IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 4, 2023 Session

EDWARD RONNY ARNOLD v. DEBORAH MALCHOW ET AL.

Appeal from the Circuit Court for Davidson County
Nos. 19-C3007, 20-C2199 Amanda J. McClendon, Judge

No. M2022-00907-COA-R3-CV

This is the second appeal in this matter involving a motor vehicle collision that occurred on October 23, 2019, in Nashville. Upon remand, following dismissal of the first appeal for lack of subject matter jurisdiction due to the absence of a final judgment, the trial court granted summary judgment in favor of the individual tortfeasor and subsequently dismissed the plaintiff's claim against his underinsured motorist insurance carrier. The plaintiff has appealed. Determining that the plaintiff has demonstrated the existence of a genuine issue of material fact with respect to his negligence claim, we vacate the trial court's grant of summary judgment in favor of the tortfeasor. We further vacate the dismissal of the plaintiff's underinsured motorist claim against his automobile insurer. We affirm the trial court's judgment in all other respects and remand this matter to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated in Part; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which ANDY D. BENNETT and JEFFREY USMAN, JJ., joined.

Edward Ronny Arnold, Nashville, Tennessee, Pro Se.

Nathan E. Shelby and Jordan K. Gibson, Nashville, Tennessee, for the appellee, Deborah Malchow.

Cyrus L. Booker, Brentwood, Tennessee, for the appellee, Allstate Insurance Company.

OPINION

I. Factual and Procedural Background

This case originated with the filing of a *pro se* complaint by the plaintiff, Edward Ronny Arnold, on December 27, 2019, in the Davidson County Circuit Court ("trial court"). Mr. Arnold named as defendants Deborah Malchow, Progressive Direct Auto ("Progressive"), and Mountain Laurel Assurance Company ("MLAC"). In his complaint, Mr. Arnold alleged that on October 23, 2019, Ms. Malchow had negligently operated her motor vehicle while driving in Nashville and had struck Mr. Arnold's vehicle and that of a third party, Natalie Beaman. Mr. Arnold averred that he had sustained bodily injuries and property damage as a consequence of Ms. Malchow's negligence and that he had to be transported to the emergency room immediately after the accident. Mr. Arnold further averred that Ms. Malchow was insured by Progressive and MLAC and that these companies had denied his claims in bad faith.

This is the second appeal in this cause. As explained in this Court's Opinion resulting from the first appeal, *Arnold v. Malchow*, No. M2021-00695-COA-R3-CV, 2022 WL 774925, at *1-2 (Tenn. Ct. App. Mar. 15, 2022) ("*Arnold I*"):

> This appeal involves two interrelated cases filed in the trial court. First, on December 27, 2019, Plaintiff/Appellant Edward Ronny Arnold ("Appellant"), proceeding pro se, filed a complaint for damages against Defendants Deborah Malchow, Progressive Direct Auto ("Progressive"), and Mountain Laurel Assurance Company ("Mountain Laurel"). This complaint was assigned docket number 19C-3007 ("Case No. 19C-3007"). The complaint alleged that Ms. Malchow had injured Appellant through the negligent operation of a motor vehicle and that either Progressive or Mountain Laurel was Ms. Malchow's insurer. On January 2, 2020, Progressive and Mountain Laurel filed a joint motion to dismiss on the ground that Tennessee law does not permit direct actions against insurance companies. On January 27, 2020, the trial court entered an order dismissing Progressive and Mountain Laurel as parties. This ruling was designated as final pursuant to Rule 54.02 of the Tennessee Rules of Appellate Procedure.
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> On October 5, 2020, Appellant initiated a second lawsuit involving the car accident at issue in Case No. 19C-3007. In the second case, Appellant named his own underinsured/uninsured motorist carrier, Defendant/Appellee Allstate Insurance Company ("Allstate") as the sole defendant. Therein, Appellant set out as his "first cause of action" "negligent operation of a motor vehicle by uninsured motorist." Appellant then set forth four "cause[es] of action against insurance company," including breach of contract, breach of the implied duty of good faith and fair dealing, and two claims of tortious

breach of the implied duty of good faith and fair dealing. This complaint against Allstate was assigned docket number 20C-2199. ("Case No. 20C-2199").

On October 22, 2020, the trial court consolidated the two cases "as the two matters concern the same common questions of fact and law and therefore should be consolidated." Allstate answered the complaint in Case No. 20C-2199 on November 4, 2020.

Relevant to this appeal, on January 15, 2021, Appellant filed a motion to begin discovery in Case No. 20C-2199. In response, on the same day, Allstate filed a motion for a protective order precluding Appellant from taking the depositions of several of its employees. On January 9, 2021, the trial court entered an order stating that

> this Court finds that Docket No. 20C-2199 is being pursued by [Appellant] as a uninsured/underinsured motorist claim, and because the named Defendant in Docket No. 19C-3007 is a claim against the alleged negligent named Defendant, Deborah Malchow, who has been determined to have insurance, this Court finds that all proceedings by [Appellant] in Docket No. 20C-2199 should be stayed pending further development of proof relating to whether Defendant Malchow may be an underinsured motorist, and accordingly it is
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> ORDERED that all proceedings relating to Docket No. 20C-2199 be and hereby are stayed pending further order of this Court, and it is
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> FURTHER ORDERED that Plaintiff's Motion to Begin Discovery Phase in Civil Action 20C-2199 be and hereby is denied as without merit and unnecessary, and it is also
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> FURTHER ORDERED that the Motion of [] Allstate [] for Protective Order be and hereby is denied in light of the fact that this Court is staying all proceedings relating to Docket No. 20C-2199.

On April 30, 2021, Ms. Malchow filed a motion to dismiss Case No. 19C-3007. Ms. Malchow also filed a motion for sanctions. The trial court granted in part and denied in part Ms. Malchow's motion to dismiss by order of June 16, 2021. Therein, the trial court found that Appellant stated a claim against Ms. Malchow for negligent operation of a motor vehicle. But the

trial court ruled that all other claims against Ms. Malchow should be dismissed, including the claims of breach of an insurance contract and breach of the duty of good faith and fair dealing. This order was filed under the docket numbers of both cases. On June 23, 2021, Appellant filed a notice of appeal to this Court.

Following the filing of the notice of appeal, proceedings occurred simultaneously in the trial court and the appellate court. In the trial court, on July 22, 2021, Allstate filed a renewed motion for a protective order, asking that Appellant be precluded from taking the depositions of Allstate employees that had no knowledge of the facts involved in the case. According to Allstate, the only remaining issues in the case were "whether Defendant Malchow engaged in the negligent operation of a motor vehicle, and if so, whether said negligence resulted in property damage and/or personal injuries to [Appellant]." The trial court entered an order on August 11, 2021, granting Allstate's motion. First, the trial court detailed the procedural history of the consolidated cases, including the fact that the trial court had "stayed further proceedings relating to Docket No. 20C-2199 pending further development of proof relating to whether Defendant Malchow was an underinsured motorist relating to the subject accident." As for the June 16, 2021 order on the motion to dismiss, the trial court found as follows:

> By an Order on Motion to Dismiss (CaseLink 20C-2199 Item No. 58), this Court dismissed the [Appellant's] claims of breach of insurance contract, contractual breach of implied covenant of good faith dealing and tortious breach of implied covenant of good faith and fair dealing. This Order was not a final order relating to Docket No. 20C-2199, since this Court had stayed proceedings regarding the underinsurance motorist claim pending the outcome of Docket No. 19C-3007 and a determination regarding whether Defendant Malchow was an underinsured motorist.

The trial court further found that because the deposition of the only Allstate employee with knowledge had already been taken, Appellant was seeking to depose individuals with no relevant information on the issues to be tried. Thus, the trial court granted Allstate's motion for a protective order. The only subsequent filings in the trial court related to the record on appeal.

Meanwhile, in the appellate court, on July 9, 2021, Ms. Malchow filed a motion to dismiss this appeal due to lack of a final judgment. Appellant responded in opposition on July 15, 2021. On July 19, 2021, this Court

> reserved ruling on Ms. Malchow's motion to allow her to supplement her motion with supporting documentation. On July 26, 2021, Allstate filed its own motion to dismiss for lack of subject matter jurisdiction. On July 30, 2021, Ms. Malchow filed a supplement to her motion to dismiss. On the same day, Appellant responded in opposition to Allstate's motion. On August 3, 2021, we denied the motions to dismiss "without prejudice to the parties addressing the issue in their briefs or to the Court revisiting the issue sua sponte once the record has been filed." The parties thereafter submitted their respective briefs and this matter was submitted to the Court.

In *Arnold I*, this Court ultimately determined that it did not have subject matter jurisdiction to adjudicate the appeal due to (1) lack of a final judgment in the trial court concerning Mr. Arnold's claims against Ms. Malchow and Allstate and (2) lack of a timely notice of appeal concerning Mr. Arnold's claims against Progressive and MLAC, for which a final judgment of dismissal had been entered on January 27, 2020. *See id.*

Following this Court's remand to the trial court, on November 16, 2021, Ms. Malchow filed a motion for summary judgment. Ms. Malchow propounded that Mr. Arnold could not establish that she had breached a duty or that she was the proximate cause of his injuries. In support, Ms. Malchow filed a statement of undisputed material facts along with her motion, recounting Mr. Arnold's deposition testimony that he "didn't see anything" other than "something white" before the accident occurred. Ms. Malchow also pointed out that Mr. Arnold had failed to come forward with any expert medical proof regarding his injuries.

The following day, Mr. Arnold filed a motion to reopen discovery concerning his claims against Ms. Malchow, seeking to depose two law students who purportedly attended one of the depositions. He subsequently filed an objection to the summary judgment motion along with his response to Ms. Malchow's statement of undisputed facts. Several responses and replies from both Ms. Malchow and Mr. Arnold followed.

On May 20, 2022, the trial court conducted a hearing on Ms. Malchow's motion for summary judgment. In its subsequent written order, entered June 30, 2022, the court stated in pertinent part:

> The Court has considered Defendant Deborah Malchow's Memorandum of Law in Support of Defendant's Motion for Summary Judgment, Plaintiff's Objection to Defendant's Motion for A Summary Judgment and Plaintiff's Statement and Evidence of Material Facts (filed January 6, 2022). The Material Facts presented are not submission of material facts that are undisputed but are instead assertions of "true" facts by the Plaintiff submitted in an inadmissible manner.

> The Court has additionally considered Defendant Deborah Malchow's Reply to Edward Arnold's Response to the MSJ and Response to Arnold's Additional Alleged Material Facts, Plaintiff's Motion (and Memorandum) to Dismiss Defendant's Motion for Summary Judgment filed November 15, 2021 (Defendant's Motion to Dismiss was filed March 18, 2022), and Defendant Deborah Malchow's Supplemental Reply to Edward Arnold's Response to the MSJ.
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> Plaintiff has filed numerous responses to the Defendant's Motion for Summary Judgment, including a Motion to reopen proof, which was granted by the Court, but Plaintiff has not yet respond[ed] to the substance of the Defendant's Motion for Summary Judgment. There simply are no admissible material facts that would lead a rational jury to find that Defendant Malchow was liable for the accident. Plaintiff testified that he did not see the [Ms. Malchow] operating her vehicle before the collision. Plaintiff does not know how the collision occurred. There is no evidence that the Defendant breached any duty of care to anyone, let alone to the Plaintiff.
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> Similarly, Plaintiff's responses have not included any admissible testimony of any competent medical professional to establish causation and reasonableness of his injuries and medical bills.
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> Based upon the foregoing the Court DENIES the Plaintiff's Motion to Dismiss the Defendant's Motion for Summary Judgment, and the Court finds the Defendant's Motion for Summary Judgment to be well taken and is hereby granted in favor of the Defendant. Plaintiff's causes of action against Deborah Malchow are dismissed with prejudice.

On July 6, 2022, the court entered a separate order denying Mr. Arnold's motion seeking dismissal of the summary judgment motion. Mr. Arnold filed a notice of appeal that same day.

On July 7, 2022, Allstate filed a motion to dismiss Mr. Arnold's underinsured motorist claim predicated on the trial court's grant of summary judgment in favor of Ms. Malchow concerning the underlying claim of liability. Mr. Arnold opposed the motion, arguing that his claim against Allstate was based on a breach of contract. On September 16, 2022, the trial court entered an order granting Allstate's motion to dismiss, stating in pertinent part:

> At the hearing on Allstate's Motion to Dismiss, Mr. Arnold stated Allstate was seeking to dismiss "any and all claims against Allstate Insurance Company, including collision." Mr. Arnold went on to say this case "was never an underinsured motorist claim" and was a contract dispute for

> collision coverage against Allstate. Mr. Arnold claims Allstate made him three offers for his vehicle, including a final offer for approximately $14,400. He refused these offers based on belief that the offers were not reasonable, rendering his policy "null and void." He maintains this is a contract dispute with the issue of the vehicle's value to be determined by the jury.
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> However, this Court finds that Mr. Arnold never filed suit against Allstate for the collision coverage. Though Mr. Arnold may understandably wish to resolve the dispute over the value of his vehicle with Allstate, the only cognizable claims against Allstate in his Complaint were for uninsured/underinsured motorist coverage.
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> The claims plead against Allstate in Plaintiff's Complaint in 20C-2199 are against it as uninsured/un[der]insured motorist carrier. Because this Court granted summary judgment in favor of Defendant Malchow, there is no "uninsured motorist," thus Defendant submits the claims against Allstate as uninsured motorist carrier must be dismissed.
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> This Court finds Defendant's Motion to Dismiss is well taken and should be GRANTED.

The trial court accordingly dismissed Mr. Arnold's claims against Allstate.

Ms. Malchow and Allstate each filed a "statement of the evidence," purportedly pursuant to Tennessee Rule of Appellate Procedure 24, containing a narrative of the procedural events leading up to the grant of summary judgment in Ms. Malchow's favor and the grant of Allstate's motion to dismiss. Although Mr. Arnold had apparently filed statement(s) of the evidence previously, the trial court rejected his statement(s) as noncompliant with Rule 24.[1] The court accepted the defendants' statements of the evidence as "reflecting a fair, accurate and complete account of what transpired with respect to those issues that are the bases of the appeal pursuant T.R.A.P. Rule 24(c)."

II. Issues Presented

Concerning his claims against Ms. Malchow, Mr. Arnold presents the following issues for our review, which we have recited here verbatim:

1. Whether the trial court erred in not understanding civil action *Edward Ronny Arnold v Bob Oglesby, Commissioner State of Tennessee*

[1] Because the trial court directed that Mr. Arnold's statement or statements were not to be included in the appellate record, we are unable to discern whether Mr. Arnold filed one consolidated statement or separate statements regarding the summary judgment proceedings and the dismissal proceedings.

Department of General Services 21-1443 directly affected civil action *Edward Ronny Arnold v Deborah Malchow* 19-C3007?

2. Whether the Trial Court erred in incorrectly *applying Ferguson v. Nationwide Prop. & Cas. Ins. Co.*?

3. Whether the Trial Court erred in classifying civil action *Edward Ronny Arnold v Deborah Malchow, Progressive Direct Auto Mountain Laurel Assurance Company* 19-C3007 as Uninsured Motorist?

4. Whether the Trial Court's July 10, 2020 bench order violated Tenn. Rules Civ. P. 30.01 and Tenn. Code Ann. § 24-9-101?

5. Whether the Trial Court's order to consolidate civil action 20-C2199 and civil action 19-C3007 limited the Discovery Phase of civil action 20-C2199?

6. Whether The Trial Court's May 20, 2021 protection order violated Tenn. Rules Civ. P. 30.01 and Tenn. Code Ann. § 24-9-101?

7. Whether the Trial Court's six (6) protective orders granted to Allstate Insurance Company August 11, 2021 violated Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution and U.S. Const. Amend. XIV, § 2?

8. Whether the Trial Court erred in that the court's function is not to weigh the evidence and determine the truth of the matters asserted but to determine whether there is a genuine issue for trial?

9. Whether the Trial Court violated Tenn. R. Sup. Ct. 2.9 - Ex Parte Communications?

In a separate brief filed by Mr. Arnold concerning his claims against Allstate, he presents the following additional issues for our review, which we have also recited verbatim:

10. Whether the Trial Court erred in understanding the Defendant's Motion to Dismiss filed July 7, 2022 is a violation of RULE 4: APPEAL AS OF RIGHT: TIME FOR FILING NOTICE OF APPEAL and RULE 5: APPEAL AS OF RIGHT: SERVICE OF NOTICE OF APPEAL; DOCKETING OF THE APPEAL?

11. Whether the Trial Court understood the deposition by subpoena of the owner/operator of vehicle 3: 2018 Toyota 4Runner, on the date of August 11, 2022, directly affected civil action *Edward Ronny Arnold v Deborah Malchow* 19-C3007 and potentially altered civil action *Edward Ronny Arnold v Allstate Insurance Company* 20-C2199?

12. Whether the Trial Court erred in understanding civil action *Edward Ronny Arnold v Allstate Insurance Company* 20-C2199 was a direct result of the Trial Court's ruling January 17, 2020 Civil Action *Edward Ronny Arnold v Deborah Malchow, Progressive Direct Auto Mountain Laurel Assurance Company* 19-C3007, filed December 27, 2019, was uninsured motorist?

13. Whether the Trial Court erred in understanding the Trial Court's ruling of uninsured motorist was not rescinded or altered from the dates of January 17, 2020 to September 15, 2022?

14. Whether the Trial Court erred in understanding the Defendant, Allstate Insurance Company, has been in violation of Tenn. Code Ann. § 56-7-105(a) "Bad faith refusal to pay" from the date of January 17, 2020 to September 15, 2022, a period of 958 calendar days or 32 months?

15. Whether the Trial Court erred in understanding civil action *Edward Ronny Arnold v Allstate Insurance Company* 20-C2199 is a contract dispute between the Policy Holder and the Policy Provider in the Policy Provider's refusal to process Allstate Insurance Company claim number: 0565632033 issued October 23, 2019 for personal injury, pain and suffering, property damage as uninsured motorist is a direct violation of Tenn. Code Ann. § 56-7-105(a) "Bad faith refusal to pay"?

16. Whether the Trial Court erred in not understanding the refusal of the legal representative of Allstate Insurance Company to allow the Policy Holder/Plaintiff deposition by notice of deposition of Allstate Insurance Company claim agents August 4-6, 2021 violated Rule 501; Tenn. Rules Civ. P. 30.01; Article I, section 8 and Article XI, section 8 of the Tennessee Constitution, and U.S. Const. amend. XIV, § 1?

17. Whether the Trial Court erred in understanding the Defendant's Motion for a seventh (7) protective order violated Rule 501; Tenn.

Rules Civ. P. 26.03, Tenn. Rules Civ. P. 30.01, Tenn. Code Ann. § 24-9-101?

18. Whether the Trial Court's six (6) protective orders granted to Allstate Insurance Company, on the date of August 11, 2021, violated Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution and U.S. Const. Amend. XIV, § 1?

III. Standard of Review

With respect to the trial court's grant of summary judgment in Ms. Malchow's favor, we note that the grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). As such, this Court must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Rye*, 477 S.W.3d at 250. As our Supreme Court has explained concerning the requirements for a movant to prevail on a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 56:

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the

> material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. [574,] 586, 106 S. Ct. 1348, [89 L. Ed. 2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye, 477 S.W.3d at 264-65. "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects, Inc. v. The Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019) (quoting *Rye*, 477 S.W.3d at 265). Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment, and our Supreme Court has instructed that the trial court must state these grounds "before it invites or requests the prevailing party to draft a proposed order." *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014).

Concerning Mr. Arnold's claims against Allstate, which the trial court dismissed pursuant to Tennessee Rule of Civil Procedure 12, our Supreme Court has elucidated:

> A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss "'admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action.'" *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010) (quoting *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005)).
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> In considering a motion to dismiss, courts "'must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.'" *Tigg v. Pirelli Tire*

> *Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007) (quoting *Trau-Med* [*of Am., Inc. v. Allstate Ins. Co.*], 71 S.W.3d [691,] 696 [(Tenn. 2002)]). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002). We review the trial court's legal conclusions regarding the adequacy of the complaint de novo.

Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 426 (Tenn. 2011) (other internal citations omitted).

We respect Mr. Arnold's decision to proceed without benefit of counsel. We note that in reviewing pleadings, we "must give effect to the substance, rather than the form or terminology of a pleading." *Stewart v. Schofield*, 368 S.W.3d 457, 463 (Tenn. 2012) (citing *Abshure v. Methodist Healthcare-Memphis Hosp.*, 325 S.W.3d 98, 104 (Tenn. 2010)). We note also that pleadings "prepared by pro se litigants untrained in the law should be measured by less stringent standards than those applied to pleadings prepared by lawyers." *Stewart*, 368 S.W.3d at 462 (citing *Carter v. Bell*, 279 S.W.3d 560, 568 (Tenn. 2009); *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003); *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003)). Parties proceeding without benefit of counsel are "entitled to fair and equal treatment by the courts," but we "must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe." *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003).

IV. Summary Judgment

Although we recognize that Mr. Arnold has presented a multitude of issues for this Court's review, we determine that the overarching question that must be addressed as a threshold matter is whether the trial court erred in granting summary judgment in favor of Ms. Malchow. In fact, one of Mr. Arnold's claims against Allstate—the claim based on uninsured/underinsured motorist coverage—is wholly dependent upon whether Ms. Malchow maintains liability in tort. Accordingly, we will first address the trial court's grant of summary judgment in her favor.

As this Court has previously explained concerning a motion for summary judgment:

> When a motion for summary judgment is made, the moving party has the burden of showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. "A fact is material 'if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.'" *Akers v. Heritage Med. Assocs., P.C.*, No. M2017-02470-COA-R3-CV, 2019 WL 104130, at *5 (Tenn. Ct. App. Jan. 4, 2019), *perm. app. denied* (Tenn. May

> 16, 2019) (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). Further, "[a] 'genuine issue' exists if 'a reasonable jury could legitimately resolve that fact in favor of one side or the other.'" *Akers*, 2019 WL 104130, at *5 (quoting *Byrd*, 847 S.W.2d at 215).
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> The trial court may grant summary judgment only if "'both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion.'" *Helderman v. Smolin*, 179 S.W.3d 493, 500 (Tenn. Ct. App. 2005) (quoting *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995)).

Davis v. Ellis, No. W2019-01367-COA-R3-CV, 2020 WL 6499559, at *3 (Tenn. Ct. App. Nov. 5, 2020).

Our Supreme Court has further clarified the initial requirements a moving party must satisfy in order to seek a grant of summary judgment:

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.*

Rye, 477 S.W.3d at 264.

Mr. Arnold's claim against Ms. Malchow sounds in negligence. A negligence claim requires a plaintiff to show: "(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause." *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005) (citation omitted). Concerning the duty that drivers owe to fellow drivers, this Court has explained:

> [I]t being a basic requirement of due care in the operation of an automobile that the driver keep a reasonably careful lookout for traffic upon the highway "commensurate with the dangerous character of the vehicle and the nature of the locality" (*Hale v. Rayburn*, 37 Tenn. App. 413, 264 S.W.2d 230), "and to see all that comes within the radius of his line of vision, both in front and to the side." *Hadley v. Morris*, 35 Tenn. App. 534, 249 S.W.2d 295, 298.

Van Sickel v. Howard, 882 S.W.2d 794, 798 (Tenn. Ct. App. 1994) (quoting *Nash-Wilson Funeral Home, Inc. v. Greer*, 417 S.W.2d 562 (Tenn. Ct. App. 1966)). *See* Tenn. Code Ann. § 55-8-136(b) ("[E]very driver of a vehicle shall exercise due care by operating the vehicle at a safe speed, by maintaining a safe lookout, by keeping the vehicle under proper control and by devoting full time and attention to operating the vehicle, under the existing circumstances as necessary in order to be able to see and to avoid endangering life, limb or property and to see and avoid colliding with any other vehicle or person[.]"). Accordingly, there can be no question that Ms. Malchow owed a duty of due care to Mr. Arnold and other drivers on the roadway.

A. Propriety of Grant of Summary Judgment

In its order granting summary judgment in Ms. Malchow's favor, the trial court stated:

> Plaintiff has not yet respond[ed] to the substance of the Defendant's Motion for Summary Judgment. There simply are no admissible material facts that would lead a rational jury to find that Defendant Malchow was liable for the accident. Plaintiff testified that he did not see the Plaintiff operating her vehicle before the collision. Plaintiff does not know how the collision occurred. There is no evidence that the Defendant breached any duty of care to anyone, let alone to the Plaintiff.

Following our review of the record in this matter, we disagree with the trial court's determination.

In her motion for summary judgment, Ms. Malchow averred that Mr. Arnold had failed to state a basis for her liability because his complaint contained no distinct facts specifically demonstrating that Ms. Malchow was negligent in the accident. As Ms. Malchow further asserted in her motion, Mr. Arnold had acknowledged in his deposition that he never saw her operating her vehicle; rather, Mr. Arnold testified that he only saw Ms. Malchow exiting her vehicle following the accident. Ms. Malchow therefore argues that Mr. Arnold's evidence concerning breach of duty was insufficient to establish his claim.

We reiterate that in order to prevail in her summary judgment motion, Ms. Malchow was required to either: (1) affirmatively negate an essential element of Mr. Arnold's claim or (2) demonstrate that Mr. Arnold's evidence at the summary judgment stage was insufficient to establish his claim. *See Rye,* 477 S.W.3d at 264. As such, Ms. Malchow cannot simply "make a conclusory assertion that summary judgment is appropriate." *See id*. As our Supreme Court has elucidated:

> The *Celotex* majority emphasized that "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." [*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)]. Where the moving party satisfies this burden, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id*. at 324, 106 S. Ct. 2548 (quoting Fed. R. Civ. P. 56(e)).
>
> * * *
>
> Tennessee Rule 56 requires both the movant and the nonmovant to submit statements of undisputed facts, supported by citations to the record, "[i]n order to assist the Court in ascertaining whether there are any material facts in dispute," Tenn. R. Civ. P. 56.03, and provides that, "[s]ubject to the moving party's compliance with Rule 56.03, the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04 (emphasis added).

Rye, 477 S.W.3d at 254, 261-62.

Ms. Malchow filed a statement of undisputed material facts in support of her motion for summary judgment, wherein she stated as follows:[2]

> 1. An automobile accident occurred on October 23, 2019 in Davidson County, Tennessee. (Complaint).
>
> 2. Plaintiff and Defendant Malchow were involved in the accident. (Complaint).

[2] We have herein recited Ms. Malchow's statement of undisputed facts verbatim and in its entirety, including her parenthetical citations to the record.

3. Aside from "something white," Plaintiff "didn't see anything." (Deposition of Plaintiff, at 22:15-22; 26:24 - 27:1).

4. Plaintiff did not see Defendant Malchow operating her vehicle before the accident occurred. (Deposition of Plaintiff, at 27:4-8).

5. Plaintiff did not identify, produce, or depose any medical expert to testify to the cause of his injuries.

Reviewing Ms. Malchow's statement of undisputed facts, we determine that she successfully pointed out "an absence of evidence to support the nonmoving party's case." *See id*. at 264. As such, the burden shifted to Mr. Arnold to demonstrate that a genuine issue of material fact existed. *See id*. at 265. As our High Court further explained:

> "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. [574,] 586, 106 S. Ct. 1348, [89 L. Ed. 2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.

Id. at 265.

Tennessee Rule of Civil Procedure 56.03 specifically provides that a party opposing a motion for summary judgment must "serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed." Moreover, Rule 56.03 states that each disputed fact "must be supported by specific citation to the record." Rule 56.03 further provides:

> [T]he non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.

In this case, Mr. Arnold replied to each enumerated material fact presented by Ms. Malchow and also stated additional undisputed facts, relying upon various documents in the record as support. We note that many of the documents relied upon by Mr. Arnold in his responses were irrelevant and/or inadmissible. For example, although Mr. Arnold filed affidavits in support of his argument that a genuine issue of material fact existed as to Ms. Malchow's negligence, a number of these affidavits were signed by individuals who were not present when the accident occurred and were simply reporting information that they had been told. As such, this evidence would constitute inadmissible hearsay, as this Court has previously explained:

> Regarding affidavits presented in support of a motion for summary judgment, Tennessee Rule of Civil Procedure 56.06 requires in pertinent part:
>
> > Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.
>
> Tennessee Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pursuant to Tennessee Rule of Evidence 802, "[h]earsay is not admissible except as provided by these rules or otherwise by law." *See Godbee v. Dimick*, 213 S.W.3d 865, 894 (Tenn. Ct. App. 2006).

Tenn. State Bank v. Mashek, 616 S.W.3d 777, 810-11 (Tenn. Ct. App. 2020).

In addition, other witnesses executing affidavits reported information concerning events occurring after the accident and possessed no firsthand knowledge with respect to the cause of the accident. Ergo, these affidavits would be irrelevant and inadmissible with regard to the issue of Ms. Malchow's negligence. *See* Tenn. R. Evid. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Tenn. R. Evid. 402 (providing that irrelevant evidence is inadmissible).

Also in support of his position, Mr. Arnold relies heavily upon the electronic crash report from the accident entered by a Nashville Metropolitan Police Officer. However, Tennessee Code Annotated § 55-10-114 provides that such accident reports shall not be used as evidence "in any trial, civil or criminal, arising out of an accident." *See McBee v. Williams*, 405 S.W.2d 668, 671 (Tenn. Ct. App. 1966) (determining accident reports to be inadmissible hearsay based on the prior version of the statute); *Youngblood v. Solomon*, No. 03A01-9601-CV-00037, 1996 WL 310015, at *1 (Tenn. Ct. App. June 11, 1996)

(finding that accident reports were inadmissible pursuant to the statute). As such, Mr. Arnold cannot rely upon the accident report to establish that Ms. Malchow breached a duty. As this Court has previously explained, "[t]o permit an opposition to be based on evidence that would not be admissible at trial would undermine the goal of the summary judgment process to prevent unnecessary trials since inadmissible evidence could not be used to support a jury verdict." *In re Rhyder C.*, No. E2021-01051-COA-R3-PT, 2022 WL 2837923, at *9 (Tenn. Ct. App. July 21, 2022) (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215-16 (Tenn. 1993)).

Significantly, however, one of Mr. Arnold's responses to the summary judgment motion cites Ms. Malchow's own statement as establishing her liability. Mr. Arnold quotes from Ms. Malchow's response to Mr. Arnold's interrogatories, wherein Ms. Malchow stated:

> On the date of the accident I was going to see a friend . . . . I was attempting to turn around on the road and had just pulled off the road and into either a parking lot or street to turn around. As I was preparing to re-enter 8th Avenue, I looked both ways and did not see any cars coming so I pulled out into the road. When I pulled into the road I did not see any cars coming but suddenly a car made contact with my car.

In addition, Mr. Arnold presented proof contained in his deposition testimony, wherein he stated regarding his perception of the accident: "I'm driving down the road, there's something white in front of me, there is a crash and a bang, and my car stopped, and I got out and realized there had been an accident." When questioned further, Mr. Arnold reported that he saw Ms. Malchow exiting her vehicle following the accident. When asked what the "something white" was that he saw immediately before the accident, Mr. Arnold stated that it was Ms. Malchow's car.

Accordingly, based on this evidence, we conclude that the trial court erred in determining that no genuine issue of material fact existed concerning Ms. Malchow's breach of duty. When determining if summary judgment is proper: "Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor." *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). Viewing Mr. Arnold's deposition testimony and Ms. Malchow's interrogatory response in the light most favorable to Mr. Arnold, we are able to draw a reasonable inference that Mr. Arnold was driving along Eighth Avenue when Ms. Malchow attempted to enter Eighth Avenue from a side street or parking lot and the collision occurred. Whether Ms. Malchow was entering from a side street with a stop or yield sign or from a parking lot, and whether Eighth Avenue is properly categorized as a roadway or highway, Ms. Malchow would still maintain a duty to yield to close, oncoming traffic when entering the roadway. *See*, *e.g.*, Tenn. Code Ann. §§ 55-8-130, -131, -150. Ergo, when viewing the evidence most favorably to Mr. Arnold and drawing all reasonable

inferences in his favor, we conclude that Mr. Arnold successfully demonstrated a genuine issue of material fact concerning whether Ms. Malchow had breached a duty on the day in question.

We next address the trial court's determination that Mr. Arnold failed to set forth evidence establishing that his injuries were caused by Ms. Malchow's alleged breach of duty. In regard to this issue, Ms. Malchow simply stated in her statement of undisputed facts: "Plaintiff did not identify, produce, or depose any medical expert to testify to the cause of his injuries." The trial court agreed, stating in its summary judgment order that "Plaintiff's responses have not included any admissible testimony of any competent medical professional to establish causation and reasonableness of his injuries and medical bills."

Regarding causation, this Court has previously clarified:

> A defendant's negligent conduct is the cause in fact of the plaintiff's injury "if, as a factual matter, it directly contributed to the plaintiff's injury and without it plaintiff's injury would not have occurred." T.P.I.-Civil 3.21 (8th ed. 2008) (citing *Hale v. Ostrow*, 166 S.W.3d 713, 718-19 (Tenn. 2005)). An actor's conduct is the legal cause of a person's injury if the actor's conduct was "a substantial factor in bringing about the harm," and if there is no "legal rule or policy that would operate to relieve the actor from liability." *Lowery v. Franks*, No. 02A01-9612-CV-00304, 1997 WL 566114, at *5 (Tenn. Ct. App. Sept. 10, 1997) (citing *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)). Additionally, the harm that occurred must have been reasonably foreseeable by a person of ordinary intelligence and prudence. *Id*. (citing *McClenahan*, 806 S.W.2d at 775).

Timmons v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 307 S.W.3d 735, 743 (Tenn. Ct. App. 2009).

Again, in Ms. Malchow's statement of undisputed facts, she simply stated that Mr. Arnold had provided no expert medical proof regarding the cause of his injuries, apparently referring solely to his medical injuries. However, this statement ignores the fact that Mr. Arnold himself testified by deposition that he was physically harmed in the accident, that he had to be transported to the emergency room for care, and that his property was damaged. Although Mr. Arnold may not be able to establish the full extent or value of his physical injuries without expert medical proof, this does not signal that he would be unable to establish having suffered physical trauma or property damage. As such, we determine that a genuine issue of material fact also exists concerning the element of causation.

We note that negligence cases are not easily amenable to summary judgment. *See*, *e.g.*, *Keene v. Cracker Barrel Old Country Store, Inc*., 853 S.W.2d 501, 502 (Tenn. Ct.

App. 1992). Summary judgment can only be granted when "all of the facts together with the inferences to be drawn from the facts . . . are so certain and uncontroverted that reasonable minds must agree." *Id*. at 502-03. In this matter, we determine that genuine issues of material fact exist precluding a grant of summary judgment in favor of Ms. Malchow. As such, we vacate the grant of summary judgment and remand this case to the trial court for further proceedings.

B. Timeliness of Motion for Summary Judgment

We now turn to an additional issue that Mr. Arnold has raised on appeal regarding the trial court's grant of summary judgment. Mr. Arnold contends that Ms. Malchow's filing of a motion for summary judgment was untimely because of the trial court's rescheduling of or failure to schedule a trial date. He insists that parties "must file a motion for summary judgment within thirty (30) days of the scheduled trial date." However, Mr. Arnold's statement demonstrates a misunderstanding of Tennessee Rule of Civil Procedure 56, which provides that a defending party "may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Tenn. R. Civ. P. 56.02. Moreover, Rule 56.04 provides that the motion "shall be served at least thirty (30) days before the time fixed for the hearing." Therefore, Rule 56 contains no requirement that a motion for summary judgment must be filed within thirty days of a scheduled trial date.

Mr. Arnold relies on this Court's opinion in *Arnold v. Oglesby*, No. M2017-00808-COA-R3-CV, 2017 WL 5634249 (Tenn. Ct. App. Nov. 22, 2017), in support of his position. However, our review of that decision demonstrates that his reliance is misplaced. That opinion addressed a tribunal's dismissal under Tennessee Rule of Civil Procedure 12.02(1) for lack of subject matter jurisdiction and contains no discussion of summary judgment procedure. As such, we find Mr. Arnold's argument on this point to be unavailing.

V. Motion to Dismiss

In his original complaint filed against Allstate, Mr. Arnold stated manifold causes of action including negligent operation of a motor vehicle by an uninsured/underinsured motorist ("UM claim"), breach of insurance contract, contractual breach of the implied covenant of good faith and fair dealing, and tortious breach of the implied covenant of good faith and fair dealing. On June 16, 2021, the trial court dismissed the contract and tortious breach claims, such that the UM claim remained the only cause of action against Allstate to be adjudicated. After the trial court dismissed Mr. Arnold's negligence claim against Ms. Malchow, Allstate filed a Rule 12 motion to dismiss on July 7, 2022. Allstate averred that the UM claim should be dismissed because the claim was derivative and Allstate could have no uninsured/underinsured motorist liability if Ms. Malchow had no tort liability. In response, Mr. Arnold contended that there remained a viable breach of contract claim

against Allstate. The trial court disagreed, ruling that the remaining UM claim would be dismissed and rendering all claims against Allstate fully adjudicated.

On appeal, Mr. Arnold has presented issues concerning whether the trial court erred in its June 16, 2021 order by dismissing all claims except the UM claim. Mr. Arnold also questions whether the subsequent motion to dismiss concerning the remaining UM claim was properly granted. In their appellate briefs, the appellees argue that the only ruling concerning Allstate that can be addressed on appeal is the trial court's dismissal of the UM claim because the trial court's order dismissing other claims against Allstate was entered on June 16, 2021. We note, however, that the 2021 order was not a final order. *See Arnold I*, 2022 WL 774925, at *3. Therefore, Mr. Arnold is not precluded from raising an issue in this appeal regarding the claims dismissed in the June 2021 interlocutory order.

We first address Mr. Arnold's statutory bad faith claim against Allstate. To support his claim, Mr. Arnold delineates a list of facts which essentially provides that (1) an accident occurred, (2) Allstate was his insurance provider, (3) he had paid all premiums due on the policy, and (4) Allstate had failed to compensate him for his losses, including the damage to/loss of his vehicle, towing fees, storage fees, and medical bills. Mr. Arnold contends that he was accordingly entitled to an award under Tennessee Code Annotated § 56-7-105 for Allstate's bad faith refusal to pay.

Tennessee Code Annotated § 56-7-105(a) provides in pertinent part:

> The insurance companies of this state, and foreign insurance companies and other persons or corporations doing an insurance or fidelity bonding business in this state, in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest thereon, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that the failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy or fidelity bond; and provided, further, that the additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorney fees thus entailed.

However, this Court has previously ruled that "Tennessee Code Annotated section 56-7-105 is inapplicable to [an] automobile insurance policy[.]" *Giles v. Geico Gen. Ins. Co.*, 643 S.W.3d 171, 184 (Tenn. Ct. App. 2021), *perm. app. denied* (Tenn. Feb. 10, 2022); *see Medley v. Cimmaron Ins. Co.*, 514 S.W.2d 426, 428 (Tenn. 1974) (stating that "[i]t has been held in several cases in this state that a policy of automobile liability insurance is not

subject to the terms and provisions of [the bad faith penalty] statute."); *see also Tenn. Farmers Mut. Ins. Co. v. Cherry*, 374 S.W.2d 371, 394 (Tenn. 1964) (determining that "[t]his type of insurance contract would not bear interest prior to any judgment secured thereon and then only upon the judgment; therefore [bad faith penalty statute] would not be applicable to such obligations."). We therefore conclude that Mr. Arnold cannot maintain an action against Allstate based on Tennessee Code Annotated § 56-7-105 because the claim arises out of automobile insurance. Mr. Arnold's bad faith claim was properly dismissed by the trial court.

Next, we address Mr. Arnold's assertions with respect to Allstate's alleged contractual and tortious breach of the implied covenant of good faith and fair dealing. Regarding the existence of an implied covenant of good faith and fair dealing, our Supreme Court has elucidated:

> Generally[,]. . . no fiduciary relationship exists between an insurer and its insured when the company is settling a claim directly with its insured, but it does not necessarily follow that the insurer owes no duty that is not specifically spelled out in the contract drawn by the insurer. As noted in *Bowler v. Fidelity and Casualty Company of New York*, 53 N.J. 313, 250 A.2d 580 (1969), which involved a limitation of time to sue on a policy of disability insurance:
>
> > Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. Good faith "demands that the insurer deal with laymen as laymen and not as experts in the subtleties of law and underwriting." (Citations omitted). In all insurance contracts, particularly where the language expressing the extent of the coverage may be deceptive to the ordinary layman, there is an implied covenant of good faith and fair dealing that the insurer will not do anything to injure the right of its policyholder to receive the benefits of his contract. This covenant goes deeper than the mere surface of the writing. When a loss occurs which because of its expertise the insurer knows or should know is within the coverage, and the dealings between the parties reasonably put the company on notice that the insured relies upon its integrity, fairness and honesty of purpose, and expects his right of payment to be considered, the obligation to deal with him takes on the highest burden of good faith. [*Bowler*,] 250 A.2d 580 at 587.
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> * * *

> We hold, therefore, that an insurer is under the duty of dealing with its insured "fairly and in good faith" in settling a claim by its insured under the uninsured motorist provision of an automobile liability insurance contract.

MFA Mut. Ins. Co. v. Flint, 574 S.W.2d 718, 720-21 (Tenn. 1978).

In its order dismissing Mr. Arnold's claims of breach of the implied covenant of good faith and fair dealing, the trial court determined that he had failed to state a claim upon which relief could be granted. Although Mr. Arnold argues in his appellate brief that this ruling was generally in error, we note that he did not raise an issue to this effect in his statement of the issues. Rather, the only issues that Mr. Arnold raised regarding Allstate's contractual obligations relate to his claim of statutory bad faith, which we have addressed in the prior section of this Opinion.

Because Mr. Arnold did not raise an issue concerning the trial court's dismissal of his claims of breach of the implied covenant of good faith and fair dealing in his statement of the issues, we conclude that Mr. Arnold has waived this issue. *See*, *e.g.*, *Logan v. Estate of Cannon*, 602 S.W.3d 363, 383 n.4 (Tenn. Ct. App. 2019) (determining, in a second appeal before this Court, that an issue from the first appeal for which the appellees stated they were "renew[ing] all objection" was waived because the appellees had not raised it in their statement of the issues); *In re Conservatorship of Osborn*, No. M2020-01447-COA-R3-CV, 2021 WL 5144547, at *8 (Tenn. Ct. App. Nov. 5, 2021) (determining the appellants' argument concerning personal jurisdiction to be waived because it was not included in their issue statement); *Himes v. Himes*, No. M2019-01344-COA-R3-CV, 2021 WL 1546961, at *8 n.5 (Tenn. Ct. App. Apr. 20, 2021) (determining that the appellant husband had waived his request for attorney's fees on appeal when he had stated the request solely in the conclusion of his brief and did not include it in his statement of the issues).

Finally, we address the court's ultimate grant of Allstate's motion to dismiss the remaining UM claim. The trial court found that Mr. Arnold could not maintain an action against Allstate based in underinsured motorist coverage because Ms. Malchow had been granted summary judgment on the issue of her tort liability. *See*, *e.g.*, Tenn. Code Ann. § 56-7-1201 (providing that uninsured/underinsured motorist coverage is intended "for the protection of persons insured under the policy who are legally entitled to recover compensatory damages from owners or operators of uninsured motor vehicles"). However, inasmuch as we have determined that the trial court improperly granted summary judgment in favor of Ms. Malchow concerning her negligence, we must accordingly conclude that the UM claim likewise should not have been dismissed. We therefore vacate the trial court's dismissal of Mr. Arnold's UM claim against Allstate.

We now turn to Mr. Arnold's remaining issue concerning the trial court's grant of Allstate's motion to dismiss. Mr. Arnold avers that the trial court violated Tennessee Rules of Appellate Procedure 4 and 5 in granting the motion. To the extent that we are able to

discern the nature and scope of his argument, it appears that Mr. Arnold is advancing the position that the trial court erred in ruling on Allstate's motion to dismiss after Mr. Arnold's first notice of appeal was filed. The trial court granted summary judgment in Ms. Malchow's favor on June 30, 2022. Mr. Arnold subsequently filed his notice of appeal on July 6, 2022. Therefore, Mr. Arnold ostensibly contends that the trial court had no jurisdiction to rule on the motion to dismiss because jurisdiction had vested in this Court.

We note that Tennessee Rule of Appellate Procedure 3 provides that all claims against all parties must be adjudicated by a final judgment before an appeal as of right can be initiated. Here, the order granting summary judgment in favor of Ms. Malchow adjudicated only Mr. Arnold's claims against her. Notwithstanding, Mr. Arnold's UM claims against Allstate remained, such that the order granting summary judgment was not a final, appealable order. *See* Tenn. R. App. P. 3. The motion to dismiss Mr. Arnold's UM Claim against Allstate was granted on September 16, 2022, thereby adjudicating Mr. Arnold's remaining claim. As such, this order was the final order adjudicating all claims against all parties and was the order from which an appeal to this Court would lie. *See* Tenn. R. App. P. 3. Mr. Arnold's notice of appeal, filed in this Court on July 6, 2022, would therefore be considered prematurely filed and "shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof." *See* Tenn. R. App. P. 4(d). Accordingly, we determine Mr. Arnold's jurisdictional argument to be unavailing.

VI. Protective Orders

We next address Mr. Arnold's multiple arguments that protective orders were improperly granted in this matter. As this Court has stated, "[a]ppellate courts will interfere with pre-trial rulings regarding discovery only where the trial court's decision manifests a clear abuse of discretion." *Thomas v. Oldfield*, No. M2006-02767-COA-R9-CV, 2007 WL 3306759, at *2 (Tenn. Ct. App. Nov. 7, 2007). Regarding an abuse of discretion, our Supreme Court has elucidated:

> An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010).

First, Mr. Arnold argues that the trial court erred by allegedly entering an order which prevented him from having contact with Progressive employees. Mr. Arnold posits that the order did not allow him to take the deposition of a Progressive employee who

purportedly investigated the claim. However, our review of the appellate record has revealed no such order. As this Court has previously clarified, "it is the appellant's responsibility to provide this Court with a sufficient appellate record with which this Court can conduct a proper review of the trial court proceedings." *Dishon v. Dishon*, No. M2017-01378-COA-R3-CV, 2018 WL 3493159, at *9 (Tenn. Ct. App. July 20, 2018). Without this order appearing in the record, we are unable to discern the trial court's basis for its ruling. Moreover, in the absence of a sufficient record, "we usually assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Id*. (quoting *Tarpley v. Hornyak*, 174 S.W.3d 736, 740 (Tenn. Ct. App. 2004)).

Next, Mr. Arnold contends that the protective order granted to an employee of defense counsel's law firm was erroneous. Although parties have the right to take depositions and conduct discovery, certain restrictions are placed thereon in order to protect, *inter alia*, matters subject to attorney-client privilege and work product. For example, "[t]he attorney-client evidentiary privilege . . . extends to communications from the client to the attorney" and "[w]hen [a] third party in whose presence such communications take place is an agent of the client, the confidentiality is not destroyed." *Smith Cnty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984). In addition, the work product doctrine, codified at Tennessee Rule of Civil Procedure 26.02, provides that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

As this Court has previously explained:

> The Tennessee Rules of Civil Procedure limit the scope of discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" Tenn. R. Civ. P. 26.02. Our Supreme Court has provided the following additional guidance in such matters:
>
> > When a discovery dispute involves the application of a privilege, the court's judgment should be guided by the following three principles. First, Tennessee's discovery rules favor discovery of all relevant, non-privileged information. Second, even though privileges do not facilitate the fact-finding process, they are designed to protect interests and relationships that are regarded as sufficiently important to justify limitations on discovery. Third, while statutory privileges should be fairly construed according to their plain meaning, they need not be broadly construed.

Gene Lovelace Enterprises, LLC v. City of Knoxville, No. E2019-01574-COA-R3-CV, 2021 WL 2395957, at *4 (Tenn. Ct. App. June 11, 2021) (emphasis added).

Mr. Arnold urges that because he sought to depose an unnamed law firm employee in a particular position, the "record keeper," rather than naming a specific person or attorney, these discovery limits were inapplicable. We note, however, that this person would still be an employee and therefore an agent of the law firm, who Mr. Arnold reportedly planned to question regarding practices of the firm, billing questions, and questions concerning the firm's client. Ergo, the information Mr. Arnold sought would more than likely be privileged and non-discoverable. Mr. Arnold has presented no reasonable basis for the deposition testimony of this employee to be taken. Therefore, we conclude that the trial court did not abuse its discretion in granting a protective order concerning the deposition of a law firm employee.

Finally, Mr. Arnold avers that the protective orders granted to Allstate were improper. Mr. Arnold sought to depose several Allstate employees regarding "the process for issuing and completing auto claims and issues related to how Allstate Insurance Company process civil actions." The trial court granted protective orders, reasoning that one Allstate employee—who performed the inspection, evaluation, and value estimate of the vehicle—had already been deposed. The trial court further found:

> [T]he remaining employees of Allstate Insurance Company that the Plaintiff seeks to depose have no relevant information on the issues to be tried . . . specifically, the Plaintiff's claim of negligent operation of a motor vehicle against Defendant Malchow. Regarding the areas of inquiry stated by the Plaintiff in his request to take depositions, none of the information sought is admissible, relevant and/or likely to lead to the discovery of admissible and/or relevant information.

Mr. Arnold contends that these proposed witnesses would have revealed evidence demonstrating Allstate's liability regarding the contractual issues, and Mr. Arnold's stated reason for seeking to depose the other witnesses was to examine how Allstate handles claims. Having determined that Mr. Arnold's contractual claims against Allstate have been waived or are without merit, we conclude that Mr. Arnold has demonstrated no abuse of discretion by the trial court in issuing these protective orders in favor of Allstate.

We reiterate our Supreme Court's instruction, "Because decisions regarding pretrial discovery are inherently discretionary, they are reviewed using the 'abuse of discretion' standard of review." *Lee Med., Inc.*, 312 S.W.3d at 524. In order to show an abuse of discretion, Mr. Arnold would need to demonstrate that the trial court "cause[d] an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Id.* No such showing has been made herein. We

therefore affirm the trial court's decisions regarding the protective orders issued in this cause.

VII. Remaining Questions

Mr. Arnold states that the trial court improperly dismissed his suit against Progressive by utilizing an incorrect interpretation of *Ferguson v. Nationwide Prop. & Cas. Ins. Co.*, 218 S.W.3d 42 (Tenn. Ct. App. 2006). *Ferguson* states the widely accepted proposition that "Tennessee is not a 'direct action' state where a plaintiff can sue the liability insurance carrier of the defendant who allegedly caused the harm." *Id.* at 52 (quoting *Seymour v. Sierra*, 98 S.W.3d 164, 165 (Tenn. Ct. App. 2002)). Mr. Arnold's claims against Progressive were based on the fact that Progressive was Ms. Malchow's insurer. The trial court dismissed these claims as a direct action against an insurer. In *Arnold I*, this Court explained:

> The trial court dismissed Progressive and Mountain Laurel by order of January 27, 2020. This order stated as follows:
>
> > Upon oral Motion of counsel for Defendants to make this Order final for purposes of appeal pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court further expressly determines there is no just reason for delay and directs the entry of this order as a final judgment of Dismissal as to Defendants Progressive [] and Mountain Laurel [].
>
> Thus, the January 27, 2020 order was properly designated as final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. Appellant therefore had thirty days to file a notice of appeal as to this order. Nothing in the record indicates that Appellant filed any notice of appeal until June 23, 2021. Because this notice of appeal was filed more than thirty days following the entry of the January 27, 2020 order, the notice of appeal was not timely as to the claims against Progressive and Mountain Laurel.

Arnold I, 2022 WL 774925, at *4. Ergo, Mr. Arnold's contention that Progressive was improperly dismissed is procedurally untimely and cannot be further reviewed on appeal.

Mr. Arnold also argues that the trial court erred in not allowing him take the deposition of the third driver involved in the accident. According to a case management order entered on July 1, 2021, depositions were to be completed by August 31, 2021. On November 17, 2021, Mr. Arnold filed a motion to reopen discovery, but the only persons Mr. Arnold sought to depose were two law students. The record reveals that Mr. Arnold never filed a motion seeking to depose the third driver or to further extend the discovery deadlines.

Tennessee Rule of Appellate Procedure 36(a) provides: "Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Although Mr. Arnold could have asked the trial court to extend the discovery phase or to grant him permission to depose this driver when he filed his motion to reopen discovery, Mr. Arnold failed to avail himself of any procedural safeguard to protect his interests. As such, Mr. Arnold cannot complain concerning any alleged error in this regard on appeal. *See In re Matthew K.*, No. E2020-00773-COA-R3-PT, 2021 WL 3578703, at *14 (Tenn. Ct. App. Aug. 13, 2021) (finding that a party alleging error must demonstrate that she availed herself of procedural safeguard at the trial court level).

Although Mr. Arnold did eventually depose the third driver on August 11, 2022, we note that the trial court had previously granted summary judgment to Ms. Malchow by order dated June 30, 2022. As such, the court did not err in failing to consider this deposition before granting summary judgment because the deposition had not yet occurred when the trial court's order regarding summary judgment was entered. Mr. Arnold's issues concerning the third driver's deposition are accordingly without merit.

Mr. Arnold also claims that the court improperly consolidated his actions against Ms. Malchow and Allstate because in doing so, the court limited his discovery opportunities. Tennessee Rule of Civil Procedure 42.01 grants courts the authority to use discretion in consolidating actions with common questions of law or fact. We therefore review a trial court's decision to consolidate under an abuse of discretion. *See Van Zandt v. Dance*, 827 S.W.2d 785, 788 (Tenn. Ct. App. 1991). "When a decision of a trial court rests purely in its discretion, this Court will not reverse the trial court unless it affirmatively appears that the court improperly used or manifestly abused its discretion to the great injustice and injury of the complaining party." *Id*. at 787.

The claims against Ms. Malchow and Allstate arose from the same event—the vehicle accident. Both lawsuits shared a common question of law or fact—whether Ms. Malchow was negligent. Additionally, regarding his limited discovery argument, we reiterate that Mr. Arnold failed to demonstrate that he sought additional time from the trial court within which to conduct discovery. Instead, as previously explained, Mr. Arnold only filed a single motion seeking to reopen discovery in order to take two limited depositions. If Mr. Arnold believed that his discovery opportunities had been unfairly constrained by the trial court's consolidation of these cases, his remedy would have been to file a motion seeking an extension of the discovery deadlines. This he did not do.

We emphasize that Tennessee Rule of Appellate Procedure 36(a) provides: "Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Mr. Arnold did not avail himself of remedies

available to him at the trial court level and thus cannot obtain relief concerning this issue on appeal. The trial court's decision to consolidate the cases was premised upon the interest of judicial efficiency, a decision which we understand and do not disturb. Therefore, Mr. Arnold's argument that the cases were improperly consolidated is unavailing.

Lastly, Mr. Arnold postulates that the trial court participated in improper *ex parte* communications with defense counsel, as demonstrated by the trial court's orders concerning the statements of the evidence. The trial court entered two separate orders denying Mr. Arnold's proposed statement(s) of the evidence filed in this case. In those orders, the trial court stated that because Mr. Arnold's statement(s) did not comply with the requirements of Tennessee Rule of Appellate Procedure 24(c), the trial court had requested that defendants' counsel prepare statements of the evidence. The court proceeded to accept both statements filed by the defendants as conveying a fair and accurate account of what transpired in the trial court pursuant to Tennessee Rule of Appellate Procedure 24(c), and the court further directed that Mr. Arnold's statement(s) would not be transmitted with the record on appeal.

Mr. Arnold argues that by stating in its orders that it had requested defendants' counsel to prepare statements of the evidence, the trial court acknowledged having had *ex parte* communications with defense counsel. Based on the record before us, we must agree with Mr. Arnold's contentions in this regard.

This Court has previously noted that the typical remedy sought in a case involving improper *ex parte* communications between the court and counsel would be a motion to recuse. *See Brunetz v. Brunetz*, No. E2018-01116-COA-R3-CV, 2019 WL 1092718, at *5 (Tenn. Ct. App. Mar. 8, 2019). Mr. Arnold has filed no such motion in this cause. In another case involving *ex parte* communications between the court and counsel, however, we have also explained:

> Tennessee Supreme Court Rule 10, Rule of Judicial Conduct 2.9, states, "A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . . ." (Emphasis added.) Defense counsel posits that there was no discussion of the pending matter and characterizes the conversations as an exchange of "polite pleasantry." The trial judge ostensibly agreed that there was no improper communication as he denied the Burchfields' post-trial motion raising the issue.
>
> We do not find reversible error where there has been no showing of prejudice related to these communications. *See State v. Jones*, 735 S.W.2d 803, 810 (Tenn. Crim. App. 1987); *State v. Ramsey*, No. 01C01-9412-CC-

> 00408, 1998 WL 255576 (Tenn. Crim. App. May 19, 1998). As stated in *Jones*, while the trial court's decision to participate in *ex parte* communication might be lacking in judgment, it is harmless error unless there is a showing of prejudice.

Burchfield v. Renfree, No. E2012-01582-COA-R3-CV, 2013 WL 5676268, at *10 (Tenn. Ct. App. Oct. 18, 2013). We will therefore examine the issue of whether Mr. Arnold has demonstrated prejudice based on the *ex parte* communications between the court and counsel in this matter.

With reference to a statement of the evidence, Tennessee Rule of Appellate Procedure 24(c) provides:

> **Statement of the Evidence When No Report, Recital, or Transcript Is Available**. If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, or if the trial court determines, in its discretion, that the cost to obtain the stenographic report in a civil case is beyond the financial means of the appellant or that the cost is more expensive than the matters at issue on appeal justify, and a statement of the evidence or proceedings is a reasonable alternative to a stenographic report, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the statement. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule.

(Emphasis added.) Subdivision (e) provides in pertinent part: "Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court."

Ergo, according to Rule 24(c), when no "stenographic report, substantially verbatim recital or transcript of the evidence" is available, the appellant shall prepare and file a

statement of the evidence, serving a copy on opposing counsel. The appellee should then "file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement." Any differences between the two are to then be resolved by the trial court.

In the case at bar, it appears that Mr. Arnold prepared one or more "statements of the evidence" concerning the procedural history leading up to the grant of summary judgment as well as the grant of Allstate's motion to dismiss.[3] Because the trial court directed that these statement(s) would not be made a part of the appellate record, we are unable to discern whether Mr. Arnold properly served those statement(s) on opposing counsel. However, what is clear is that rather than allowing the defendants' counsel to file objections thereto, the trial court instead requested that defendants' counsel each prepare another statement of the evidence. This practice was improper and failed to follow the mandates of Rule 24 concerning the filing of a statement of the evidence.

We determine, however, that no prejudice to Mr. Arnold resulted in this case because we have not considered the statements of the evidence filed by the defendants. Inasmuch as the judgments rendered in this cause were based on Tennessee Rules of Civil Procedure 12 and 56, review of the judgments would mandate that this Court view only the pleadings and other filings submitted in accordance with those rules. In other words, because there was no trial or other evidentiary hearing from which a transcript would result, the filing of statements of the evidence was unnecessary and those statements are irrelevant. *See* Tenn. R. App. P. 24(c) ("If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, . . . and a statement of the evidence or proceedings is a reasonable alternative to a stenographic report, the appellant shall prepare a statement of the evidence or proceedings" (emphasis added)). Accordingly, we conclude that although "the trial court's decision to participate in *ex parte* communication might be lacking in judgment, it is harmless error" in this case. *See Burchfield*, 2013 WL 5676268, at *10.

VIII. Conclusion

For the foregoing reasons, we vacate the trial court's grant of summary judgment in favor of Ms. Malchow. We further vacate the dismissal of Mr. Arnold's underinsured motorist claim against Allstate. We affirm the trial court's judgment in all other respects and remand this matter to the trial court for further proceedings consistent with this opinion. Costs on appeal are assessed one-half to Deborah Malchow and one-half to Allstate.

s/Thomas R. Frierson, II

[3] We reiterate that because the trial court directed that Mr. Arnold's statement or statements would not be made a part of the appellate record, we are unable to discern whether he filed one statement or two.

THOMAS R. FRIERSON, II, JUDGE