STATE OF MICHIGAN

COURT OF APPEALS

WAEL DOKHO and MARY ANN DOKHO,

Plaintiffs-Appellants,

v

MICHAEL JABLONOWSKI,

Defendant,

and

AAA OF MICHIGAN,

Garnishee-Defendant-Appellee.

UNPUBLISHED
November 15, 2012

No. 306082
Oakland Circuit Court
LC No. 05-067862-NO

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal by right from the opinion and order of the trial court denying their motion for summary disposition and granting summary disposition to garnishee-defendant AAA of Michigan (AAA) pursuant to MCR 2.116(C)(10). We affirm.

I. BASIC FACTS

This appeal arises out of a garnishment proceeding brought by plaintiffs. Plaintiffs originally brought suit in 2005 against defendant Michael Jablonowski seeking damages for injuries Wael Dohko allegedly sustained on April 8, 2003, as a result of a fall on the Elgin Street property where Michael resided.

Markus and Henia Jablonowski had purchased the Elgin Street property in 1966. Following the death of Markus, Henia became the sole owner of the property until her death on June 20, 2002. Michael (Henia's son) lived with Henia before her death, and continued to live in the home after her death until the home was conveyed to an unrelated seller in 2005. Michael never had an ownership interest in the property.

Prior to her death, Henia had purchased a homeowner's insurance policy from AAA; the parties agree that a homeowner's policy in her name was in place from February 4, 2002 to February 4, 2003. The parties agree that Michael was covered under this policy as a "resident

relative." Although this policy was not produced at trial, it appears the parties agree that only Henia was listed as the named insured.

In late 2002, after Henia's death, AAA mailed a "Renewal Homeowner's Declaration Certificate" to Henia at the Elgin street address. Henia was the only named insured listed on the certificate. The renewal policy term was to be from February 4, 2003 to February 4, 2004. Plaintiffs allege that Michael paid for the renewal of this policy; AAA agreed with the allegation for the purposes of summary disposition and the instant appeal.

The policy thus was renewed for the February 4, 2003 to February 4, 2004 term, with Henia listed as the sole named insured. On April 8, 2003, Wael slipped and fell on a snow or ice-covered handicap ramp while delivering mail to the Elgin Street address. Michael moved out of the house on Elgin Street on June 11, 2005.

Plaintiffs filed suit in 2005, but were not able to serve Michael by personal service; they obtained the trial court's permission for substituted service by mail and posting of the summons at the Elgin Street property. Michael did not plead or appear in the action, and plaintiffs obtained a default and default judgment in the amount of $250,000 against him.

According to Michael, he first learned of the lawsuit when plaintiffs unsuccessfully attempted to obtain satisfaction on their judgment from his mother's estate. Shortly thereafter, he notified AAA by telephone of Wael's fall on the property. Computer records of AAA introduced below indicate that AAA was aware of the lawsuit and Henia's death by July 24, 2006. The computer records also indicated that the claims adjuster for AAA, Deborah Hoehnscheid, was "not sure about coverage here, whether there was ever proper service, whether there is an issue regarding the insurance status due to the fact the named insured was deceased at the time of this loss and insurance still in her name, not the son's name" on July 26, 2006. After receiving copies of the lawsuit and Wael's medical records, AAA denied coverage for plaintiffs' claim on October 26, 2006.

Plaintiffs then filed a writ of garnishment against the 2003-2004 policy issued by AAA. AAA responded in its disclosure that "Garnishee never insured defendant, Michael Jablonowski." Plaintiffs served interrogatories and requests for admissions on AAA, requesting documents related to the policy, claims history, and when and how AAA was notified of plaintiffs' suit, although they did not specifically request an "underwriting file." AAA answered the interrogatories and provided the requested documents.

During this time period, Michael attempted to have the default judgment set aside, but was unsuccessful. No further action occurred until November of 2008, when plaintiffs filed a second writ of garnishment against the policy; AAA responded the same as it did the first writ. Plaintiffs then sent additional interrogatories inquiring into premium payments after Henia's death and any claims paid on behalf of Michael, although there again was no specific request for an underwriting file. AAA answered these interrogatories as well, and indicated that it could not determine who paid any premiums after Henia's death, or when they were paid, stating "Records not available. Premium payment information purged."

In October of 2009, plaintiffs mailed supplemental interrogatories and a deposition notice to AAA that made the first specific mention of the term "underwriting file." The request for the underwriting file was repeated in two deposition notices in 2010. AAA's Deborah Hoehnscheid testified that she requested that the underwriting department produce any relevant documents prior to her deposition, but that she was informed on March 16, 2010 that all information on the 2003-2004 policy had been purged pursuant to AAA's corporate retention policy.

Plaintiffs moved for entry of judgment and summary disposition against AAA in late 2010, arguing that the policy provided for coverage and that they were entitled to an adverse inference due to AAA's destruction of its files; AAA responded with its own motion for summary disposition, stating that the policy was invalid because of Henia's death, and that it had purged its files as a result of good-faith routine procedures. The trial court heard oral arguments on the parties' motions, and issued an opinion and order in June 2011 denying plaintiffs' motion and granting summary disposition to AAA. The trial court concluded that the 2003-2004 homeowner's policy excluded coverage of plaintiffs' claim, because the declaration certificate only named Henia as the named insured and Michael could not be an insured "resident relative" as "one could not possibly reside with a deceased homeowner." The trial court also found that the policy was not transferred to Michael.

The trial court also addressed plaintiffs' argument that they were entitled to an adverse inference due to AAA's destruction of its files:

> With regard to the destruction of the underwriting files and whether AAA was ever on notice of Ms. Jablonowski's death—first, the testimony of Ms. Hoenscheid was that AAA does not necessarily maintain an underwriting file on each of its accounts; second, it would be difficult, if not impossible to prove a negative-that it was not notified of Ms. Jablonowski's death. Here, the evidence shows that AAA was not on notice of the death as it renewed the policy in Ms. Jablonowski's name—query, why would AAA renew a policy in the name of a deceased homeowner?

Plaintiffs moved for reconsideration, which the trial court denied.

II. SPOLIATION OF EVIDENCE

On appeal, plaintiffs first argue that they were entitled to an adverse inference; specifically that AAA intentionally issued the 2003-2004 policy with notice of Henia's death. Although we agree that AAA should not have purged its files, we disagree that the trial court's ruling requires reversal.

A trial court's decision on sanctions for failure to preserve evidence "will be reversed 'only upon a finding that there has been a clear abuse of discretion.'" See *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 242; 635 NW2d 379 (2001), quoting *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.313(B) permits a trial court to impose sanctions for failure to comply with a discovery order. The court rule is inapplicable "in the absence of a discovery order." *Brenner v Kolk*, 226 Mich App 149, 159; 573 NW2d 65 (1997). Nonetheless, "[a] trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2002), citing *MASB-SEG Property/Casualty Pool, Inc*, 231 Mich App at 400.

Spoliation can occur in the absence of a discovery order. *Brenner*, 226 Mich App at 160. Spoliation of evidence occurs when a party either deliberately or accidentally destroys or loses crucial evidence, or when a party fails to preserve such evidence when it is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action. *Id.* The litigant is under such a duty "[e]ven when an action has not been commenced and there is only a potential for litigation[.]" *Id.* at 162.

An appropriate consequence for a party's failure to preserve evidence may be "an instruction to the jury that it may draw an inference adverse to the culpable party from the absence of the evidence." *Brenner*, 226 Mich App at 161. Here, plaintiffs argue that the trial court should have drawn such an adverse inference in determining the parties' cross-motions for summary disposition. Plaintiffs further argue that the effect of this inference would be for the trial court to conclude that AAA intentionally issued the 2003-2004 policy with knowledge of Henia's death. Plaintiffs have not provided this Court with an example of the application of an "adverse inference" in the context of a motion for summary disposition under MCR 2.116(C)(10). This Court is not obligated to discover and rationalize the basis for a party's claims. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). From our review of the case law, this issue has not been squarely addressed. But there is support for applying an adverse inference, in appropriate circumstances, in the summary disposition context. See *Banks v Exxon Mobil*, 477 Mich 983, 984; 725 NW 2d 455 (2007) (Marilyn J. Kelly, J., concurring). Even assuming that these "adverse inference" principles apply in a summary disposition context, however, we conclude that the trial court did not err by failing to conclude that AAA intentionally issued the 2003-2004 policy with knowledge of Henia's death.

As a threshold matter, we note that AAA should have preserved any files related to the 2003-2004 policy, rather than allow them to be purged from its computers after six years. AAA's own record retention policy allowed for a "litigation hold" to be placed on information when it was informed of pending litigation. Although AAA argues that plaintiffs never specifically requested an "underwriting file" until more than six years after the accident, the record shows that (1) AAA was informed of the accident in 2006, (2) AAA knew there was an issue surrounding the death of Henia and the renewal of the policy in 2006, (3) plaintiffs commenced a garnishment action related to the 2003-2004 policy in 2006, (4) AAA received interrogatories from plaintiffs requesting documents relating to premium payments after Henia's death and any claims paid on behalf of Michael and (5) these interrogatories were received prior to the six-year deadline. The record is sufficient for this Court to conclude that AAA knew or should have known that there was a potential for litigation, and that any information relating to the 2003-2004 policy could be relevant to that litigation. *Brenner*, 226 Mich App at 160, 162. Therefore, the underwriting files, if any, should not have been purged.

However, we reject plaintiffs' argument that the trial court was obligated, because of this purge, to conclude that underwriting files existed that would conclusively prove that AAA intentionally issued the policy with knowledge of Henia's death. Plaintiffs allege that they are not seeking sanctions for the destruction of evidence, but are "seeking merely to have an adverse inference imposed against Garnishee-Appellee for destroying (whether or not with malicious intent) their underwriting file." However, plaintiffs' suggested remedy would amount to an adverse *presumption* against AAA, not a mere inference.

The presumption that unproduced evidence would have been adverse can be applied only "where there is evidence of intentional fraudulent conduct and intentional destruction of evidence." *Lagalo v Allied Corp*, 233 Mich App 514, 520; 592 NW2d 786 (1999). An adverse presumption, if unrebutted, *requires* the fact finder to "conclude that the unproduced evidence would have been adverse." *Id.* at 521. An adverse inference, by contrast, merely *permits* the fact finder to conclude that the unproduced evidence would have been adverse, the fact-finder is still "free to decide for itself." *Id.* at 521. Here, there was no evidence introduced of fraudulent conduct or intentional destruction of evidence on the part of AAA; therefore the trial court did not abuse its discretion in failing to give plaintiffs the benefit of an adverse presumption.

Further, plaintiffs do not explain how the trial court's alleged failure to give an adverse inference altered the trial court's summary disposition analysis. In the context of a motion under MCR 2.116(C)(10), the trial court was *already* required to consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and draw all reasonable inferences in favor of the nonmovant, *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Plaintiffs have not addressed how an additional "adverse inference" would have altered the trial court's analysis under this subrule.

The trial court noted that AAA had presented evidence that it did not necessarily maintain an underwriting file on each of its accounts, and thus an underwriting file may never have existed. It further concluded that there was no evidence presented of AAA's intent to transfer the policy to Michael either individually or on behalf of his mother's estate. It then concluded that the evidence supported the inference that AAA was not on notice of Henia's death at the time it renewed the policy, because it renewed the policy in Henia's name only. Plaintiffs presented no evidence that supported the opposite inference. The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A mere possibility that the claim might be supported by evidence at trial is insufficient. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

Even drawing all reasonable inferences in favor of plaintiffs, the trial court did not err in concluding that no issue of material fact existed regarding AAA's knowledge (or lack thereof) of Henia's death at the time it renewed the policy. Plaintiffs simply did not carry their burden of coming forth with evidence to establish the existence of such a dispute. As the trial court was already required, in the context of AAA's motion, to draw inferences in favor of plaintiff, the grant of an adverse inference would not have altered this analysis. Only an adverse *presumption* would have affected the trial court's ruling; but such a sanction would have been inappropriate in light of the lack of evidence of intentional wrong-doing on the part of AAA. We therefore

conclude that the trial court did not abuse its discretion in declining to apply such a presumption (whether labeled as inference or presumption) against AAA.

III. POLICY TRANSFER LANGUAGE

Next, plaintiffs argue that the trial court erred in concluding that the "Transfer of Policy" language in the policy precluded coverage. We review a trial court's interpretation of policy language de novo. *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012). Although the 2002-2003 policy (in effect at the time of Henia's death) was not produced for the trial court, the parties agree that the policy contained the following language:

> 1. TRANSFER OF THE POLICY
>
> This Policy may not be transferred without our written consent. If the Named Insured dies, this Policy shall provide protection until the end of the Policy Term for (a) the surviving insured persons, (b) the personal representative of the Named Insured while acting within that capacity, and (c) a person having proper custody of insured property until a legal representative is appointed.

It is undisputed that this language provided coverage for Michael through the end of the policy period on February 4, 2003. The trial court concluded that

> [u]nder this clear language under the policy, Mr. Jablonowski could only remain an "insured person" until the end of the policy term in effect at the time of his mother's death—February 3, 2003. Inasmuch as the policy was renewed *after* Ms. Jablonowski's death and the subject accident occurred on April 8, 2003, there can be no coverage for the claim. The 2003-2004 declaration certificate only names Ms. Jablonowski and due to her death, Mr. Jablonowski could not possibly be named as an insured as one could not possibly reside with a deceased homeowner. Further, Plaintiff has not explained how acceptance of payments by AAA effectively transfers the policy to Mr. Jablonowski. . . .There is no evidence of consent to transfer the policy to either the name of Mr. Jablonowski individually or on behalf of his mother's estate.

Plaintiffs first argue that this language does not apply because AAA wrote a new policy for Michael with knowledge of Henia's death. This argument in part depends upon the so-called "adverse inference" to which plaintiffs allege they were entitled; as discussed above, we conclude that the application of such an adverse inference would not in any event result in the conclusion that is sought by plaintiffs. Additionally, the fact that Michael may have paid for the renewal of the policy did not provide notice to AAA of Henia's death, or function as a request for a policy transfer.

We find the case of *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 819 (2010), instructive. In *McGrath*, the defendant insured the home of the plaintiff's mother. *Id.* at 436. The plaintiff's mother developed dementia and Alzheimer's disease, and eventually her family members decided to move her to an apartment in Farmington Hills to be closer to her family and doctors. *Id.* at 437. A family member notified the defendant that the insurance bills

should be sent to the Farmington Hills address, but did not otherwise notify the defendant the house was no longer used as a full-time residence. *Id.* After the house developed water damage caused by ruptured pipes in the winter, the defendant denied coverage for the damage because the house was not used as a full-time residence as required by the policy terms. *Id.* at 439. This Court determined that the mere fact of a change of billing address was not sufficient to provide notice that there was a change in occupancy of the insured property. *Id.* at 446. Specifically, we stated:

> [T]he policy places on the policyholder the responsibility to inform the insurer of a change in occupancy. Further, a person may change a billing address for myriad reasons that would not raise a suspicion that residency has changed. As one example, the children of an elderly person may decide to assume the responsibility for paying a parent's bills, and thus make arrangements for those bills to be sent somewhere other than the parent's residential address. [*Id.* at 446-447.]

We conclude that, like the defendant in *McGrath*, AAA was not placed on notice of Henia's death by the mere fact that her son paid for the renewal of the homeowner's policy. To construe Michael's renewal of the policy (in Henia's name) as a request to transfer the policy to Michael, and AAA's issuance of a new policy (in the name of his deceased mother) as written confirmation of that transfer, strains credulity, and we decline to do so. Such a construction would render the limitations on transfer found in the "Transfer of Policy" section essentially nugatory, as anyone who paid to renew an insured's policy could then claim that the policy was transferred to them upon renewal. We decline to interpret an insurance policy to render any part of the contract surplusage or nugatory, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 468; 663 NW2d 447 (2003), or as to produce absurd or unreasonable conditions or results, *Hastings Mut Ins v Safety King Inc*, 286 Mich App 287, 297; 778 NW2d 275 (2009).

Plaintiffs alternatively argue that the "Transfer of Policy" section is not applicable, because AAA wrote a new policy for Michael. As the parties agree that the policy only names Henia as the named insured, and contains terms identical to the previous year, and was issued in response to the payment of the amount listed on the renewal certificate, this argument is unpersuasive, to say the least. A renewal of an insurance policy is a separate contract, but (absent notice from an insurer) the coverage provided is deemed to be the same as the earlier policy. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 395; 729 NW2d 277 (2006). The record is devoid of evidence that the 2003-2004 policy was anything other than a renewal of the previous policy.

Plaintiffs' argument depends on being entitled to an adverse presumption against AAA; absent that presumption, the fact that AAA issued a renewal of the policy does not support an inference that either (1) the existing policy was transferred to Michael by written consent of AAA or (2) that a new policy was issued by AAA that provided coverage for Michael.

IV. MUTUAL MISTAKE

Plaintiffs argue that there was a mutual mistake in the issuance of the 2003-2004 policy, i.e., that Michael thought he was renewing the insurance policy and AAA thought the policy was

being renewed. Therefore, plaintiffs argue, the policy should be reformed to add Michael as an insured.

Plaintiffs did not raise the argument of mutual mistake before the trial court. The issue is thus unpreserved for appeal. We are obliged only to review issues that are properly raised and preserved. *MEA v SOS*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194; 801 NW2d 35 (2011). Nonetheless, we briefly address plaintiffs' argument that they are entitled to reformation on the grounds of mutual mistake.

"'Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties.'" *Mate v Wolverine Mut Ins Co*, 223 Mich App 14, 24-25; 592 NW2d 379 (1998), quoting *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). However, non-parties to an insurance contract generally lack standing to seek reformation of the contract. *Id.*

Further, the mistake described by plaintiffs is not mutual. A mutual mistake of fact[1] is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). Michael may have believed he was renewing the insurance policy by paying for the renewal, but the evidence supports the inference that AAA's "mistake" was in believing that Henia was still alive. Therefore this is not an example of an instrument not expressing the true intent of the parties, because AAA never intended to provide coverage to Michael under a new or renewed policy. See *Mate*, 223 Mich App at 24-25.

Accordingly, even if plaintiffs had standing to seek reformation of the contract, reformation is not appropriate in this case.

V. INSURED NON-COOPERATION

Plaintiffs argue that AAA could not defend its denial of coverage on the grounds of insured non-cooperation. Indeed, AAA never asserted this defense in the action below. An insurer can obtain relief from a garnishment action if it can show it was prejudiced by its client's noncompliance. *Anderson v Kemper Ins Co*, 128 Mich App 249, 253; 340 NW2d 87 (1983). Although the trial court made passing general reference to an insurer obtaining relief from a garnishment in such a manner, it is clear that its decision in the instant case was not based on any insured non-cooperation with the defense, but rather on the determination that the policy at issue did not provide coverage for plaintiffs' claims. Plaintiffs' arguments concerning insured non-cooperation and prejudice to AAA are thus irrelevant to this appeal.

[1] Plaintiffs did not allege a mutual mistake of law in this case, which would not in any event support a claim for reformation. See *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 379; 761 NW2d 353 (2008) (mutual mistake of law regarding the legal effect of the contract actually made will seldom, if ever, warrant reformation).

Affirmed. Having prevailed in full, AAA may tax costs. MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra