided the City's motion, Progressive, relying on plaintiff's affidavit, moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff did not reside with LaRonda at the time of his accident. The trial court granted the motion, stating:

> This is [d]efendant Progressive's motion for summary disposition. The issue before me, and there may be some other issues that I'm not aware of, but right now the only issue that's before me is whether or not [plaintiff] was a resident relative of his sister[] and in his own affidavit he says he wasn't. He

> says, you know, it's my mailing address that I had a place for my mail pick up and it was my official legal address and on my driver's license but he didn't keep personal or clothing items there. On January 7th, at the time of the accident, he kept his clothing at this girlfriend's house, [Khahila Adger]. I don't know how much more explicit it could be.
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> [R]ight now I'm looking at a document that says, "I was not a resident relative of my sister. I was staying with my girlfriend and I just basically had mail delivered to my sister's address[."] Motion granted.

In regard to Progressive's motion, plaintiff's position is not entirely clear. Plaintiff argues that a question of fact exists regarding where he was domiciled at the time of his accident. He requests that this Court reverse "the trial court's judgments" and remand for a trial to resolve the domicile issue in his statement of relief requested. However, plaintiff also asserts that, "[o]f the nine factors listed above [(the *Workman-Dairyland* factors)], two of them point to the sister's home as his place of domicile, the other seven indicate otherwise." Plaintiff states:

> But [LaRonda's address] was only a mailbox. He had no bedroom there, did not keep his personal clothing or items there, did not take his meals there. He displays no intent to do so. We know . . . that he had a job, so he did not depend on LaRonda for support. He had two daughters by Kha[h]ila Adger, his fiancée, and spent most of his non-working time with them at [Adger's address], where he contributed to the household expenses.

Thus, plaintiff seems to admit that there are no questions of fact to be resolved regarding any particular factor; rather, he argues that the question to be answered is the application of the facts to the *Workman-Dairyland* analysis. "[W]here the underlying material facts are not in dispute, the determination of domicile is a question of law for the circuit court." *Grange Ins Co*, 494 Mich at 490.

In the trial court, plaintiff made essentially the same argument, but did not argue that a question of fact existed; rather, he took the position that he was not domiciled with LaRonda. When arguing the City's motion for summary disposition on the issue of domicile, plaintiff stated:

> [O]nly two . . . [factors] indicate any domicile at [LaRonda's] address where, one, his driver's license which was—he can't change his address, that's his first problem. He can't change [the] address on his driver's license because he owes these tickets and the Secretary of State will not issue a new license, they will not allow him to change his driver's license on—his address on his driver's license because he's got these two violations.
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> But every other factor of the nine factors, all the other seven point to his being domicile[d] . . . with his fiancé[e]. There's no insured automobile there. He's not

> related to—he's not married to her. They're not related so there's no insured automobile at that address. He doesn't own an insured automobile. He was a pedestrian when he's hit by the DOT coach, *so DOT falls in the first line of priority here, because there is no other insurer*. [Emphasis added.]

The City then argued that plaintiff had admitted in his deposition, his answers to the City's interrogatories, and in a variety of documents that he lived with LaRonda. Plaintiff responded, "Well, again, he didn't say that he was domicile[d] there. He said he stayed there. That was his address on his driver's license and I've explained why that remained."

In other words, on the basis of the exact evidence plaintiff now argues creates a question of fact regarding whether plaintiff was domiciled with LaRonda, plaintiff argued in the trial court that he was not domiciled with LaRonda, that the City was first in priority, and that there was "no other insurer" that could be responsible for paying his no-fault benefits. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (citations and quotations omitted). As plaintiff previously took the position that he was not domiciled with LaRonda, and that only the City could be liable for his injuries, he is precluded from seeking redress in this Court based upon the position that Progressive is the liable insurer because he was domiciled with LaRonda.

Even if plaintiff were not bound by the position he took in the trial court, a review of the trial court's decision in regard to Progressive's second motion for summary disposition demonstrates that plaintiff did not present evidence creating a question of fact regarding whether he was domiciled with LaRonda. In support of its motion pursuant to MCR 2.116(C)(10), Progressive offered plaintiff's own affidavit, discussed in Section I. Progressive also provided the Court with LaRonda's deposition transcript. In her deposition, LaRonda testified that plaintiff did not reside in her home.

The evidence presented by Progressive does not support a finding that plaintiff was domiciled with LaRonda under any of the *Workman* factors. Plaintiff's affidavit and LaRonda's deposition demonstrate that plaintiff never resided in LaRonda's home. Thus, the first *Workman* factor weighs against finding that plaintiff was domiciled with LaRonda, because plaintiff could have no intent "of remaining, either permanently or for an indefinite or unlimited length of time" in a home in which he never resided. *Workman*, 404 Mich at 496. The second *Workman* factor also weighs against a finding of domicile with LaRonda, as plaintiff demonstrated essentially no relationship with LaRonda, and instead, that he had a formal relationship with his fiancée in her home, where he paid rent and utilities. See *id*. The third *Workman* factor weighs against plaintiff being domiciled with LaRonda, as plaintiff's affidavit demonstrates that he lived in Adger's home, not LaRonda's home. *Id*. Finally, the fourth *Workman* factor weighs against a finding of domicile with LaRonda, as there clearly existed "another place of lodging" for plaintiff, with Adger. *Id*. at 497.

The five *Dairyland* factors also weigh against a finding that plaintiff was domiciled with LaRonda. Two factors weigh in favor of a finding that plaintiff was domiciled with LaRonda: that plaintiff received mail at LaRonda's address and that plaintiff used LaRonda's address on his "driver's license or other documents[.]" *Dairyland*, 123 Mich App at 682. However, the

remaining three factors weigh against finding domicile with LaRonda. Plaintiff maintained no possessions at LaRonda's home, had no room maintained for him in LaRonda's home, and was not dependent upon LaRonda for support. *Id*. On balance, it is clear that the evidence presented by Progressive demonstrated that plaintiff was not domiciled with LaRonda at the time of his accident. *Workman*, 404 Mich at 496-497; *Dairyland*, 123 Mich App at 682.

"Once [Progressive] made a properly supported motion for summary disposition under MCR 2.116(C)(10), the burden shifted to [plaintiff] 'to establish that a genuine issue of disputed fact exists' with respect to" the issue of domicile. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 377; 775 NW2d 618 (2009), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Plaintiff was required to, "by affidavits or as otherwise provided in this rule, set forth specific facts showing that there [was] a genuine issue for trial." MCR 2.116(G)(4). At the motion hearing, plaintiff referred generally to "every relevant document that we have already in the Court files regarding all these motions[,]" but did not point to any specific document, or to any specific facts contained within those documents, to support his position. Instead, plaintiff argued that the trial court had previously ruled that plaintiff was domiciled with LaRonda. Plaintiff also stated that the court "had the same affidavit and the same evidence before" it in the prior motion, but again failed to point to any specific evidence, other than his affidavit, that created a question of fact regarding domicile. In short, plaintiff produced no evidence contesting that produced by Progressive. As was discussed, the evidence produced by Progressive demonstrated that plaintiff was not domiciled with LaRonda at the time of his accident. Thus, the trial court correctly granted Progressive's motion. See *Barnard Mfg Co, Inc*, 285 Mich App at 374-375.

Plaintiff argues that his own deposition and a variety of other documents where plaintiff listed LaRonda's address as his own create a question of fact, as well as a question of his own credibility, regarding whether plaintiff was domiciled with LaRonda at the time of his accident. However, none of this evidence was presented to the trial court in the context of Progressive's second motion for summary disposition. Rather, this evidence was elsewhere in the trial court record. Although a party may rely on evidence previously filed in a case to support its position on a motion brought under MCR 2.116(C)(10), the trial court has no duty to "scour the lower court record in search of a basis for denying the moving party's motion." *Barnard Mfg Co, Inc*, 285 Mich App at 377. Rather, it is only when "a party refers to and relies on an affidavit, pleading, deposition, admission, or other documentary evidence, and that evidence is 'then filed in the action or submitted by the parties,' " that the trial court is bound to consider that evidence. *Id*., quoting MCR 2.116(G)(5). Neither Progressive nor plaintiff relied upon the evidence cited by plaintiff when arguing the motion. Thus, the trial court was not asked or required to consider it. *Barnard Mfg Co, Inc*, 285 Mich App at 377. "When reviewing a motion for summary disposition, this Court's review is limited to review of the evidence properly presented to the trial court." *Id*. at 380. Because the evidence now cited by plaintiff as creating a question of fact regarding domicile was not presented to the trial court, nor was it referred to and relied upon by either party in the context of the motion, this Court may not consider it on appeal. *Id*. at 381.

Plaintiff also argues that the trial court's ruling on Progressive's motion is contrary to the trial court's ruling on the City's motion. Plaintiff misconstrues the trial court's earlier ruling. In ruling on the City's motion, the trial court found that plaintiff had admitted that he lived with LaRonda at the time of the accident, and that this admission was binding upon plaintiff.

However, when plaintiff later characterized the trial court's ruling as a finding that plaintiff was, in fact, domiciled with LaRonda, the trial court was quick to point out that it did not make such a ruling. Rather, the trial court explained that its ruling was based upon plaintiff's various statements to that effect, which the trial court found to be admissions, but that it had not decided that plaintiff's admissions were factually accurate. Plaintiff's arguments lack merit.

III. MCL 500.3145(1)

Plaintiff also asks this Court to determine whether his claim against Progressive is barred under MCL 500.3145(1). Although Progressive raised this issue in its first motion for summary disposition, the trial court never ruled on the motion. Accordingly, the issue is not preserved for our review. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005) ("For an issue to be preserved for appellate review it must be raised, addressed, and decided by the lower court."). However, "this Court may review an unpreserved issue if it presents a question of law and all the facts necessary for its resolution are before the Court." *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010). As all of the facts necessary to determine this issue are before the Court, this Court may decide the issue. *Id*.

A. STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 386; 738 NW2d 664 (2007). "In the absence of disputed facts, we also review de novo whether a cause of action is barred by the applicable statute of limitations." *Id*.

B. DISCUSSION

Progressive was also entitled to summary disposition because plaintiff's claim against Progressive is barred by MCL 500.3145(1), the no-fault act's statute of limitations for recovery of personal protection benefits. As provided by MCL 500.3145(1):

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred.

As our Supreme Court explained in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 69; 718 NW2d 784 (2006):

> This Court has consistently interpreted MCL 500.3145(1) as containing three distinct periods of limitations: two limitations on the time for filing suit (one provided in the first half of the first sentence of MCL 500.3145[1] that starts on the date of the accident, and a second, later one provided in the second sentence of MCL 500.3145[1] that starts at the time of the most recent allowable expense if the insurer has given notice of injury or the insured has previously paid

> benefits), and one limitation on the period for which benefits may be recovered (the one-year-back rule contained in the third sentence of MCL 500.3145[1]).

Plaintiff argues that his claim against Progressive was effectively filed on March 29, 2011, the date he filed his first complaint. Plaintiff is incorrect. Plaintiff's first complaint did not name Progressive as a party. Plaintiff filed an amended complaint on December 13, 2011, which named Progressive as a defendant. Although amendments adding a claim or defense generally relate back to the date of the original pleading, MCR 2.118(D), "the relation-back doctrine does not apply to the addition of new parties." *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007) (brackets, quotation marks, and citation omitted). Accordingly, plaintiff's claim against Progressive was filed on December 13, 2011, not March 29, 2011. *Id*. Because plaintiff's claim against Progressive was not filed until December 13, 2011, well over a year after plaintiff's January 7, 2010 accident, it is barred by MCL 500.3145(1), unless a "later [accrual date] provided in the second sentence of MCL 500.3145(1) that starts at the time of the most recent allowable expense" saves the claim. *Cameron*, 476 Mich at 69.

This later accrual date applies if "written notice of injury . . . has been given to the insurer within 1 year after the accident . . . ." MCL 500.3145(1). In an affidavit attached to Progressive's motion, Erin L. Rath stated, "After a diligent search through the Progressive database I was unable to find any proof that [plaintiff] ever gave proper notice within one year of the date of loss . . . ." In his response to this motion, plaintiff did not present any evidence that he had supplied Progressive with notice of his claim; rather, he argued that, because LaRonda refused to divulge her insurer, he should be excused from the notice requirement. Plaintiff asserts the same position on appeal. This Court addressed, and rejected, this precise argument in *Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 840, 842-843; 325 NW2d 602 (1982):

> Plaintiff maintains that an exception should be carved from the statute of limitations when, despite diligent efforts, a claimant is unable to ascertain the identity of the responsible insurer.
>
> * * *
>
> We find plaintiff's argument to be unpersuasive. The legislative intent is clear and unambiguous. The Courts should not enlarge nor alter the reciprocal rights and obligations of claimant and insurer under such circumstances. We note that in tort cases involving other statutes of limitations, no tolling of the statute occurs while a claimant seeks to discover, or in the exercise of due diligence should discover, the identity of the tortfeasor. *Reiterman v Westinghouse, Inc*, 106 Mich App 698, 704; 308 NW2d 612 (1981), *Thomas v Ferndale Laboratories, Inc*, 97 Mich App 718, 720-722; 296 NW2d 160 (1980).
>
> Mindful of the possibility that, under some circumstances, the responsible insurer cannot be identified within one year the Legislature enacted an alternative source of recovery. A person entitled to No-Fault benefits who has difficulty in determining the identity of the responsible insurer is given rights against the

> Assigned Claims Office under MCL 500.3174. This alternative was not timely exercised by the plaintiff.

See also *Allen v Farm Bureau Ins Co*, 210 Mich App 591, 600; 534 NW2d 177 (1995) (citing *Pendergast* with approval). Thus, despite plaintiff's difficulty in discovering the identity of LaRonda's insurer, plaintiff was still required to provide written notice to Progressive within one year of his accident in order to invoke the later accrual date under the notice provision of MCL 500.3145(1). *Id.*

Plaintiff alternatively argues that the accrual date of his claim should be delayed under the second condition stated in MCL 500.3145(1), that being when "the insurer has previously made a payment of personal protection benefits for the injury." Plaintiff argues that, because he received benefits from a different insurer, Aflac, until April 7, 2011, his complaint is timely. A plaintiff may commence a suit against an insurer more than one year after the accident if "*the* insurer has previously made a payment," not if *any* insurer has previously made a payment. MCL 500.3145(1) (emphasis supplied). Further, even if plaintiff's proposed date of April 7, 2010, were the date his claim against Progressive accrued, plaintiff's claim against Progressive was untimely. If plaintiff's cause of action accrued on April 7, 2010, he was required to file his claim no later than April 7, 2011. MCL 500.3145(1). As was discussed, plaintiff's claim against Progressive was not filed until December 13, 2011.

In short, plaintiff's accident occurred on January 7, 2010. The accrual date of plaintiff's claim was not delayed by plaintiff providing written notice to Progressive or by Progressive making payments to plaintiff. Plaintiff did not file his action against Progressive until December 13, 2011, well beyond the one-year statute of limitations provided by MCL 500.3145(1). Thus, plaintiff's claim against Progressive is barred by MCL 500.3145(1).

IV. ESTOPPEL

Plaintiff argues that the City should be estopped from denying his claim because the City paid some, but not all, of his medical expenses. He asks this Court to remand for entry of an order requiring the City to pay all of plaintiff's unpaid PIP benefits. We decline plaintiff's request.

A. STANDARD OF REVIEW

Plaintiff did not plead a claim of estoppel in his complaint. Plaintiff also failed to raise the doctrine of estoppel in his response to the City's motion for summary disposition. However, plaintiff raised the estoppel doctrine in a motion for reconsideration of the trial court's order granting the City's motion. This motion for reconsideration was denied by the trial court. As the issue was raised for the first time in plaintiff's motion for reconsideration, we treat plaintiff's challenge as one to the trial court's decision to deny the motion for reconsideration. A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Sanders v Perfecting Church*, 303 Mich App 1, 8; 840 NW2d 401 (2013). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

B. DISCUSSION

The trial court did not abuse its discretion when it denied defendant's motion for reconsideration, despite plaintiff's presentation of his estoppel argument in that motion. "Ordinarily, a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided." *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). See also *Woods v SLB Prop Management, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008), quoting *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) ("'We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order.'"). Because plaintiff did not plead or otherwise raise his estoppel argument before the trial court's order granting the City summary disposition, the trial court did not abuse its discretion by denying defendant's motion for reconsideration.

Even if the issue had been presented to the trial court before it decided the City's motion, the City would have been entitled to summary disposition on plaintiff's estoppel claim pursuant to MCR 2.116(C)(8). As our Supreme Court stated in *Maiden*, 461 Mich at 119-120:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

Plaintiff argues that the City is now precluded from denying payment of PIP benefits because it paid PIP benefits to plaintiff, and plaintiff relied upon that conduct as a representation that the City would fully compensate plaintiff for his injuries. In doing so, plaintiff first cites a variety of cases discussing the doctrine of equitable estoppel.[1] As this Court stated in *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999):

> Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact. *West American Ins Co v Meridian Mut Ins Co,* 230 Mich App 305, 309-310; 583 NW2d 548 (1998). Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *Id.* at 310.

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[1] *Dickerson v Colgrove*, 100 US 578, 580-584; 25 L Ed 618 (1879); *Holt v Stofflet*, 338 Mich 115, 118-120; 61 NW2d 28 (1953); *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 527-528; 644 NW2d 765 (2002); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999).

However, the only case plaintiff discusses in any detail is our Supreme Court's decision in *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977). In *Huhtala*, our Supreme Court held that the plaintiffs' claim of *promissory* estoppel, a separate claim raised in the plaintiffs' complaint, was subject to a six-year statute of limitations applicable to breach of contract claims. *Id*. at 130-132. This was so because the claim was based upon an alleged breach of an express promise. *Id*. This Court discussed the elements of promissory estoppel in *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999):

> (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. "The doctrine of promissory estoppel is cautiously applied." *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993).

In regard to the estoppel issue, plaintiff asks this Court to remand the case to the trial court "with instructions to enter a judgment in favor of [plaintiff] and against the [C]ity for payment of all past and future [PIP] benefits." Thus, plaintiff does not seek to preclude the City "from asserting or denying the existence of a particular fact." *Conagra*, 237 Mich App at 141. Rather, plaintiff seeks a judgment requiring the City to pay his PIP benefits. What plaintiff seeks is enforcement of an alleged promise to do so under a theory of promissory estoppel. Plaintiff's complaint, however, fails to plead a separate claim of promissory estoppel. Plaintiff's complaint also lacks any allegation of a promise made by the City. Rather, the complaint only alleges that the City wrongfully stopped paying PIP benefits. Thus, plaintiff's complaint fails to allege a necessary element of promissory estoppel, that being the existence of a promise, and accordingly, the City would be entitled to summary disposition on a promissory estoppel claim pursuant to MCR 2.116(C)(8).

Even if plaintiff's estoppel claim is to be understood as a claim of equitable estoppel, plaintiff would not be entitled to any relief. "Equitable estoppel is . . . a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular *fact*." *Conagra, Inc*, 237 Mich App at 140-141 (emphasis supplied). Although plaintiff seeks to preclude the City from denying liability, the question of liability is a legal conclusion, not a factual one. Because the City sought summary judgment on the basis of domicile, the fact that plaintiff would want to preclude the City from asserting is that plaintiff resided with LaRonda at the time of the accident, thus leaving Progressive as the responsible insurer. However, plaintiff would certainly be in the best position to know where he resided at any given time. Plaintiff cannot conceivably argue that he justifiably relied upon another's false assertion of where he resided at any given time. Accordingly, plaintiff cannot preclude the City from arguing that he resided with LaRonda at the time of his accident. As plaintiff's estoppel argument would have failed, had it been presented to the trial court before the trial court ruled on the City's motion for summary disposition, the trial court did not abuse its discretion when it denied plaintiff's motion for reconsideration raising the issue.

The trial court's order granting summary disposition in favor of the City is reversed. The trial court's order granting summary disposition in favor of Progressive is affirmed. The case is remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell