STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

RICHARD RUSSELL and JOANNE RUSSELL,
husband and wife,

Plaintiffs,

v

File No. 00-20197-NZ
HON. PHILIP E. RODGERS, JR.

AUTO-OWNERS INSURANCE COMPANY and
LARKIN INSURANCE AGENCY,

Defendants.
_____/

Philip A. Clancey (P11912)
Attorney for Plaintiffs

Philip J. Crowley (P24218)
Attorney for Defendant Larkin

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Attorney for Defendant Auto-Owners

DECISION AND ORDER REGARDING
DEFENDANT AUTO-OWNERS' MOTION FOR SUMMARY DISPOSITION
AND DEFENDANT LARKIN'S MOTION FOR SUMMARY DISPOSITION

On November 23, 1992, the Plaintiffs purchased a 1991 motor home with 18,368 miles on it from TC RV for approximately $63,000. They financed the purchase through Northwestern Savings and Loan. They procured insurance through the Defendant Larkin Agency as agent for Defendant Auto-Owners.

In June of 1996, the Plaintiffs took the motor home to TC RV for repair. At that time, the motor home had 46,447 miles on it. While the motor home was at TC RV, it was stolen. At that time, the Plaintiffs had an outstanding balance on their loan of $53,418.55.

The Plaintiffs filed a claim of loss with Defendant Auto-Owners. Defendant Auto-Owners eventually paid the Plaintiffs $45,599 for their loss. This figure was determined by taking the

NADA book used retail figure of $39,840 and adding "for the equipment that was not contents and part of the vehicle that was the generator and two air conditioners, bringing the value to $42,325.00 retail"... "plus tax of $2,580.00 and title transfer $19.00 for a total of $45,599.00." How this figure was determined was explained to the Plaintiffs through correspondence with their attorney prior to the payment being made.[1]

Northwestern Savings and Loan agreed to "release and discharge its lien on the subject motor home upon receipt of the sum of $45,599.00." Auto-Owners issued its check in the amount of $45,599 payable to the Plaintiffs, their attorney and Northwestern Savings and Loan. The Plaintiffs endorsed the check and wrote "paid in full" on the memo line. Northwestern Savings and Loan initiated collection proceedings against these Plaintiffs to recover the balance due on their loan.

The Plaintiffs subsequently sued TC RV on several theories for an amount equal to the remaining balance they owed on their loan. Defendant Auto-Owners was also the carrier for TC RV. It provided a defense and indemnification to TC RV and the suit was settled through case evaluation for $5,500.

Now, the Plaintiffs have filed suit against Defendants Auto-Owners and Larkin seeking to recover the difference between the amount they currently owe on their loan and the amount Auto-Owners originally paid, not including the $5,500 they recovered from the TC RV suit, for a total of $13,000. The Plaintiffs claim that they insisted that, in the event of loss, "their policy of insurance pay off the loan due against the motor home no matter what the amount of that loan would be" and that agents and employees of Defendant Larkin assured them that that was the nature of the coverage they were purchasing.

The Defendant Auto-Owners filed a motion for summary disposition. The motion does not identify any particular subsection of MCR 2.116(C), but the bases for the motion are accord and satisfaction, release and the unambiguous language of the insurance policy. Therefore, the Court will assume that the motion is brought pursuant to MCR 2.116(C)(7) release and (10). The Defendant Larkin filed a motion for summary disposition pursuant to MCR 2.116(C)(7) statute of limitations, (8) and (10).

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[1]The Plaintiffs' attorney then and now is Philip A. Clancey.

The Plaintiffs filed a response to the motions. On October 23, 2000, the Court heard the arguments of counsel and took the matter under advisement. The Court now issues this written Decision and Order.

APPLICABLE STANDARDS OF REVIEW

MCR 2.116(C)(7)

MCR 2.116(C)(7) sets forth the following grounds for summary disposition:

> The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000), the Court of Appeals said:

> When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley, supra* at 365; 579 NW2d 374; *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). '[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.' *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra* at 192; 572 NW2d 715.

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988).

MCR 2.116(C)(10)

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was recently set forth in *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

ACCORD AND SATISFACTION

Defendant Auto-Owners contends that the Plaintiffs' claims are barred by the doctrine of accord and satisfaction because they paid $45,599 in insurance benefits on the Plaintiffs' claim of loss. The Plaintiffs claim that there was no accord and satisfaction because they understood that

their insurance would pay off their loan in the event of a loss and, therefore, they did not agree to accept the insurance proceeds in settlement of their claim.[2] This position is consistent throughout their depositions and their response to these motions.

Accord and satisfaction relates to a situation where one party tenders an item in full satisfaction of a claim and the other party accepts the thing tendered. In such a situation, an accord and satisfaction may arise regardless of the lack of an agreement between the parties. An accord and satisfaction may be effected by payment of less than the amount which is claimed to be due if the payment is tendered by the debtor in full settlement and satisfaction of the claim. In order to effect an accord and satisfaction under such circumstances, the tender must be accompanied by an explicit and clear condition indicating that, if the money is accepted, it is accepted in discharge of the whole claim. *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 646; 482 NW2d 474 (1992), quoting *Fuller v Integrated Metal Technology, Inc*, 154 Mich App 601, 607-608; 397 NW2d 846 (1986).

As the court said in *Stefanac v Cranbrook Educational Community*, 435 Mich 155; 458 NW2d 56 (1990):

> Accord and satisfaction is an affirmative defense. Defendant has the burden of establishing an accord and satisfaction. *Obremski v Dworzanin*, 322 Mich 285, 290; 33 NW2d 796 (1948). Accord and satisfaction is based on contract principles and is generally contractual in nature. *Fuller v Integrated Metal Technology, Inc*, *supra* at 607. An "accord" is an agreement between parties to give and accept, in settlement of a claim or previous agreement, something other than that which is claimed to be due, and "satisfaction" is the performance or execution of the new agreement. *Id.*

Whether a particular set of facts amounts to an accord and satisfaction is generally a question of fact for the fact-finder. *Fritz v Marantette*, 404 Mich 329, 335; 273 NW2d 425 (1978), and *Urben v Public Bank*, 365 Mich 279; 112 NW2d 444 (1961).

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[2]The Defendant relies upon the deposition testimony of Ms. Russell wherein she states that she understood that the insurance check was "a final deal." However, read in context, the testimony would also support inference that Ms. Russell thought the insurance payment was "a final deal,"in that, once she endorsed that payment to Northwestern Savings & Loan, it would end the loan obligation.

In the instant case, whether there was an accord and satisfaction is a question of fact for the jury to decide. The Defendant's motion for summary disposition on the basis of accord and satisfaction should be denied.

RELEASE

When the Plaintiffs sued TC RV for the balance due on their loan and the case was resolved through case evaluation for $5,500, the Plaintiffs executed a Full Release Receipt ("Release"). Copies are attached to the Defendants' motions. The Release provides in pertinent part as follows:

> For and in consideration of the sum of FIVE THOUSAND FIVE HUNDRED AND 00/100 ($5,500.00) **paid by Auto-Owners Insurance Company, on behalf of TC RV** Saab, Inc. of Grand Traverse County, Michigan, We, Richard Dean Russell and Joanne E. Russell of Kewadin, Michigan hereby acknowledge receipt of said sum and accept same in **full satisfaction and settlement of all claims and demands against said TC RV** Saab, Inc., and we for ourselves, our heirs, executors, administrators and assigns hereby **release and discharge the said named TC RV** Saab, Inc. from any and all claims, demands, and actions or causes of action on account of personal injuries and property damage, direct or indirect, both known or unknown, resulting from or which may hereafter result from an incident that occurred on or about the 26th day of July, 1996, in Grand Traverse County, Michigan.
>
> The undersigned understand and agree that said payment is the sole consideration for this Release and is **in full settlement of all claims resulting from said incident**. . .
>
> The undersigned further agree to indemnify **the party herein released** and hold harmless from any and all claims brought against said party to be released herein based upon the injuries claimed by the undersigned. This indemnification shall be broadly construed and shall cover any third-party claim or claim for contribution against the party released herein as well as any direct claim by any other individual or entity that may have a cause of action based directly or indirectly upon the above referenced incident.
>
> The undersigned understand that **the party hereby released** admits no liability of any sort by reason of said incident and that the said payment and settlement in compromise is made to terminate further controversy respecting all claims for damages that the undersigned have heretofore asserted or that the undersigned or their personal representatives might hereafter assert because of said incident. [Emphasis added.]

The Release is signed by the Plaintiffs.

The Defendants interpret this Release as a release of Defendant Auto-Owners that bars this action. The Defendant Auto-Owners relies upon the fact that Auto-Owners paid $5,500 "on behalf of TC RV" and that the release states that the Plaintiffs "understand and agree that said payment . . . is in full settlement of all claims resulting from said incident." The Defendant Larkin cites the case of *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999) for the proposition that a general release of "all other parties, firms or corporations who are or might be liable" bars subsequent claims against other defendants arising out of the same incident.

In response, the Plaintiffs point out that the Release runs only to TC RV and that they sued TC RV on several theories, only one of which was for loss of their motor home on a bailment theory.

The Defendants in the instant case were not parties to the Release. The Defendant Auto-Owners was involved only as the insurance carrier for TC RV. The Release in the instant case does not contain the language relied upon by the Defendant from the *Romska* case. The Release in the instant case specifically says: "[The Plaintiffs] acknowledge receipt of said sum and accept same in full satisfaction and settlement of all claims and demand **against said TC RV Saab, Inc. . . .**" not "all other parties, firms or corporations who are or might be liable." [Emphasis added.] Therefore, Defendant Larkin's reliance on *Romska* is misplaced.

MCL 600.2925d; MSA 27A.2925(4), provides:

> If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons for the same injury or the same wrongful death, both of the following apply:
>
> > (a) The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.
> >
> > (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

Thus, as a matter of law, the Release in the instant case, did not release these Defendants. The Defendants' motion for summary disposition on the basis of the Release should be denied. MCR 2.116(C)(7).

STATUTE OF LIMITATIONS

The Plaintiffs' policy of insurance provided in pertinent part as follows:

4. Limit of Liability

We will pay no more than the lowest of the following:

(1) the actual cash value of stolen or damages property;

(2) the necessary cost, at local prices, to repair or replace the property or damaged parts with material of similar kind and quality; or

(3) the Limit of Liability stated in the Declarations.

The Plaintiffs allege in their Complaint, however, that agents of Defendant Larkin agency told them that their insurance would "cover everything" and that no matter what the balance was on their loan, it would be paid off if anything happened to the motor home. At her deposition, the Plaintiff Joanne Russell testified that they purchased the insurance on the same day that they bought the motor home in 1993 and that she spoke with an agent of Larkin in the Elk Rapids office and he told her that "the motor home would be paid off." After the motor home was stolen, another agent of Larkin told her that they "were fully covered." The Plaintiff Richard Russell testified at his deposition that it was his understanding from what he was told that "no matter what the balance due and owing Northwestern Savings & Loan might be at the time of any loss, it would be paid in full." In their response to the Defendant's motion, the Plaintiffs assert that "[t]hese discussions occurred several times over a period of years and cemented [the Plaintiffs'] clear understanding that in the event of a loss of the motor home, Auto-Owners would pay the entire unpaid balance due Northwestern."[3]

The Defendant Larkin categorizes the Plaintiffs claims as sounding in professional negligence and argues that the Plaintiffs' claims are barred by the applicable two-year statute of limitations, MCL 600.5805(4); MSA 27A.5805(4), and the discovery rule, MCL 600,5838; MSA 27A.3838. A malpractice claim requires proof of simple negligence based on a breach of a professional standard

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[3]Neither Plaintiff apparently testified at their deposition that these misrepresentations were made over a period of years. At least, no portion of their deposition transcripts is cited.

of care. Expert testimony is usually required to establish the applicable standard of conduct and its breach. *Phillips v Mazda Motor Manufacturing (USA) Corp*, 204 Mich App 401, 410; 516 NW2d 502 (1994).

The Plaintiffs argue that the gravamen of their complaint is an action for fraud, i.e., innocent misrepresentations or silent fraud, and that the six-year statute of limitations should apply. MCL 600.5813; MSA 27A.5813. The elements of fraud include: (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. *Brownell v Garber*, 199 Mich App 519, 533; 503 NW2d 81 (1993), quoting *Scott v Harper Recreation, Inc*, 192 Mich App 137, 144; 480 NW2d 270 (1991).

In *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5-6; 555 NW2d 496 (1996) our Court of Appeals addressed this exact issue in the context of an action by plaintiff insureds against their life insurer and its agent to reform their whole life insurance policies to conform to the agent's allegedly fraudulent misrepresentation that the policies were vanishing premium policies. The Court said:

> Chapter 58 of the Revised Judicature Act, MCL 600.5801 et seq.; MSA 27A.5801 et seq., governs the times for pursuing various causes of action. The burden of establishing the bar imposed by a statute of limitations is normally on the party asserting the defense. *Blaha v A.H. Robins & Co*, 536 F Supp 344, 345 (WD Mich 1982), aff'd. 708 F2d 238 (CA6, 1983).
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> Generally, two years is the limit for malpractice actions. MCL 600.5805(4); MSA 27A.5805(4). Alternatives include MCL 600.5805(8); MSA 27A.5805(8), which provides a three-year period to "recover damages. . . for injury to a person or property," MCL 600.5807(8); MSA 27A.5807(8), which provides a six-year limitation period for breach of contract, and MCL 600.5813; MSA 27A.5813, which provides a six-year period for all personal actions not otherwise provided for in the statutes. Plaintiffs argue that the last six-year limitation should have been applied because the gravamen of their complaint was an action for fraud. See *Kwasny v Driessen*, 42 Mich App 442, 446; 202 NW2d 443 (1972).
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> **When a complaint alleges all the necessary elements of fraud as well as malpractice, the statute of limitations governing fraud actions will apply to the**

fraud count. *Brownell v Garber*, 199 Mich App 519, 533; 503 NW2d 81 (1993)... [Emphasis added.]

Thus, if the Plaintiffs in the instant case have plead only professional malpractice, their action is time barred by the applicable two-year statute of limitations. If, however, they have plead each element of fraud with the particularity required by MCR 2.112, the applicable statute of limitations is six years, MCL 600.5813; MSA 27A.5813, and their fraud claim may not be time barred depending on when the Plaintiffs' fraud claim accrued.

In *Shields v Shell Oil Co*, 237 Mich App 682, 690-692; 604 NW2d 719 (2000), the Court said:

> The primary inquiry in any case that involves a statute of limitation defense focuses on determining the deadline for filing an action. See generally *Beauregard-Bezou v Pierce*, 194 Mich App 388, 391-392; 487 NW2d 792 (1992). To determine this deadline, a court must know when the claim accrued. MCL 600.5827; MSA 27A.5827. Pursuant to the relevant language in this general accrual statute, a claim accrues 'at the time the wrong upon which the claim is based was done regardless of the time when damage results.' *Id.* In 1972, the Michigan Supreme Court interpreted this language to mean that a claim does not accrue until 'all of the elements of an action for personal injury, including the element of damage, are present. *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). Consequently, a cause of action may accrue on the date the defendant's negligent act harms the plaintiff, which may occur some time after the date on which the defendant acted negligently. See *Stephens v Dixon,* 449 Mich 531, 534-535; 536 NW2d 755 (1995).
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> The accrual rule works well when a plaintiff is aware that all elements of a cause of action exist. However, '[w]here an element of a cause of action, such as damage, has occurred, but cannot be pleaded in a proper complaint because it is not yet discoverable with reasonable diligence, Michigan courts have applied the discovery rule.' *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 479-480; 586 NW2d 760 (1998). The discovery rule effectively delays when a statute of limitation begins to run by delaying when a claim accrues, thereby extending the time in which a plaintiff can file a complaint.
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> Whether the discovery rule applies in a given case depends on when a plaintiff discovered or should have discovered a cause of action, which is an objective test. *Poffenbarger v Kaplan*, 224 Mich App 1, 11-12; 568 NW2d 131 (1997). A plaintiff need only be aware that a possible cause of action exists, not that a likely cause of action exists. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). A

> statute of limitation begins to run once a plaintiff is aware of an injury that presents a possible cause of action. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997). 'The law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim.' *Moll v Abbott Laboratories*, 444 Mich 1, 29; 506 NW2d 816 (1993).

In the instant case, the Plaintiffs purchased the subject insurance in 1993 when the purchased the motor home. They were provided a copy of the policy and admit having read it. They claim, however, that the Defendant Larkin repeatedly assured them over the years that the policy, which was underwritten by Defendant Auto-Owners, would pay off their loan in the event that anything happened to the motor home. In 1996, the motor home was stolen and the Defendant Auto-Owners failed and refused to pay off their loan. The Plaintiffs did not have a cause of action until 1996 when they suffered the loss of their motor home and the Defendant Auto-Owners failed and refused to pay off their loan. Consequently, a fraud action could still be timely filed. MCL 600.5813; MSA 27A.5813.

However, the Court has reviewed the Complaint. The Plaintiffs have not plead each element of fraud with particularity. Whether to grant or deny leave so that the Plaintiffs might amend their Complaint is within the Court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). Ordinarily, leave to amend a complaint should be "freely given when justice so requires." MCR 2.118(A)(2). The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). Leave to amend may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. *Weymers, supra* at 658; 563 NW2d 647; *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Delay, alone, does not warrant denial of a motion to amend. *Weymers, supra* at 659; 563 NW2d 647. However, a motion may be properly denied if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Id.* Prejudice to a defendant that will justify denial of leave to amend is the prejudice that arises when the amendment would prevent the defendant from having a fair trial; the prejudice must stem from the fact that the

new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. *Id* at 659, 563 NW2d 647.

The Defendants herein will not be prejudiced by granting the Plaintiffs leave to amend their Complaint to allege fraud with particularity. The allegations of fraud spring from the same transactional setting as that plead originally. *Stamp v Mill Street Inn*, 152 Mich App 290, 299; 393 NW2d 614 (1986).

The Defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(7) should be denied. The Plaintiffs are granted leave to amend their Complaint to allege fraud with the requisite particularity. MCR 2.112.

FAILURE TO STATE A CLAIM and
NO GENUINE ISSUE OF MATERIAL FACT

Both Defendants claim that the Plaintiffs' case should be dismissed pursuant to MCR 2.116(C)(8) and (10) because the Complaint fails to state a claim upon which relief can be granted and there is no genuine issue of material fact. They rely upon the plain and unambiguous language of the insurance policy which provides that Defendant Auto-Owners will pay "actual cash value" in the event that the motor home is stolen.

Generally, an insured is held to have knowledge of the terms and conditions contained within an insurance policy, even though he may not have read the policy. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 324; 575 NW2d 324 (1998); *Farm Bureau Mut Ins Co* v *Hoag*, 136 Mich App 326, 332; 356 NW2d 630 (1984). An insured is obligated to read his insurance policy and raise questions concerning coverage within a reasonable time after the issuance of the policy. *Koski v Allstate Ins Co*, 213 Mich App 166, 170; 539 NW2d 561 (1995); *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 145; 314 NW2d 453 (1981).

In the instant case, the Plaintiffs admittedly had and read their insurance policy. They claim nonetheless to have been told by the Defendants' agents that the policy would pay off the balance of their loan if anything happened to their motor home. This factual scenario is similar to the factual scenario in *Kuebler*, *supra* and *Bleam v Sterling Ins Co*, 360 Mich 208; 103 NW2d 466 (1960) in

which the question whether an insurance contract can be reformed on the basis of an insurance agent's fraud was addressed. The Court in *Bleam* said:

> A corporation, such as defendant, acts through its agents and employees. Their mistakes are the mistakes of the corporation, warranting, under circumstances such as these, reformation of the resulting contract . . . . If it be not a case of mistake but fraud on the part of the agent committed in the course of his employment, defendant, as his principal, is chargeable therewith, even though the principal was ignorant thereof and the agent, in so doing, exceeded his authority or acted in violation of his principal's instructions.

Id at 213.

In both *Kuebler* and *Bleam*, the Courts held that the trial courts erred in granting summary disposition because the language in the policies did not preclude reformation of the contract inasmuch as the defendant insurance companies would be bound by the fraudulent representations made by their agents.

Plaintiffs in the instant case are entitled to an opportunity to prove facts that would support a claim of fraud and reformation. Whether those facts are sufficient is up to the trier of fact. The Defendants' motions for summary disposition brought pursuant to 2.116(C)(8) and (10) are denied.

CONCLUSION

The Defendants' motions for summary disposition brought pursuant to MCR 2.116(C)(7), (8) and (10) are denied. **The Plaintiffs have twenty-one (21) days from the date of this decision and order to amend their Complaint to allege fraud with particularity or this complaint shall be dismissed with prejudice.**

IT IS SO ORDERED.

This decision and order does **not** resolve the last pending claim or close the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 11/13/20