STATE OF MICHIGAN

COURT OF APPEALS

BROOK ATKINSON,

Plaintiff-Appellee,

v

VINCENT GEORGE KREILTER,

Defendant/Cross-Appellant,

and

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellant/Cross-Appellee,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

UNPUBLISHED
October 21, 2021

No. 353079
St. Clair Circuit Court
LC No. 17-002182-NO

MICHAEL FALECKI,

Plaintiff-Appellee,

v

VINCENT GEORGE KREILTER,

Defendant/Cross-Appellant,

and

No. 353080
St. Clair Circuit Court
LC No. 17-003103-NI

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellant/Cross-Appellee.

ESTATE OF CAROLYN MANES, by JOHN MANES, Personal Representative,

Plaintiff-Appellee,

v

VINCENT GEORGE KREILTER,

Defendant-Appellee/Cross-Appellant,

and

AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Defendant-Appellant/Cross-Appellee.

No. 353364
St. Clair Circuit Court
LC No. 17-001901-NI

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

In these consolidated cases, defendant American Alternative Insurance Corporation (AAIC) appeals as of right judgments entered in favor of plaintiffs, Brook Atkinson, Michael Falecki, and John Manes, as personal representative of the estate of Carolyn Manes. The judgments in favor of plaintiffs were entered against defendants Vincent George Kreilter and AAIC following a jury trial in this action against Kreilter under the vehicle owner's liability statute, MCL 257.401, and for recovery of underinsured motorist (UIM) benefits from AAIC under an automobile insurance policy. Kreilter cross-appeals as of right, challenging the trial court's denial of his motion for approval of a tentative settlement between himself and plaintiffs. We affirm in part, but remand for modification of plaintiffs' judgments to vacate any awards of statutory prejudgment interest that are duplicative of the awards of interest under the Unfair Trade Practices Act (UTPA), MCL 500.2001 *et seq*.

I. BACKGROUND

These cases arise from a motor vehicle accident on November 11, 2016, in Kenockee Township, Michigan. The accident occurred when a 2003 Saturn Ion owned by Kreilter, and driven by his son, Tyler George Kreilter (Tyler), collided with an ambulance being driven by plaintiff Atkinson, and occupied by Carolyn and Falecki, while Carolyn was being transported to

her nursing home from a hospital in Port Huron. As a result of the accident, Atkinson and Falecki were injured, and Carolyn died. Tyler also sustained fatal injuries in the accident. The 2003 Saturn Ion was insured by a policy of no-fault insurance issued by Liberty Mutual Insurance Company with a maximum coverage limit of $50,000. AAIC had issued a policy to Tri-Hospital Emergency Medical Services, Inc. for the ambulance involved in the crash. AAIC's policy included coverage for UIM benefits with a limit of $1 million. The parties do not dispute that Atkinson, Falecki, and Carolyn all qualify as "insureds" under the UIM endorsement of AAIC's policy.

All three plaintiffs filed suit against Kreilter and AAIC, alleging liability against Kreilter under the owner's liability statute, and contract claims against AAIC for recovery of UIM benefits. Before trial, the trial court granted plaintiffs' motion to strike defendants' asserted defense of the sudden-emergency doctrine.

Following a jury trial, the jury returned verdicts for all three plaintiffs, awarding them compensatory damages, collectively, of $1,445,000. AAIC thereafter filed a motion for declaratory judgment, remittitur, and apportionment of damages, arguing that the limit of insurance coverage under its UIM endorsement was $1 million, and that the terms of its policy precluded it from paying "duplicate payments" for the same loss. As such, AAIC reasoned that its contractual obligation should be reduced to $950,000 because coverage of $50,000 was also available from Kreilter's insurer, Liberty Mutual Insurance Company. AAIC also argued that any interest, costs, and case-evaluation sanctions were subject to the $950,000 limit. The trial court declined to reduce AAIC's coverage limit from $1,000,000 to $950,000 on account of the Liberty Mutual policy, and also rejected AAIC's argument that litigation costs were subject to the policy's coverage limit.

AAIC also filed a motion for judgment notwithstanding the verdict (JNOV), the thrust of which was that none of the plaintiffs presented evidence at trial to establish that AAIC breached its policy with respect to the payment of UIM benefits, and, therefore, plaintiffs were not entitled to judgment against AAIC because "the jury did not make a finding as to AAIC for their claims brought by each [p]laintiff." The trial court denied AAIC's motion for JNOV.

After adjusting the jury awards of future damages to present value, the trial court entered separate judgments for each plaintiff against Kreilter and AAIC, awarding plaintiffs, collectively, in excess of $1,200,000 in compensatory damages. The court also awarded plaintiffs prejudgment interest against both defendants, and taxable costs and penalty interest under the UTPA against AAIC. In Manes's case, the court also awarded case-evaluation sanctions against AAIC under MCR 2.403.

AAIC appeals each of the judgments as of right. On cross-appeal, Kreilter challenges the trial court's denial of his motion for approval of a tentative settlement between himself and plaintiffs.

II. AAIC'S MOTIONS FOR JNOV AND DECLARATORY JUDGMENT

AAIC argues that the trial court erred by denying its motion for JNOV because plaintiffs did not present evidence at trial to show that it breached the UIM endorsement. AAIC also argues that the trial court erred by denying its motion for a declaratory judgment and remittitur to reduce its potential exposure to $950,000, rather than its $1,000,000 policy limit on account of the $50,000

in coverage available under Liberty Mutual's policy, and by ruling that any litigation costs were not subject to its $1,000,000 policy limit. We reject these claims of error.

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for JNOV. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016). In reviewing such a motion, the evidence and all legitimate inferences drawn from that evidence are viewed in the light most favorable to the nonmoving party. *Id*. "Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Id*.

To the extent that AAIC requested that the trial court grant its motion for declaratory judgment, this Court reviews the trial court's decision on that motion for an abuse of discretion. *Matouk v Mich Muni League Liability & Prop Pool*, 320 Mich App 402, 408; 907 NW2d 853 (2017); *Martin v Murray*, 309 Mich App 37, 45; 867 NW2d 444 (2015). A trial court's decision on a motion for remittitur is also reviewed for an abuse of discretion. *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 30; 930 NW2d 393 (2018). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Hecht*, 499 Mich at 604.

B. MOTION FOR JNOV

In *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014), our Supreme Court explained that "[a] party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach."

At trial, AAIC did not dispute that plaintiffs qualified for UIM coverage under its insurance policy. For example, at one point, counsel for Manes stated that he had served a subpoena on a representative of AAIC, but counsel for AAIC was "refusing to produce [the representative]." Counsel for Manes stated that he did not need to call the AAIC representative if the parties could agree that an insurance policy was in effect, and counsel for AAIC responded, "It's never been a contention that there's a policy that's been issued." Counsel for AAIC further stated that he would stipulate that the insurance policy "says what it says," that "the Jury . . . has no role in that," and that "the Court can deal with it following the verdict."

During opening statements, counsel for AAIC conceded that plaintiffs had suffered injuries in the collision, and that plaintiffs "are entitled to some money as a result of the injuries they sustained in this accident." Counsel for AAIC further stated:

> The question is why are we here[?] The obvious answer[] is we're here because we can't agree on how much money that is, that's why we're here.

After considering the injuries of each plaintiff, as well as the medical treatment they received, counsel for AAIC stated, "And again, this is something [for which] you should award money, and I, I don't disagree with that. The question is what is the amount of money." Counsel for AAIC further stated, in pertinent part:

> When you consider all of the information that we've all seen now in the case that the proof will show, that the evidence will show that the damages of Mr. Falecki falls [sic] somewhere between $35,000.00 and $50,000.00. That the damages for Ms. Atkinson fall somewhere between $35,000.00 and $50,000.00. And that the damages for the survivors, that means the people who are still here in the Manes family would fall somewhere between $75,000.00, and $100,000.
>
> And we tell you and I'm telling you that because of the admission that Mr. Kreilter was at fault in this accident there should be some compensation as a result of this. That's what I'm submitting to you is the proper amount of compensation and the proofs will show that in this case. Thank you.

Notably, during his closing argument, counsel for AAIC never argued that AAIC did not have a contractual obligation to pay UIM benefits, or that plaintiffs had not proven their claims for breach of contract. Instead, counsel focused on the nature and extent of the injuries, and whether the three plaintiffs were entitled to noneconomic damages and the potential amount of those damages. Moreover, in its instructions to the jury, the trial court informed the jury, without objection, that Kreilter and AAIC had admitted liability, stating:

> *Now, the defendants have admitted that they are liable to the Plaintiff[s] for any damages which they have caused*. You are to decide only what damages were caused by the Defendants and the amount to be awarded to the Plaintiff[s] for such damages. [Emphasis added.]

The trial court further instructed the jury regarding what plaintiffs were required to prove to recover noneconomic damages. After the trial court instructed the jury, counsel for AAIC did not raise any objections to the court's instructions.

In sum, the record shows that AAIC conceded that it was liable for paying any damages found by the jury. Not only did it not challenge its liability, either before or during trial, it in fact agreed at trial that the only issue for the jury to determine was the amount of damages owed to plaintiffs. Against this backdrop, it was disingenuous for AAIC to argue in a posttrial motion, and now on appeal, that plaintiffs failed to establish that AAIC was contractually liable for paying UIM benefits. To allow AAIC to claim error with regard to a matter that it deemed appropriate at trial would allow AAIC to harbor error as an appellate parachute, which this Court will not allow. See *Auto-Owners Ins Co v Compass Healthcare PLC*, 326 Mich App 595, 613; 928 NW2d 726 (2018). Accordingly, we reject AAIC's claim that the trial court erred by denying its motion for JNOV.

C. MOTION FOR DECLARATORY JUDGMENT AND REMITTITUR

As our Supreme Court recognized in *Rory v Continental Ins Co*, 473 Mich 457, 465; 73 NW2d 23 (2005):

> Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. Uninsured motorist coverage is

> optional—it is not compulsory coverage mandated by the no-fault act. Accordingly, the rights and limitations of such coverage are purely contractual and are construed without reference to the no-fault act.

This case involves underinsured motorist coverage, which is similar to uninsured motorist coverage, but differs only to the extent that the injured person's damages exceed the limit of coverage of the underinsured motorist. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 44; 664 NW2d 776 (2003).

At issue here is whether the scope of UIM coverage under AAIC's policy is limited to an insured's damages, exclusive of litigation costs, or whether any litigation costs that may be imposed against AAIC are also subject to the policy's coverage limits. In *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting*, 322 Mich App 218, 225; 911 NW2d 493 (2017), this Court, observed:

> This Court's main goal in the interpretation of contracts is to honor the intent of the parties. The words used in the contract are the best evidence [of] the parties' intent. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent. [Quotation marks and citation omitted.]

The UIM endorsement to AAIC's insurance policy provides, in pertinent part:

> **A. Coverage**
>
> 1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle."
>
> * * *
>
> **D. Limit Of Insurance**
>
> 1. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", *the most we will pay for all damages resulting from any one "accident" is the Limit of Insurance for Uninsured Motorists Coverage shown in the Schedule or Declarations*. [Emphasis added.]

Additionally, the UIM endorsement provides that the limit of insurance for each accident is $1,000,000. Further, under Section D, addressing the limit of insurance, the UIM endorsement provides that AAIC "will not make a duplicate payment under this coverage for any element of 'loss' for which payment has been made by or for anyone who is legally responsible."

AAIC's argument challenging the trial court's denial of its motion for declaratory judgment is two-fold. First, AAIC claims that its liability is limited to $950,000 because Liberty Mutual had already tendered $50,000 to plaintiffs as Kreilter's no-fault insurer. AAIC also generally claims that its liability for all three plaintiffs, including case-evaluation sanctions and penalty interest, cannot exceed the policy's coverage limits. We disagree.

In *Matich v Modern Research Corp*, 430 Mich 1, 23; 420 NW2d 67 (1988), our Supreme Court explained:

> An insurer whose policy includes the standard interest clause[1] is required to pay prejudgment interest from the date of filing of a complaint until the entry of judgment, calculated on the basis of its policy limits, not on the entire judgment, and interest on the policy limits must be paid even though the combined amount exceeds the policy limits. [Footnote added.]

More recently, in *Estate of Hunt v Drielick*, 322 Mich App 318, 323, 328-329; 914 NW2d 371 (2017), rev'd in part on other grounds 956 NW2d 354 (2021), a garnishee-defendant insurer challenged a trial court's decision to award the garnisher-plaintiff statutory interest under MCL 600.6013,which resulted in a recovery that exceeded the $750,000 policy limit. The insurance policy in *Estate of Hunt*, 322 Mich App at 334, provided, in pertinent part:

> **a. Supplementary Payments**. In addition to the Limit of Insurance, we will pay for the "insured":
>
> * * *
>
> (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

In *Estate of Hunt*, this Court acknowledged the holding in *Matich* that, under Michigan law, if an insurer's policy includes a standard interest clause, the insurer is liable for prejudgment interest under MCL 600.6013 with such interest calculated on the basis of its policy limits, not the entire judgment, " 'and interest on the policy limits must be paid even though the combined amount exceeds the policy limits.' " *Id*. at 335, quoting *Matich*, 430 Mich at 23. This Court recognized that similar to the standard interest clause at issue in *Matich*, the interest clause in *Estate of Hunt* did not contain language specifically addressing prejudgment interest, and therefore, it did not contractually limit the insurer's risk to pay prejudgment interest. *Estate of Hunt*, 322 Mich App at 335-336. Therefore, this Court held that, under the authority of *Matich*, the defendant insurer was required to pay prejudgment interest calculated on the basis of the policy limit, even if the amount of the judgment, as well as the prejudgment interest, exceeded the policy's limits. *Id*. at 336.

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[1] The standard interest clause in the policies at issue in *Matich* provided that the insurer was required to pay

> all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before . . .. [the insurer] has . . . tendered or deposited in court that part of the judgment which does not exceed the limit of [the insurer's] liability thereon. [Quotation marks omitted.]

The thrust of AAIC's argument is that the trial court erred by assessing case-evaluation sanctions under MCR 2.403 and penalty interest under the UTPA, and that the present case is distinguishable from both *Estate of Hunt* and *Matich* because those cases addressed the language of the standard interest clauses in the policies at issue in each case. We agree that AAIC's policy does not contain a standard interest clause similar to the clauses at issue in *Estate of Hunt* and *Matich*. We further acknowledge that in both *Matich* and *Estate of Hunt*, the courts held that in an insurance policy with a standard interest clause, an insurer is responsible for the payment of prejudgment interest from the date of the filing of the complaint until judgment is entered, with the calculation of such interest to be made on the basis of policy limits, not the amount of the judgment, with the interest to be paid even if it exceeds policy limits. *Matich*, 430 Mich at 23; *Estate of Hunt*, 322 Mich App at 335. However, we find no reason to disturb the trial court's ruling. The trial court properly recognized that AAIC was permitted to contractually limit the risk it assumes, but the language of the policy and the UIM endorsement do not indicate that AAIC contractually agreed that any liability for litigation costs was to be subject to its coverage limits. On the contrary, the Limit of Insurance clause in the UIM endorsement provides that the specified limit of insurance, which in this case is $1,000,000 per accident, is "the most we will pay for all *damages* resulting from any one accident." Additionally, Section A of the UIM endorsement provides that AAIC will pay all sums an insured is legally entitled to "recover as *compensatory* damages from the owner or driver of an 'uninsured motor vehicle.' " Viewed together, these provisions suggest that the specified coverage limit applies only to compensatory damages recovered by an insured. Litigation costs are not compensatory damages. Thus, the language of AAIC's policy does not support its claim that litigation costs, including case-evaluation sanctions and penalty interest, are subject to the policy's coverage limits.

In support of its argument that the judgments in favor of plaintiffs, inclusive of litigation costs, could not exceed the policy limits, AAIC relies on *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76; 910 NW2d 691 (2017). In that case, the defendant insurer argued that the trial court abused its discretion by denying its motion for remittitur because the jury's verdict exceeded the policy limits for underinsured motorist benefits. *Id*. at 84. The trial court denied the defendant's motion for remittitur, finding that the defendant had essentially waived the policy limits for UIM benefits by not disclosing the policy limits to the jury. *Id*. at 85. This Court disagreed and held that the trial court was precluded from entering an award "that exceeded the maximum liability agreed to by the parties in their contract, plus applicable interest and costs." *Id*. at 86. This Court recognized that an insurance company should not be held responsible for a loss for which it did not charge a premium. *Id*. at 87. However, this Court's decision in *Andreson*—that the insurer had not waived its policy limits—has no bearing on this case. This case does not involve any question of waiver, but instead involves the question whether AAIC contractually agreed that any litigation costs would also be subject to its policy's coverage limits. As explained earlier, AAIC's position on this issue is not supported by the language of its insurance policy.

We also agree with the trial court that a declaratory judgment limiting AAIC's maximum exposure under its policy limits to $950,000 was not warranted. AAIC argues that its policy limit of $1,000,000 should be reduced to $950,000 given the $50,000 payment from Liberty Mutual under its policy. As the trial court recognized, however, Liberty Mutual was not a party to the lower court proceedings, and it is not clear from the record what Liberty Mutual had paid on behalf of its insured, Kreilter. The trial court declined to "declare the rights . . . of an interested party

seeking a declaratory judgment" as requested by AAIC by interpreting its policy provisions without giving Liberty Mutual an opportunity to also address the issue. The specific language of AAIC's insurance policy provides that "[AAIC] will not make a *duplicate payment* under this coverage for any element of 'loss' for which payment has been made by or for anyone who is legally responsible." Although AAIC generally asserts that the $50,000 was in fact tendered to plaintiffs, it is not clear from the record whether this amount was actually paid. Because it is unclear from the record what Liberty Mutual in fact tendered to plaintiffs, we are not persuaded that the trial court erred by declining to rule on this issue.

III. SUDDEN-EMERGENCY DOCTRINE

AAIC next argues that the trial court erred by granting plaintiffs' motion to strike defendants' reliance on the sudden-emergency doctrine. We disagree.

A. STANDARD OF REVIEW

The application of the sudden-emergency doctrine involves a question of law, which we review de novo. See *Citizens Protecting Michigan's Constitution v Secretary of Stat*e, 503 Mich 42, 59; 921 NW2d 247 (2018).

B. GOVERNING LEGAL PRINCIPLES

In *Szymborski v Slatina*, 386 Mich App 339, 341; 192 NW2d 213 (1971), our Supreme Court recognized that the sudden-emergency doctrine is not an affirmative defense, but is better characterized as an extension of the reasonably prudent person rule, and, therefore, a defendant does not have the burden of establishing, by a preponderance of the evidence, that a sudden emergency existed. See also *Baker v Alt*, 374 Mich 492, 496; 132 NW2d 614 (1965) (stating that the sudden-emergency doctrine stems from the reasonably prudent person rule). For the doctrine to apply, "the circumstances surrounding the accident must present a situation that is unusual or unsuspected." *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 622; 739 NW2d 132 (2007) (*White I*), aff'd 482 Mich 136 (2008).

In *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139; 753 NW2d 591 (2008) (*White II*), our Supreme Court stated that the statutory presumption of negligence under MCL 257.402(a) may be rebutted "by showing the existence of a sudden emergency." When a collision occurs as a result of a sudden emergency that the defendant did not create, the sudden-emergency doctrine will apply. *White II*, 482 Mich at 140. However, for the doctrine to apply, the sudden emergency must be " 'totally unexpected' " and it must not be of the defendant's "own making." *Id*. at 140, 142, quoting *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971).

Preliminarily, we agree with AAIC to the extent it argues that the trial court erred by concluding that the sudden-emergency doctrine is an affirmative defense. Authority from our Supreme Court and this Court clearly establishes that the sudden-emergency doctrine is not an affirmative defense. See *Symborski*, 386 Mich at 341; *Baumann v Potts*, 82 Mich App 225, 232; 266 NW2d 766 (1978) ("the 'sudden emergency' doctrine is not an affirmative defense"). However, while plaintiffs' challenge to the invocation of the sudden-emergency doctrine was

presented in the context of a motion to strike an affirmative defense, we are not persuaded that reversal is necessary.

In its ruling on this issue, the trial court recognized that (1) Tyler, in driving in the erratic and unsafe manner that he did, violated statutes enacted to ensure safety on the state's roadways, (2) his violation of the statutes created a rebuttable presumption of negligence, and (3) the sudden-emergency doctrine could provide an excuse for Tyler's otherwise negligent behavior. Admittedly, it would have been more appropriate for the trial court to consider the applicability of the sudden-emergency doctrine in the context of a motion for summary disposition, rather than a motion to strike. However, the trial court nonetheless correctly recognized that the sudden-emergency doctrine is essentially an extension of the reasonably prudent person standard, and that the appropriate test is what a reasonably prudent person would have done under the circumstances of the accident. See *Szymborski*, 386 Mich at 341.

In the trial court, AAIC presented the affidavits of two medical experts. In one affidavit, Dr. Wilbur Boike, a neurologist, opined that Tyler experienced a neurological focal event that caused him to lose control of the vehicle. In the other affidavit, Dr. Gregory Mavian, a neurosurgeon, stated that Tyler encountered a "sudden unexpected cerebral event." As the trial court observed, however, crediting these opinions, the evidence did not support a finding that any such medical condition was unexpected by the time of the collision.

Tyler's passenger before the accident, Harmonic Keidel, testified that for 10 to 15 minutes before the accident, Tyler was driving unsafely and erratically, that she told him as much, and that she eventually screamed and told Tyler to let her out of the car because his driving was so erratic. Specifically, Keidel testified that right after Tyler picked her up, they almost ended up in a ditch while Tyler was reversing out of her driveway, and then when he started to drive forward, he hit her neighbor's mailbox. Once on the road, Tyler swerved and almost went into a ditch, speed over a set of train tracks, and kept swerving to the right as he was driving. After Tyler swerved so badly that Keidel had to grab the steering wheel, she started screaming because she was so scared, and then, at a stop sign, got out and called her mother to come pick her up. Throughout this time, Keidel repeatedly inquired whether Tyler felt safe to drive, and Tyler was responsive, lucid, articulate, and able to engage verbally with Keidel. When she finally told Tyler that she wanted to get out of the car because of how poorly he was driving, he told her angrily to get out, and she saw the car swerving more as he drove away. While Keidel also noticed that Tyler's face was drooping during this time, lending factual support for a conclusion that Tyler may have experienced an unexpected medical event that impacted his driving, the evidence also demonstrated that he was repeatedly informed of his condition and its impact on his driving, and thus had ample opportunity to act as a reasonably prudent person under the same circumstances to simply stop driving. As the trial court observed, the evidence demonstrated that Tyler, who was fully conscious and engaging with Keidel to the point of yelling at her as she got out of the vehicle, "chose to continue to drive and it was shortly after that when the accident occurred."

Accordingly, because there was no question of fact that Tyler continued driving after being advised of his condition and its effect on his driving, his condition at the time of the collision cannot be considered a sudden emergency that was unexpected and not the product of Tyler's own choices. Therefore, the trial court did not err by ruling that the sudden-emergency doctrine was not applicable. Accord *White*, 482 Mich at 142 ("If defendant was aware that he was not feeling

well when he left the rest area but continued driving anyway because he 'did not have far to go,' or if defendant felt ill while driving from the rest area to the Novi Road exit, or if defendant felt ill even a few minutes before he collided with plaintiff, then the emergency may well have been of his own making."). Although the trial court's decision was made in the legal context of granting plaintiffs' motions to strike an affirmative defense and the sudden-emergency doctrine does not qualify as such a defense, the trial court reached the correct result. Therefore, we affirm its decision. See *Neville v Neville*, 295 Mich Ap 460, 470; 812 NW2d 816 (2012) (explaining that this Court "will not reverse when a trial court reaches the right result for a wrong reason").

IV. PENALTY INTEREST UNDER THE UTPA

Finally, AAIC argues that the trial court erred by awarding penalty interest to plaintiffs under the UTPA. We disagree. Whether the trial court properly awarded penalty interest to plaintiffs is a question of law reviewed de novo. See *Citizens Protecting Michigan's Constitution*, 503 Mich at 59.

MCL 500.2006 provides, in pertinent part:

> (1) A person must pay on a timely basis to its insured, a person directly entitled to benefits under its insured's insurance contract, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, a person directly entitled to benefits under its insured's insurance contract, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
>
> * * *
>
> (4) If benefits are not paid on a timely basis, the benefits paid bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or a person directly entitled to benefits under the insured's insurance contract. If the claimant is a third party tort claimant, the benefits paid bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith, and the bad faith was determined by a court of law. The interest must be paid in addition to and at the time of payment of the loss. If the loss exceeds the limits of insurance coverage available, interest is payable based on the limits of insurance coverage rather than the amount of the loss. If payment is offered by the insurer but is rejected by the claimant, and the claimant does not subsequently recover an amount in excess of the amount offered, interest is not due. Interest paid as provided in this section must be offset by any award of interest that is payable by the insurer as provided in the award.

In *Nickola v Mic Gen Ins Co*, 500 Mich 115, 118; 894 NW2d 552 (2017), our Supreme Court held that "an insured making a claim under his or her own insurance policy for UIM benefits

cannot be considered a 'third party tort claimant' under MCL 500.2006(4)." The Court further recognized that because the claimants were parties to the insurance contract, not third-party tort claimants, the language in MCL 500.2006(4) addressing the liability of an insurer for penalty interest to a third-party claimant, and allowing delay for payment if the claim was reasonably in dispute, was inapplicable. *Nickola*, 500 Mich at 125. Citing *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998), and *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007), the Court in *Nickola* further explained:

> [I]f the claimant is the insured and benefits are not paid on a timely basis, the claimant is entitled to 12% penalty interest per annum irrespective of whether the claim is reasonably in dispute. [*Nickola*, 500 Mich at 131.]

In *Nickola*, counsel for the plaintiffs twice sent correspondence to the defendant insurer seeking payment of UIM benefits under their policy and their demands were denied. *Id*. at 119-120, 127-128.

In challenging the trial court's award of penalty interest to plaintiffs in the present appeals, aside from very a cursory argument in its reply brief suggesting that plaintiffs were third-party claimants, AAIC does not contest that plaintiffs were "insured[s]" or "person[s] directly entitled to benefits under the insured's insurance contract." MCL 500.2006(4). In *Nickola*, 500 Mich at 127, the Court concluded that an insured is a party to the insurance contract, specifically referring to the definition from *Black's Law Dictionary* defining an "insured" as " 'someone who is covered or protected by an insurance policy.' " A review of the UIM endorsement in this case confirms that plaintiffs qualify as "insureds" under AAIC's policy.[2] The thrust of AAIC's argument on appeal is that plaintiffs did not submit a demand or claim for benefits, amounting to a "satisfactory proof of loss" under MCL 500.2006(4), before filing their lawsuits. AAIC asserts that because it was not provided with a satisfactory proof of loss from plaintiffs, it did not incur liability for interest under the UTPA, MCL 500.2006(4), until 60 days after the trial court entered its judgments on the jury's verdicts. To the extent that AAIC relies on *Nickola* as support for its claim of error, its reliance is misplaced because the Court in that case did not address the issue whether a satisfactory proof of loss as contemplated by MCL 500.2006(4) was presented to the defendant insurer.

MCL 500.2006(3) places the onus on an insurer to provide the insured with an explanation of what is necessary to constitute a satisfactory proof of loss. The statute provides:

> An insurer shall specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days. If proof of loss is not supplied as to the entire claim, the amount supported by proof of loss is considered paid on a timely basis if paid within 60

[2] We note that in its motion for declaratory judgment, remittitur, and for apportionment of damages, AAIC acknowledged that anyone occupying a covered auto qualifies as an insured under the terms of the UIM endorsement. The UIM endorsement defines an "insured" as "[a]nyone else occupying a covered 'auto' or a temporary substitute for a covered 'auto.' "

> days after receipt of proof of loss by the insurer. Any part of the remainder of the claim that is later supported by proof of loss is considered paid on a timely basis if paid within 60 days after receipt of the proof of loss by the insurer.

In *Angott v Chubb Group Ins*, 270 Mich App 465, 486; 717 NW2d 341 (2006), this Court observed that under MCL 500.2006(3), a defendant insurer is required to notify the insured in writing of the materials that will amount to a satisfactory proof of loss. Citing *Medley v Canady*, 126 Mich App 739, 745; 337 NW2d 909 (1983), this Court stated that the insurer's failure to provide the specification in writing under MCL 500.2006(3) excused the insured from submitting the proof of loss under MCL 500.2006(4). *Angott*, 270 Mich App at 486. In *Griswold Props, LLC v Lexington Ins Co*, 275 Mich App 543, 565; 740 NW2d 659 (2007), vacated in part on other grounds 275 Mich App 801 (2007), this Court recognized that "failure [of the insurer] to comply with MCL 500.2006(3) is essentially acceptance of the proof of loss submitted." This Court further explained the policy implications that underpinned this holding:

> The policy reason for such a holding is clear—if an insurer is not held to the requirement to provide written notice of specific issues in the proof of loss and specific remedies that will render the proof of loss satisfactory, then the insured is defenseless against blanket rejections. If the insurer does properly respond with sufficient detail in its rejection of a loss statement, the insured is properly positioned to address any issues raised. Also, when the insured responds to the insurer's written request for additional documentation or evidence, the contours of any reasonable dispute about the amount of loss should be fairly well delineated. [*Griswold*, 275 Mich App at 565.]

At the hearing below, counsel for Falecki advised the trial court that Falecki had submitted a claim to AAIC following the accident, and that on February 13, 2017, AAIC's adjustor corresponded with counsel for Falecki in writing, advising that AAIC required medical authorizations as well as a sworn statement. Counsel for Falecki further explained that "[a]t no time thereafter did we ever get a notice from AAIC that we had not satisfied the proof of loss." Counsel for Falecki also represented that all three plaintiffs had submitted claims to AAIC, which led to AAIC's adjustor sending written correspondence seeking medical authorizations from all three plaintiffs and acknowledging receipt of the claims. Counsel for Falecki also stated that plaintiffs had unsuccessfully attempted to settle their claims against Kreilter, AAIC had withheld its consent regarding the proposed settlement, and these facts demonstrated "there was never an argument ever that there was not a satisfactory proof of claim or proof of loss[.]" Counsel for Manes agreed with these arguments and assertions by counsel for Falecki, characterizing AAIC's argument that it did not receive a proof of loss as "disingenuous." Counsel for Manes also stated his opinion that interest under the UTPA would begin to run from the date when Manes filed his complaint. Counsel for Atkinson also agreed with "everything that [counsel for Falecki] said," and agreed with counsel for Manes that AAIC owed penalty interest under the UTPA as of the date Atkinson filed her complaint.

The judgments for plaintiffs provide that UTPA interest began to accrue as of the date each plaintiff filed their complaint. Notably, while AAIC argues that plaintiffs failed to provide satisfactory proof of loss, it did not submit any documentary evidence to demonstrate that it had notified plaintiffs of the materials that would suffice as a satisfactory proof of loss under MCL

500.2006(3). Counsel for AAIC also did not challenge the recitation of events by counsel for Falecki in which counsel explained that AAIC had not challenged the filing of plaintiffs' claims on the basis that plaintiffs had not provided a satisfactory proof of loss. Accordingly, because AAIC failed to demonstrate that it informed plaintiffs of the materials needed to constitute a satisfactory proof of loss, any alleged failure by plaintiffs to prove a satisfactory proof of loss was excused. *Griswold*, 275 Mich App at 565; *Angott*, 270 Mich App 486. Therefore, the trial court did not err by holding that UTPA penalty interest should be awarded against AAIC in favor of plaintiffs, beginning to accrue as of the dates plaintiffs filed their complaints.

However, plaintiffs concede that they are not entitled to both statutory prejudgment interest and UTPA penalty interest, and therefore, AAIC is entitled to have the statutory interest offset any UTPA interest. In light of this concession, we remand this case to the trial court for modification of plaintiffs' judgments to vacate any awards of statutory interest that are duplicative of the awards of UTPA interest.

V. KREILTER'S CROSS-APPEAL

Given our disposition of AAIC's issues, we need not address the issue raised by Kreilter on cross-appeal. Insofar that the parties dispute whether any settlement without AAIC's approval would have affected AAIC's subrogation rights, because the record is clear that both AAIC and Liberty Mutual did not tender payment to plaintiffs in furtherance of settlement, any issue regarding the potential subrogation rights of AAIC is hypothetical, which we decline to consider. See *In re EJ Smith, Minor*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353861); slip op at 2 ("An issue is moot when there is not a real controversy, but merely a hypothetical one.").[3]

VI. CONCLUSION

Affirmed in part, but remanded for modification of plaintiffs' judgments to vacate any awards of statutory interest that are duplicative of the awards of UTPA interest, consistent with this opinion.

/s/ Douglas B. Shapiro
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

[3] In any event, counsel for AAIC conceded at oral argument in this Court that AAIC is not entitled to subrogation.