IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges Kurtis T. Wilder, E. Thomas Fitzgerald, and Kirsten Frank Kelly

LEWIS MATTHEWS, III and
DEBORAH MATTHEWS,

Plaintiffs/Appellees,

vs.

REPUBLIC WESTERN INSURANCE
COMPANY

Defendant/Appellant.
________________________________/

Docket No. 130912

BRIEF ON APPEAL–APPELLEE

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JURISDICTIONAL STATEMENT

Plaintiff/Appellee, Matthews, concurs with the Jurisdictional Statement contained in the Defendant/Appellant, Republic Western Insurance Co.'s, Brief on Appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER PLAINTIFF'S CLAIM FOR NO-FAULT PERSONAL PROTECTION INSURANCE BENEFITS AGAINST REPUBLIC ARE BARRED BY THE WRONGFUL CONDUCT RULE.

Plaintiff/Appellee answers "No."

Defendant/Appellant answers "Yes."

The Court of Appeals answered "No."

II. WHETHER THE NO-FAULT ACT OPERATES AS A STATUTORY EXCEPTION TO THE WRONGFUL CONDUCT RULE.

Plaintiff/Appellee answers "Yes."

Defendant/Appellant answers "No."

III. WHETHER PLAINTIFF/APPELLEE, MATTHEWS', CONDUCT OF DRIVING UNDER A SUSPENDED LICENSE IS EXEMPTED UNDER THE SAFETY STATUTE EXCEPTION TO THE WRONGFUL CONDUCT RULE.

Plaintiff/Appellee answers "Yes."

Defendant/Appellant answers "No."

The Court of Appeals answered "Yes."

IV. WHETHER PLAINTIFF/APPELLEE'S CONDUCT FAILS TO RISE TO THE LEVEL OF SERIOUS MISCONDUCT NECESSARY TO BAR A CAUSE OF ACTION BY THE WRONGFUL CONDUCT RULE.

Plaintiff/Appellee answers "Yes."

Defendant/Appellant answers "No."

The Court of Appeals answered "Yes."

V. WHETHER MATTHEWS' CONDUCT WAS TOO ATTENUATED TO ESTABLISH THE CAUSATION ELEMENT OF THE WRONGFUL CONDUCT RULE.

Plaintiff/Appellee answers "Yes."

Defendant/Appellant answers "No."

The Court of Appeals answered "Yes."

VI. WHETHER THE GREATER CULPABILITY EXCEPTION TO THE WRONGFUL CONDUCT RULE APPLIES IN THE INSTANT ACTION TO PRECLUDE OPERATION OF THE WRONGFUL CONDUCT RULE.

Plaintiff/Appellee answers “Yes.”

Defendant/Appellant answers “No.”

VII. WHETHER PLAINTIFF/APPELLEE, MATTHEWS QUALIFIED FOR MICHIGAN NO-FAULT PERSONAL PROTECTION INSURANCE BENEFITS WHERE THE SOLE GROUND ALLEGED BY REPUBLIC IS THAT THE TRIAL COURT AND COURT OF APPEALS ERRED IN SOMEHOW “DISREGARDING” THE “30-DAY RULE” WHEN IN FACT THIS ISSUE ALSO ALREADY HAS BEEN RAISED BY REPUBLIC IN THIS CASE IN ITS PRIOR APPEAL TO THE COURT OF APPEALS AND APPLICATION FOR LEAVE FILED IN THIS CASE.

Plaintiff/Appellee answers “Yes.”

Defendant/Appellant answers “No.”

The Court of Appeals answered “Yes.”

VIII. WHETHER THE PROHIBITION OF MCL §500.3102(1) APPLIES WHEN THE NONRESIDENT OWNER OR REGISTRANT OF A MOTOR VEHICLE NOT REGISTERED IN THIS STATE IS A MOTOR VEHICLE RENTAL COMPANY.

Plaintiff/Appellee answers “Yes.”

Defendant/Appellant answers “No.”

The Court of Appeals answered “Yes.”

IX. WHETHER THE TERM “ANY CALENDAR YEAR” AS SET FORTH IN MCL §500.3101(1) REFERS TO CALENDAR YEARS PRIOR TO AND INCLUDING THE CALENDAR YEAR DURING WHICH THE CLAIM ARISES.

Plaintiff/Appellee answers “Yes.”

Defendant/Appellant answers “No.”

The Court of Appeals answered “Yes.”

X. WHETHER DEFENDANT/APPELLANT, REPUBLIC, WAIVED DURING TRIAL ANY AND ALL PURPORTED ISSUES REGARDING THE "30-DAY RULE" AS WELL AS PLAINTIFF/APPELLEE, MATTHEWS', ENTITLEMENT TO MICHIGAN NO-FAULT PERSONAL PROTECTION INSURANCE BENEFITS FROM REPUBLIC.

Plaintiff/Appellee answers "Yes."

Defendant/Appellant answers "No."

COUNTER-STATEMENT OF FACTS

Material Proceedings

On July 14, 1996, Plaintiff/Appellee, Lewis Matthews III ("Matthews") was involved in a catastrophic car accident when the U-Haul truck he was operating was slammed into by a negligently driven eighteen-wheeler semi truck. 2-26-02 Trial Tr. (Vol. II) at 29-32 (Appendix at 158b). Matthews brought a claim for No-Fault personal protection insurance benefits, including medical bills, wage loss, and housekeeping expenses arising out of the incident against Defendant/Appellant, Republic Western Insurance Co. ("Republic"), who insured the U-Haul truck driven by Matthews, and the Assigned Claims Facility.

On February 6, 1998, Republic filed its Motion for Summary Disposition claiming that: (1) relief to Matthews was barred by the Wrongful Conduct Rule; and (2) Republic was not required to provide No-Fault benefits based on the 30-day rule, claiming that the U-Haul truck had purportedly not been operated in Michigan for more than 30 days in the calendar year preceding the accident. R. 57. On March 8, 1998, the Trial Court granted Republic's Motion for Summary Disposition based on the Wrongful Conduct Rule. R. 59.

Matthews appealed the Trial Court's ruling, and on September 15, 2000, the Court of Appeals issued an Opinion reversing the Trial Court's grant of summary disposition. (Republic's Appendix at 81a). Thereafter, Republic filed an Application for Leave to Appeal to the Michigan Supreme Court, which was denied on July 20, 2001. (Appendix 141b).

On January 11, 2002, Republic filed another Motion for Summary Disposition (R. 92), again based on the 30-day rule, which was expressly denied by the Trial Court on February 15, 2002. R 106.

A two-day jury trial took place in February 2002, the jury awarding Mathews $175,835 in allowable expenses, $75,000 in work loss benefits, $21,900 in replacement services, and $75,585

in No-Fault interest. 2-26-02 Trial Tr. (Vol. II) at 115-118 (Appendix at 158b). On April 19, 2002, Judgment was entered to that effect, also providing for costs and attorney fees pursuant to MCL §500.3148. (Republic's Appendix at 123a)

On May 9, 2002, Republic filed in the Trial Court a post-judgment Motion for Judgment Notwithstanding The Verdict or For Amendment of Judgment By Remittitur ("Motion For JNOV or Remittitur"). R. 140. On September 16, 2003, the Trial Court denied Republic's Motion on all grounds. R. 170 (Appendix 184b).

On October 7, 2003, Republic filed its second appeal in this action with the Court of Appeals. On March 2, 2006, the Court of Appeals issued an Opinion affirming the April 19, 2002 Judgment in favor of Matthews in all respects. (Republic's Appendix at 150a).

On April 12, 2006, Republic filed it Application for Leave to Appeal to the Michigan Supreme Court, which this Court granted on January 12, 2007.

Relevant Underlying Facts:

On July 14, 1996, Matthews was driving a rented U-Haul trailer in the State of Georgia, filled with equipment and goods, en route to Atlanta, Georgia where the 1996 Olympics were being held. 12-15-97 Deposition Transcript ("Dep. Tr.") of Matthews at 30, 118 (Appendix at 25b). Matthews, and his partner had paid for and rented space at the Olympics where they planned to operate a fast-food concession trailer for the sale of food to customers attending the Olympics. Id. at 34, 118.

At approximately 5:30 p.m. during well-lighted daylight hours, Matthews was driving in the right hand lane on I-75, a six lane divided highway approximately two miles North of Exit 127 in Centersville, Georgia. 12-15-97 Dep. Tr. of Matthews at 115-116; 8-2-96 Statement Under Oath of Julia Baggett ("Statement of Baggett") at 7-8; 8-2-96 Statement Under Oath of Beverly Kisor ("Statement of Kisor") at 8; 5-7-98 Dep. Tr. of Lisa E. Rudd ("Rudd") at 9, 11; 12-18-97 Dep. Tr. of Wyant at 31, 38; 5-29-98 Dep. Tr. of Georgia State Trooper Mitch Ralston ("State Trooper

Ralston") at 30 (Appendix at 25b, 9b 17b, 98b, 76b, 115b). Matthews' driving manner was entirely prudent, proper, and completely within the speed limit. 8-2-96 Statement of Baggett at 13; 12-18-97 Dep. Tr. of Wyant at 38, 41; 5-7-98 Dep. Tr. of Rudd at 11, 20 (Appendix at 9b, 76b, 98b).

Suddenly and without warning, Matthews', vehicle was struck with great force from the rear by Wyant who was driving an 18 wheel tractor and trailer filled with insulation which weighed in excess of 50,000 pounds. 8-2-96 Statement of Baggett at 8; 5-7-98 Dep. Tr. of Rudd at 10, 19-20. 12-18-97; Dep. Tr. of Wyant at 4, 31. (Id.) Wyant was negligently and carelessly following too closely behind Matthews and drove his fully loaded 18 wheel tractor trailer into the rear of Matthews' vehicle. 5-7-98 Dep. Tr. of Rudd at 12, 14, 19-20; 12-18-97 Dep. Tr. of Wyant at 76; 5-29-98 Dep. Tr. of State Trooper Ralston at 9, 12-13 (Appendix at 98b, 76b, 115b).

Matthews', vehicle was knocked off the highway 200 feet into the adjacent woods, crashing into trees at great speed, momentum, and force. 8-2-96 Statement of Baggett at 8; 8-2-96 Statement of Kisor at 11; 5-7-98 Dep. Tr. of Rudd at 20; 12-18-97 Dep. Tr. of Wyant at 40; 5-29-98 Dep. Tr. of State Trooper Ralston at 11, 25-26 (Appendix at 9b, 17b, 98b, 76b, 115b). Wyant failed to apply his brakes before and after the collision and consequently, Wyant's fully loaded 18 wheel tractor trailer traveled an additional 100 feet off the road beyond where Matthews' vehicle crashed into the trees. 8-2-96 Statement of Baggett at 11-12; 8-2-96 Statement of Kisor at 15; 5-7-98 Dep. Tr. of Rudd at 17-19; 5-29-98 Dep. Tr. of State Trooper Ralston at 24-25 (Appendix at 9b, 17b, 98b, 115b). Wyant's 18 wheel tractor trailer was burned beyond recognition. 12-18-97 Dep. Tr. of Wyant at 59; 5-29-98 Dep. Tr. of State Trooper Ralston at 32-34 (Appendix at 76b, 115b). At the scene of the collision, Wyant admitted to the investigating officers that he was at fault for the collision. 5-29-98 Dep. Tr. of State Trooper Ralston at 9; Interview Statement Checklist of State Trooper Ralston. (Appendix at 115b, 6b). In addition, several eye-witnesses to the accident, including State Trooper Mitch Ralston, confirmed that the accident was clearly Wyant's fault and that he was following too

closely to Matthews', vehicle. 5-7-98 Dep. Tr. of Rudd at 15-16; 5-29-98 Dep. Tr. of State Trooper Ralston at 12-13 (Appendix at 98b, 115b). Accordingly, Wyant was issued a citation at the scene for following too closely. 12-18-97 Dep. Tr. of Wyant at 76; 5-29-98 Dep. Tr. of State Trooper Ralston at 10, 12-13 (Appendix at 76b, 115b).

Lisa E. Rudd, a resident of Kentucky who happened on July 14, 1996 to be traveling on I-75 heading to Powder Springs, Georgia, was one eyewitness to the accident. During her deposition, she testified that at 5:30 p.m. she was in the process of passing Wyant, and his eighteen wheeler semi. 5-7-98 Dep. Tr. of Rudd at 9-10 (Appendix at 98b) Ms. Rudd had been driving behind Wyant for fifteen minutes in the right hand lane traveling about 55 miles an hour, and during that fifteen minutes no other traffic passed her or Wyant and no other cars were present in any of the other lanes of the highway as she followed Wyant in his semi. Id. at 11-12. It was as Ms. Rudd was passing Wyant that she was first able to clearly view the U-Haul driven by Matthews, which had also been driving directly ahead of the semi for at least 15 minutes before Wyant struck him. Id. at 12-13. Ms. Rudd testified that she purposely gave Wyant extra room to pass the U-Haul since she observed that Wyant was following so closely behind the U-Haul, and she kept looking over to see why he was not moving. Id. at 14. Ms. Rudd also testified in no uncertain terms that Wyant was definitely driving closer to Matthews than he should have been, and that he should have been moving over for quite some time. Id. at 16. It was at that time, that Ms. Rudd's daughter hollered "He's going to hit him!", and Wyant's eighteen wheeler semi struck Matthews shortly thereafter. Id at 14. Ms. Rudd further testified that as she watched the Wyant's vehicle strike the U-Haul: (1) Wyant's brake lights never went on nor did he slow down at all prior to striking Matthews; (2) there was never any indication that Wyant was signaling or trying to turn left or right rather than just go straight ahead into the U-Haul; and (3) that there was no screeching of Wyant's brakes or any skidding whatsoever. Id. at 18-20, 22-23. Ms. Rudd's unbiased, reliable, and detailed testimony under oath was also relayed by her

to the investigating officer at the scene of the accident (Id. at 23-24).

Beverly Kisor was another independent eyewitness to the accident. 8-2-96 Statement of Kisor at 5 (Appendix at 17b). Ms. Kisor was also traveling on I-75, headed to Chatsworth, Georgia, with her friend Julia Baggett. Id. at 5. Ms. Kisor testified that she was driving in the far right hand lane, and that there was no one driving to her left at any time. 8-2-96 Statement of Kisor at 12 (Appendix at 17b). Ms. Kisor testified that she observed Wyant's eighteen wheeler semi pushing the U-Haul without exhibiting any brake lights, signaling, or other maneuvers such as turning one way or another, slamming on his brakes, or skidding. Id. at 14. Ms. Kisor exclaimed along with other witnesses at the scene that they could not believe that anyone could have come out alive from the accident. Id. at 15.

Likewise, Julia Baggett–Ms. Kisor's traveling companion and yet another eyewitness to the accident–testified at her deposition that after witnessing the accident, she commented to her travel companion that Wyant "had evidently fallen asleep or had a heart attack because he was not even trying to stop." Id. at 12. Ms. Baggett also gave her statement to the police officer present at the scene. 8-2-96 Statement of Baggett at 20-21. (Appendix at 9b).

Furthermore, Wyant stated to the investigating officer at the scene that "he had messed up and he just didn't see the U-Haul truck." 5-29-98 Dep. Tr. of State Trooper Ralston at 9 (Appendix at 115b). State Trooper Ralston executed an Interview Statement Checklist at the scene setting forth Wyant's statement (Appendix at 6b), and State Trooper Ralston also testified at his deposition to Wyant's incriminating statement. Id. In addition, State Trooper Ralston, having performed accident reconstruction for several years and having undergone training as well, reconstructed the July 14, 1996 accident by: (1) talking with witnesses; (2) looking at the evidence including slash marks, gouge marks, and skidmarks occurring subsequent to impact; (3) taking measurements; (4) talking with Wyant; and (5) looking at the U-Haul truck. 5-29-98 Dep. Tr. of State Trooper Ralston at 10-24

(Appendix at 115b). State Trooper Ralston conclusively determined that Wyant had been following too closely behind Matthews and had struck the U-Haul in the rear causing both vehicles to go into a wooded area. Id. at 10-24. State Trooper Ralston further testified that there was no evidence that Wyant had even applied his brakes at all prior to impact. Id. at 24. Likewise, the accident report shows a diagram depicting Wyant in the right hand lane squarely impacting Matthews, also proceeding in the right hand lane, and indicates that Wyant was following too closely behind the U-Haul. (Appendix at 1b). Consequently, State Trooper Ralston issued Wyant a citation at the scene for following too closely. 5-29-98 Dep. Tr. of State Trooper Ralston at 11 (Appendix at 115b).

There is not even a shred of evidence or testimony that indicates that Matthews did anything whatsoever to even partially cause the accident on July 14, 1996. Testimony from all witnesses shows that Matthews was traveling within the speed limit and along with the flow of traffic, and that Matthews was driving entirely prudently and properly. 8-2-96 Statement of Baggett at 13; 5-7-98 Dep. Tr. of Rudd at 11, 20; 12-18-97 Dep. Tr. of Wyant at 38, 41 (Appendix at 9b, 98b, 76b).

After being cut out of his severely damaged vehicle, Matthews, was medivaced to Erlanger Medical Center in Chattanooga, Tennessee where he was diagnosed as having suffered among other injuries, a fractured skull, fractured neck and a mangled leg. 12-15-97 Dep. Tr. of Matthews at 136, 140, 144, 156-157, 159; 12-16-98 Dep. Tr. of Deborah Matthews at 78-79 (Appendix at 25b, 138b). Four days later, on July 18, 1996, Matthews was forced to have his left leg amputated mid-thigh in order to save his life. 12-15-97 Dep. Tr. of Matthews at 132, 156, 170 (Appendix at 25b).

Matthews also suffered serious impairments of numerous bodily functions; he became sore and lame resulting from severe shock and injury to his muscles, ligaments, nerves, discs, hands, legs, organs and organ systems of his head, face, nose, neck, back, body, shoulders, and extremities; suffered a closed-head injury with resulting short-term memory deficits; as well as permanent serious disfigurements and scarring all over his body; severe and debilitating depression due to the loss of

his leg; and physical and mental pain and suffering. 12-15-97 Dep. Tr. of Matthews at 63-64, 66, 130-131, 140-141, 143-148, 150, 152-154, 156-161, 163-176, 179-181, 183; 8-2-96 Statement of Kisor at 20; 12-16-98 Dep. Tr. of Deborah Matthews at 78-79; 4-23-98 Dep. Tr. of Melvin Shaw, Ph.D at 62, 97, 119, 128-129 (Appendix at 25b, 17b, 138b, 92b).

Wyant, the driver of the eighteen wheeler, was unhurt. 8-2-96 Statement of Baggett at 17; 5-7-98 Dep. Tr. of Rudd at 24; 12-18-97 Dep. Tr. of Wyant at 41 (Appendix at 9b, 98b, 76b).

SUMMARY OF ARGUMENT

The Wrongful Conduct Rule. The Court of Appeals reversed the Trial Court's erroneous grant of summary disposition by unanimous Opinion inasmuch as the Wrongful Conduct Rule is inapplicable to the facts relative to the instant action. 9-15-00 Court of Appeals Opinion. (Republic's Appendix at 81a). Specifically, the Court of Appeals properly ruled that the factual circumstances existing in this case are insufficient to establish the causation element of the Wrongful Conduct Rule. Id. The Court of Appeals correctly found that there is no causal nexus between Matthews' operating a vehicle on a suspended license and his damages which were solely caused by the driver of the eighteen wheeler truck, Brian Paul Wyant ("Wyant"). Matthews' driving with a suspended license is not a contributing cause" of the injury, and has no possible bearing upon the manner of his operation of the vehicle which was perfectly prudent and within the speed limit. Accordingly, his No-Fault action cannot be barred by the Wrongful Conduct Rule.

Even if the factual circumstances existing in this case somehow could satisfy the causation element of the Wrongful Conduct Rule (which they do not), the Wrongful Conduct Rule is also inapplicable to the situation at hand by virtue of three well-recognized exceptions to the rule.

First, the Wrongful Conduct Rule is inapplicable to the instant action because the "statutory exception" applies since the No-Fault statute upon which Matthews' cause of action is based expressly permits recovery to injured vehicle occupants without regard to fault. MCL §500.3105(2).

Accordingly, the statute is not subject to the Wrongful Conduct Rule inasmuch as the statute is to be applied to all qualifying individuals without regard to fault or wrongdoing by virtue of the express terms of the No-Fault statute which definitively lists the only types of conduct that will exclude a claimant from its purview. Id. It is clear that driving under a suspended license is not one of the specifically enumerated types of conduct. Nevertheless, Republic completely disregards the plain meaning of the statute and bases its entire position is on Republic's desire to impermissibly rewrite the No-Fault statute.

Second, the "safety statute" exception also precludes application of the Wrongful Conduct Rule since Matthews violated a misdemeanor safety statute, as opposed to a criminal or penal law which must be broken in order to trigger the Wrongful Conduct Rule.

Third, the Greater Culpability Exception provides that a plaintiff may still seek recovery if the defendant's culpability is greater than the plaintiff's culpability for the injuries. Clearly, this exception fits squarely into the facts of this case inasmuch as Wyant has a greater degree of culpability than Matthews for the injuries suffered, and in fact, Wyant is solely responsible for the accident. Although the Court of Appeals did not base its September 15, 2000 decision on the Greater Culpability Exception, the Court of Appeals' findings of fact and the record fully support that this exception also would be applicable to the case at bar. 9-15-00 Court of Appeals Opinion at 2. (Republic's Appendix at 81a) (Emphasis supplied).

The 30-Day Rule – MCL §500.3102(1) And (2).

Republic's contention that the coverage provided to U-Haul by Republic somehow did not include the subject U-Haul vehicle based on the 30-day rule utterly misses the mark in all respects especially when viewing the evidence in a light most favorable to Matthews as required. The Trial Court as well as the Appellate Courts correctly have considered and rejected on numerous occasions Republic's repeated baseless challenges based on the 30-day rule. The Trial Court properly denied

Republic's Motion For JNOV or Remittur inasmuch as Republic failed to meet its "burden of proof to establish that the vehicle was not subject to the requirement of Michigan No-Fault coverage due to its not being operated in the State of Michigan more than thirty days in any year." R. 170 (Appendix at 184b at p3).

The Court of Appeals' March 2, 2006 Opinion properly affirmed the Trial Court's decision and expressly ruled that the Trial Court's ruling contained no error whatsoever inasmuch as the "allegedly supporting" evidence presented by Republic in the record is "illegible in many instances," and the Trial Court correctly concluded that such purported evidence did not even resolve the question as to the location of the vehicle during the relevant time period pursuant to MCL §500.3102(1) and (2)–any calendar year–which would include years 1990 (when U-Haul obtained ownership of the vehicle) to 1996 (the calendar year of the accident). Despite the clear and plain language of the statute, Republic attempts to impermissibly rewrite Section 3102 to somehow pertain to the year prior to the calendar year of the accident (1995) in a wrongful and illegitimate effort to avoid its responsibilities under the law.

ARGUMENT

I. PLAINTIFF'S CLAIM FOR NO-FAULT PERSONAL PROTECTION INSURANCE BENEFITS AGAINST REPUBLIC ARE NOT BARRED BY THE WRONGFUL CONDUCT RULE.

Standard Of Review

______This Court conducts a *de novo* review of summary disposition decisions under MCR 2.116(C)(10), evaluating the factual support for the claim and viewing the evidence in the light most favorable to the nonmoving party. Dressel v Ameribank, 468 Mich 557, 561; 664 NW2d (2003). In its March 2, 2006 Opinion, the Court of Appeals set forth the applicable standard of review for a motion for summary disposition pursuant to MCR 2.116(C)(10), as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); Corley v Detroit Bd Of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. MCR 2.116(G)(4); Smith v Globe Life Ins Co, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. Corley, supra at 278. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999); By Lo Oil Co v Dep't of Treasury, 267 Mich App 19, 26-27; 703 NW2d 822 (2005).
>
> 3-2-06 Court of Appeals Opinion (Republic's Appendix at 150a).

The Wrongful Conduct Rule

The Wrongful Conduct Rule is an equitable common law doctrine which operates to bar an action when the action is based on and caused by the plaintiff's own illegal conduct which must both be serious in nature and prohibited under penal or criminal statute. See, Orzel v Scott Drug Co, 449 Mich 550; 537 NW2d 208 (1995). The Wrongful Conduct Rule prohibits a plaintiff from maintaining an action 'if, in order to establish his cause of action, he must rely in whole or in part, on an illegal or immoral act or transaction to which he is a party.' Orzel, 449 Mich at 558. See also, Morrison v McCann, 301 F Supp2d 647, 656-657 (ED Mich 2003). The rule is based on the rationale that 'courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct.' Orzel, 449 Mich at 559. Michigan courts have extended the principle to tort actions where the plaintiff seeks compensation for injuries resulting from their own illegal activities. Id. at 560, n 9. ______

______Several limitations and exceptions apply to preclude application of the Wrongful Conduct Rule under certain circumstances. First, the causation element of the Wrongful Conduct Rule must be satisfied and the conduct must not be too attenuated to the injury suffered. Orzel, 449 Mich at

564-566.

Second, "where the plaintiff's illegal act only amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe work place, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by the Wrongful Conduct Rule." Orzel 449 Mich at 561; citing; Klanseck v Anderson Sales, 426 Mich 78; 393 NW2d 356 (1986); Longstreth v Gensel, 423 Mich 675; 377 NW2d 804 (1985); Morrison, 301 F Supp2d at 657; Zeni v Anderson, 397 Mich 117; 243 NW2d 270 (1976); Massey v Scripter, 401 Mich 385; 258 NW2d 44 (1977); Hardy v Monsanto Enviro-Chem Syst, Inc 414 Mich 29; 323 NW2d 270 (1982); Poch v Anderson, 229 Mich App 40; 580 NW2d 456 (1998); Wellman v Bank One, NA, 2005 Mich App LEXIS 2238, 6 (2005) (Appendix at 242b); Ball v Dewey, 2002 Mich App LEXIS 1018 (2002) (Appendix at 206b); Lloyd v Mich Dept of Comm Health, 2002 Mich App LEXIS 1268, 5 (2002) (Appendix at 224b); Rosenick v Cham, 2001 Mich App LEXIS 741 (2001) (Appendix at 202b).

Third, under the greater culpability exception, "a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries..." Id. at 550.

Finally, where a statute permits certain classes of persons to recover, a statutory exception applies and the Wrongful Conduct Rule will not bar a plaintiff's claims under the statute. Id. at 570-571. See also, Morrison, 301 F Supp2d 647; Graham v Secure Care, Inc, 2007 Mich App LEXIS 96 (2007) (Appendix at _282b); Prime Fin Svs, LLC v Bank One, NA, 2006 US Dist LEXIS 17043 (2006) (Appendix at 267b).

A. **The No-Fault Act Operates As A Statutory Exception To The Wrongful Conduct Rule**.

The "statutory exception" to the Wrongful Conduct Rule refers to situations where the Wrongful Conduct Rule is precluded from barring a plaintiff's claims under a statute because the

statute permits individuals like the plaintiff to recover. Orzel, 449 Mich at 570-571; Morrison, 301 F Supp2d 647. See also, Graham, 2007 Mich App LEXIS 96 ("[A minor] might sue the furnisher of alcohol despite his own wrongful conduct because, by enacting legislation [set forth in the Liquor Control Act] to protect minors, the public and the legislature have declared that minors are believed to be incapable of protecting themselves from the dangers of alcohol.") (Appendix at 282b); Prime Fin Svs, LLC, 2006 US Dist LEXIS 17043, 43-44 (Because MCL §440.4704 permits recovery of any unauthorized payment of a payment order, the Wrongful Conduct Rule will not bar a criminally usurious plaintiff's claims under the statute.) (Appendix at 267b).

The Court in Orzel further explained that where a statute explicitly authorizes persons similarly situated as the plaintiff to recover, then the plaintiff is entitled to pursue his cause of action despite any wrongful conduct. Orzel, 449 Mich at 570. The Court went on to explain that only when a statute is silent regarding recovery, are courts left to determine whether a statute implies recovery for certain types of plaintiffs. Id. at 570-571. In ambiguous cases, courts may apply a test or standard such as the "statutory purpose doctrine" (as set forth in the Restatement of Torts, 2d, §286, p25) in order to determine whether a statute implies recovery for a particular type of plaintiff. Id.

In the instant action, the No-Fault statute is explicit in providing that "personal protection insurance benefits are due under this chapter without regard to fault." MCL §500.3105(2) (emphasis provided). Accordingly, the statute is not subject to the Wrongful Conduct Rule inasmuch as the statute is to be applied to all qualifying individuals without regard to fault or wrongdoing by virtue of the express terms of the No-Fault statute which definitively lists the only types of conduct that will exclude a claimant from its purview. This Court has made clear that "[i]t is a well-established principle of statutory construction that 'express mention in a statute of one thing implies the exclusion of other similar things.'" Klinke v Mitsibishi Motors Corp, 458 Mich 582, 589; 581 NW2d 272 (1998); citing; Jennings v Southwood, 446 Mich 125, 142; 521 NW2d 230 (1994).

Inasmuch as the No-Fault statute is clear and explicit and leaves nothing to interpret or infer by the Courts, strict construction of the statute must be employed and application of the Restatement's "statutory purpose doctrine" or any other test or standard is neither necessary nor appropriate. Smith v Continental Western Ins Co, 169 F Supp2d 687, 691 (ED Mich 2001) ("The Court must construe the No-Fault statute 'according to the plain and capable meaning of its words. Furthermore, when an insurance law is at issue, courts must apply a liberal construction in favor of the public and the policyholders.")

This Court has been firm and unequivocal that statutory language such as at issue here must be enforced according to its plain and literal meaning. See, e.g., Devillers v Auto Club Ins Association, 473 Mich 562, 587; 702 NW2d 539 (2005) ("Statutory or contractual language must be enforced according to its plain meaning and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of the Court."); Rory v CNA Ins Co, 473 Mich 457, 470-471; 703 NW2d 23 (2005) ("The determination of Michigan's public policy 'is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law.'"); Helder v Sruba, 462 Mich 92, 99; 611 NW2d 309 (2000) ("Where the statute is clear on its face, the role of the judiciary is not to articulate its view of 'policy,' but to apply the statute in accord with its plain language."); Putkamer v Transamerica Ins Corp of Am, 454 Mich 626, 631; 563 NW2d 683 (1997) (Courts must apply clear statutes as written.); Turner v Auto Club Ins Ass'n, 448 Mich 22, 27; 528 NW2d 681 (1995) ("If statutory language is certain and unambiguous, judicial construction is not permitted, and courts must apply the statute as written. When interpretation of the no-fault act in particular is necessary, courts are to remember that the act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it.")

The case of Cervantes v Farm Bureau General Ins Exchange, 272 Mich App 410; 726 NW2d 73 (2006) is on all fours with the case at bar. In Cervantes, the plaintiff illegal alien was injured in a car accident and sued the insurance company for refusing to grant No-Fault personal protection coverage. The insurer argued that because the plaintiff engaged in wrongful conduct by entering the United States illegally, he should not have been able to assert his domicile in the household of an insured and thereby be entitled to benefits under the insurer's policies. The Michigan Court of Appeals rejected the insurer's argument and followed the clear mandate of this Court as to the statutory construction of Michigan's No-Fault Act as follows:

> We further note that the Legislature has not included illegal aliens in the list of persons to be denied PIP benefits. See MCL 500.3113. We reject [the insurer's] request that we, in effect, incorporate into the no-fault act a provision that a relative domiciled in the same household as the insured and is thus entitled to PIP benefits under MCL 500.3114(1) should nonetheless be denied those benefits if the person is an illegal alien. [The insurer's] request is essentially that we engage in legislation, something we cannot do. Lesner v Liquid Disposal, Inc, 466 Mich 95, 101-102; 643 NW2d 553 (2002). While this case suggests a significant policy issue regarding the rights and protections that should be afforded illegal aliens under the no-fault act, it is the job of the Legislature and not this Court to address those concerns. Hauser v Reilly, 212 Mich App 184, 191; 536 NW2d 865 (1995).

Cervantes, 272 Mich App at 418.

Likewise, in the instant action, the Legislature has not included drivers operating under a suspended license in the list of persons to be denied personal protection benefits. MCL §500.3113.

B. Even if the No-Fault Act somehow does not operate as a Statutory Exception to the Wrongful Conduct Rule, Plaintiff's Conduct Falls Under The Safety Statute Exception And Does Not Constitute The Level Of Serious Misconduct Necessary To Establish the Causation Element.

This Court has made clear that the mere status of a plaintiff as a lawbreaker at the time of his injury is not sufficient in and of itself to bar him or her from resort to the courts. Manning v Noa, 345 Mich 130; 76 NW2d 75 (1956). Instead, this Court looks to the degree of harm associated with the conduct and violations. Orzel, 449 Mich 550. In the Orzel case, this Court cited the following types of cases where the Wrongful Conduct Rule has been applied–cases involving a plaintiff's

conduct of illegal lottery, trespass and gambling, illegal contract, murder, embezzlement, perjury and arson. Id. The Orzel Court also cited numerous examples of cases involving conduct insufficient to rise to the level of serious misconduct necessary to bar a cause of action by application of the Wrongful Conduct Rule, as follows: Klanseck, 426 Mich 78 (plaintiff violated the motorcycle licensing statute); Longstreth v Gensel, 423 Mich 675; 377 NW2d 804 (1985) (minor plaintiff violated the statute prohibiting driving while under the influence of alcohol); Massey v Scripter, 401 Mich 385 (plaintiff violated the statute requiring bicycle riders to ride on the right side of the road); Zeni, 397 Mich 117 (plaintiff violated the statute regarding pedestrian sidewalk laws); Hardy, 414 Mich 29 (plaintiff violated the labor safety statute). See also, Hashem v Les Stanford Oldsmobile, Inc, 266 Mich App 61; 697 NW2d 558 (2005) (plaintiff violated the statute prohibiting underage purchase and consumption of alcohol); Poch, 229 Mich App 40 (plaintiff violated the statute by furnishing alcohol to a minor); Ball, 2002 Mich App LEXIS 1018 (plaintiff violated the statute by furnishing alcohol to a minor) (Appendix at 206b).

In addition, this Court has made clear that not only is the doctrine's application limited to serious misconduct in violation of criminal or penal laws, but this Court as well as the courts below have applied an explicit "safety statute exception" to the Wrongful Conduct Rule precluding operation of the rule "where plaintiff's illegal act only amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe work place." Orzel, 449 Mich at 651. See also, Poch, 229 Mich App 40 (Violation of a safety statute such as selling or furnishing liquor to a minor does not bar a plaintiff's cause of action.); Morrison, 301 F Supp 2d at 657 (Traffic and safety law violations do not rise to the level of serious misconduct sufficient to bar a cause of action.); Barth v Goal Tender Sports Bar And Grill, 2005 Mich App LEXIS 2297 (2005) (A mere safety statute violation will bypass invocation of the Wrongful Conduct Rule.) (Appendix at 238b); Wellman, 2005 Mich App LEXIS 2238 ("Where the plaintiff's illegal conduct amounts to a violation of a

safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the Wrongful Conduct Rule.") (Appendix at 242b); Ball, 2002 Mich App LEXIS 1018, 31 ("The Wrongful Conduct Rule is applicable where the plaintiff engages in serious misconduct that is prohibited by a penal or criminal statute, and does not apply to mere violation of safety statutes, such as driving while under the influence of alcohol.") (Appendix at 206b); Lloyd, 2002 Mich App LEXIS 1268, 5 ("Violations of safety statutes, such as traffic laws, are not serious enough to support application of the [wrongful conduct] rule.") (Appendix at 224b).

Inasmuch as the Motor Vehicle Code is a safety statute and violations thereof are misdemeanors, including single and repeated violations for driving on a suspended license, any and all violations under the Code are unequivocally exempted from the Wrongful Conduct Rule. MCL §257.1; §257.901;§257.904. See also, Klinke, 458 Mich at 591-592; Orzel, 449 Mich at 561; Klanseck, 426 Mich 78; Morrison, 301 F Supp 2d at 657; Wellman, 2005 Mich App LEXIS 2238 (Appendix at 242b); Lloyd 2002 Mich App LEXIS 1268, 5 (Appendix at 224b). Accordingly, the Court of Appeals correctly ruled that Mathews' conduct of driving while his license was suspended–a misdemeanor pursuant to a safety statute–cannot operate to bar his claims pursuant to the Wrongful Conduct Rule. This is particularly true where the conduct of Plaintiff is not even remotely the cause of his injuries.

Although Republic attempts to somehow reclassify and augment the seriousness of Matthews' conduct on July 14, 1996 since he had received earlier traffic violations, Republic's attempts are improper and illegitimate. First, Matthews's July 14, 1996 misdemeanor safety statute violation remains just that by virtue of the clear letter of the statute regardless of how many traffic tickets Matthews may have received. MCL §257.901;§257.904. In addition, any past occasions where Matthews may have operated a vehicle under a suspended license cannot conceivably play any

role whatsoever in causing the July 14, 1998 accident as the sole issue as to causation is the driving manner of Wyant and Matthews on July 14, 1996. Therefore, any such irrelevant past occasions cannot be "tallied up" to make Matthews "more culpable" for an accident in which he in no way caused and is not culpable for to any degree as a matter of undisputed fact.

It is well settled that the only possible way for a plaintiff's past conduct to come into play with respect to the Wrongful Conduct Rule is where each violation cumulatively causes the specific injury and/or damages to the plaintiff, thus making the plaintiff, in essence, more culpable for his ultimate injuries than would have been the case based upon the final violation alone. For example, in the Orzel case the plaintiff sued the pharmacy which supplied drugs to him pursuant to the plaintiff's illegal prescription after plaintiff's repeated use of the drug caused permanent injuries including mental illness and addiction. Orzel, 449 Mich 550. The Orzel Court noted that the plaintiff repeatedly obtained and used the illegal drugs, which directly caused plaintiff's heightened injuries and addiction and made his conduct more egregious and therefore the Wrongful Conduct Rule was applicable. Each time the plaintiff in Orzel illegally obtained and used the dangerous drugs, he increased the injury and damage done to his mind and body directly as a result thereof, thereby making his culpability greater than if he had obtained the drugs on just one occasion. However, the Orzel situation is in no way analogous to the instant action inasmuch as Matthews was not the cause of the accident to any degree nor did any of his prior driving infractions in any way cause or contribute to the injuries he sustained as a direct result of Wyant's negligent/reckless driving. Not only is Matthews' July 14, 1996 operation of the vehicle with a suspended license completely irrelevant to causation of the July 14th accident where Matthews was carefully and prudently operating the U-Haul vehicle, but certainly any prior occasions where Matthews may have driven under a suspended licence are also completely irrelevant. In fact, if anyone's past conduct were to be relevant to causation of or culpability for the severe injuries caused to Matthews when

Wyant caused the accident by following behind him too closely on July 14, 1996, it would be the past driving record of Wyant, who has exhibited the same reckless and dangerous driving many times before.[1]

Because Republic must realize that driving on a suspended license is insufficient to trigger the Wrongful Conduct Rule, Republic makes a reaching and wholly erroneous argument that Matthews somehow violated MCL §750.414 which prohibits the taking or use of a motor vehicle without authority, and that such purported violation forms an alternate basis for barring Plaintiff's No-Fault claims pursuant to the Wrongful Conduct Rule. In such regard, Republic contends that Matthews violated MCL §750.414 since the rental agreement signed by his associate Croger Lampkin ("Lampkin") states "I will permit only licensed drivers over 18 years of age to operate equipment." Clearly, the rental agreement does not and cannot support any violation of MCL §750.414 by Matthews inasmuch as the U-Haul contract solely contains Lampkin's promises

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[1] In 1988, Wyant experienced a roll-over accident in Bronson, Michigan, where he was the only car involved. 12-18-97 Dep. Tr. of Wyant at 20, 48. (Appendix at 76b). Wyant was ticketed and he admitted responsibility for the accident. Id. In November of 1988, Wyant had another accident in Coldwater, Michigan wherein Wyant hit the car in front of him. Id at 49. Wyant, was again determined to be at fault and admitted responsibility for following too closely and/or driving carelessly. Id. In 1988, Wyant had his license suspended for having too many points. Id at 17. In 1993, Wyant was fired from his trucker job at J.B. Hunt for failure to report an accident when someone claimed that he nicked their car. Id at 8-9. On July 14, 1996, Wyant, was involved in the accident which is the subject of the instant action, where he admitted responsibility at the scene and was witnessed by several individuals to have been following too closely and was ticketed accordingly. 5-7-96 Dep. Tr. of Rudd at 12, 14-16, 19-20; 5-29-98 Dep. Tr. of State Trooper Ralston at 9-10, 12-13; 12-18-97 Dep. Tr. of Wyant, at 76. (Appendix at 98b, 115b, 76b). As a result of the July 14, 1996 accident, Matthews was seriously and permanently injured, and suffered among countless other ailments, closed-head injuries, spinal injuries, debilitating depression, and the amputation of his left leg. 12-15-97 Dep. Tr. of Matthews at 63-64, 66, 130-131, 140-141, 143-148, 150, 152-161, 163-176, 179-181, 183; 2-16-98 Dep. Tr. of Deborah Matthews at 78-79; 8-2-96 Statement of Kisor at 20; 4-23-98 Dep. Tr. of Melvin Shaw, Ph.D. at 62, 97, 119, 128-129. (Appendix at 25b, 138b, 17b, 92b). Thereafter, on July 30, 1997, Wyant was involved in yet another accident while driving his truck for Viking in Missouri, where he hit and injured a driver. 12-18-97 Dep. Tr. of Wyant, at 18-20. (Appendix at 76b). Wyant left his employ with Viking on August 11, 1997. Id.

regarding whom Lampkin will entrust the vehicle, and does not bind Plaintiff in any way whatsoever. Moreover, Matthews' driving of the U-Haul can in no way be construed as a violation of MCL §750.414 since Lampkin expressly authorized Matthews and another associate to take and operate the U-Haul vehicle in order to transport equipment and goods to the 1996 Olympics held in Atlanta.

In fact, Michigan courts have definitively rejected Republic's contention and expressly ruled that a plaintiff will not be barred from No-Fault coverage under the facts presented in this case. In Preisman v Meridian Mut Ins Co, 441 Mich 60; 490 NW2d 314 (1992), this Court ruled that an underage driver who took his parent's car without permission was not precluded from No-Fault coverage. In Cowan v Strecker, 394 Mich 110; 229 NW2d 302 (1975), this Court ruled that loaning a vehicle to another with express restrictions against further loaning will not negate implied consent for any such further loaning. Likewise, in Bronson Methodist Hosp v Forshee, 198 Mich App 617, 624-625; 499 NW2d 423 (1993), the Court of Appeals ruled that "when an owner willingly surrenders control of his vehicle to others he 'consents' to assumption of the risks attendant upon his surrender of control regardless of admonitions which would purport to delimit his consent" and therefore "such further borrowing of the vehicle by the third party is, by implication, with the consent of the owner." The Court of Appeals similarly ruled in Landon v Titan Ins Co, 251 Mich App 633; 651 NW2d 93 (2002) that bailment of automobile may translate into consent to use the car even though express permission to drive the vehicle was not granted. Accordingly, U-Haul clearly assumed the risk and is deemed to have consented to the U-Haul's use by other individuals as permitted by Lampkin, which is exactly what transpired.

Republic then stretches to alternatively argue that Matthews somehow violated the Michigan Civil Liability Statute by the use of the U-Haul which thereby purportedly provides an alternate basis for application of the Wrongful Conduct Rule. This argument utterly misses the mark for several basic reasons. First, as Republic admits in its Brief, the Michigan Civil Liability Statute is a civil

statute (MCL §257.904) and therefore cannot constitute conduct sufficient to trigger operation of the Wrongful Conduct Rule under any circumstances. Second, the statute does not even remotely apply to the facts of this case in any event. The Michigan Civil Liability Statute provides that a vehicle owner is liable for injury caused by the negligent operation of that vehicle by another unless the vehicle is driven without the owner's consent. Here, the statute is completely irrelevant because Matthews did not negligently operate the U-Haul nor did he cause injury to another. Rather, it is undisputed and fully supported by the evidence that Matthews was driving completely properly and appropriately on the day of the accident and that he was severely injured by the negligent driving of Wyant, the uninjured driver of the semi truck who caused the accident. The statute would only apply to the owner of Wyant's vehicle, not Matthews' vehicle, if Wyant somehow did not have the owner's consent to drive the vehicle. Republic is attempting to apply the statute to the wrong party based upon a complete misapplication of the clear language set forth therein.

C. Even if Plaintiff's conduct somehow does not fall under the Safety Statute Exception or fail to constitute the necessary level of serious misconduct in order to trigger the Wrongful Conduct Rule, Plaintiff's conduct is still too attenuated to establish the causation element of the Rule.

The Michigan Court of Appeals found in its September 15, 2000 unanimous Opinion to reverse the Trial Court's dismissal of Matthews' claims that there was no connection between Matthews' suspended license and his injuries in order to satisfy the causation requirement of the Wrongful Conduct Rule.

> In the case before us, there is no dispute that plaintiff was driving with a suspended license. However, the connection between plaintiff's suspended license and his injuries is simply too attenuated to establish the causation requirement of the wrongful-conduct rule. Driving a vehicle is not an illegal act in and of itself. In order to establish his cause of action, plaintiff must establish that he was driving the vehicle which was struck by the semi causing injuries, none of which is in dispute. That plaintiff's license was suspended at the time is only incidentally or collaterally connected to his cause of action. The foreseeable risk of driving with a suspended license is receiving a citation therefor along with the attendant penalties. As the Court noted approvingly in *Manning, supra, 138*, "There is another forum for punishing criminal or penal acts, and to afford the present defendant immunity is to

offer him the same subsidy that is granted charitable organizations in some jurisdictions."

The risk of being struck by a semi while driving a vehicle on an interstate is unaffected by one's status as a licensed or unlicensed driver, and is causally related only to the extent that "[t]he fatal trespass done by Eve is the cause of all our woe." *Manning, supra*. Plaintiff's status as an unlicensed driver is "merely a condition and not a contributing cause of the injury, [and therefore] a recovery may be permitted." *Id*. The Trial Court erred in granting summary disposition on the basis of the wrongful conduct rule. While many may share the Trial Court's opinion that drivers who disregard the law should not be able to avail themselves of the protection of the law, that decision rests with the Legislature.

9-15-00 Court of Appeals Opinion at 3-4. (Republic's Appendix at 81a) (Emphasis supplied).

The Court of Appeals' reasoning and conclusions are completely sound and proper, and entirely consistent with the law. Republic attempts to simplify the causation issue of the Wrongful Conduct Rule by merely stating that Matthews' driving under a suspended license need only be "a cause" of plaintiff's damages. However, in order for the Wrongful Conduct Rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's damages. See, Orzel, 449 Mich at 564. As specifically held by this Court in Orzel:

> Absent a showing that the plaintiff's illegal conduct was a proximate cause of the plaintiff's injuries, the wrongful-conduct rule could not apply to bar a plaintiff's claim: 'the plaintiff's injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. **Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted** (emphasis supplied). Manning v Bishop of Marquette, 345 Mich 130; 76 NW2d 75 (1956), quoting; Meador v Hotel Grover, 193 Miss 392, 405-406; 9 So 2d 782 (1942).
> Orzel, 449 Mich at 566. (Emphasis supplied.)

In the case of Parks v Pere Marquette Ry. Co, 315 Mich 38; 23 NW2d 196 (1946), a death action was instituted where the minor owner of an automobile was struck by a train at a railroad crossing while the automobile was being driven by another minor. This Court in Parks quoted Austin v

Rochester Folding Box Co, 111 Misc 292, 294; 181 NYS 275 (1920), and noted also Kenyon v Hathaway, 274 Mass 47; 174 NE 463 (1931):

> So in this case the failure to employ a licensed chauffeur is some evidence of negligence, which may be overcome by subsequent evidence showing that, notwithstanding the fact that the chauffeur was not licensed, he was thoroughly competent, and was not responsible for the collision. **It is not an immaterial question, like the failure to have a car license, which can have no possible bearing upon the operation of the car.** (Emphasis supplied.)

See also, Suarez v Katon, 299 Mich 38; 299 NW 798 (1941) (violation by motorcyclist of statute providing that no bicycle or motorcycle shall be used to carry more persons at one time than the number for which it is designed and equipped, was negligence per se, but to preclude recovery by the motorcyclist for injuries sustained when he collided with an automobile, such negligence was required to be a contributing cause of the accident); Kalinowski v Odlewany, 289 Mich 684; 287 NW 344 (1939) (in action for injuries caused by negligence of minor who drove a truck with consent of the truck owner's employee, who was not present at time of accident, cross-examination on whether such employee was a licensed driver was properly excluded); Ertzbischoff v Smith, 286 Mich 306; 282 NW 159 (1938) (the violation of statute requiring a bicycle to be equipped with a headlight would not preclude recovery for death of minor bicyclist from motorist who collided with bicyclist, unless the violation was a proximate cause of the accident).

Likewise, in the case of Klanseck, 426 Mich 78, the Court was faced with a similar issue with respect to an unlicensed motorcycle driver. In the Klanseck case, the court stated the following:

> **Relevancy is usually inherently established when the traffic regulation which was violated concerns the manner in which the automobile was operated. Relevancy is not so easily established when the traffic regulation which was violated concerns a licensing requirement**... (Emphasis supplied.)

The Klanseck Court then goes on to state as follows:

> We find the analysis of the Brackin court instructive: Thus the real issue in this case is whether the trial judge erred in deciding as a matter of law that Brackin's violating the restriction on his license was not relevant to the manner in which he was operating the automobile. In some situations the violation of such a restriction may be relevant to show the driver's inexperience and incompetence in handling an automobile. In this case, however, Brackin's experience and competence were not placed in issue. Moreover, the accident took place only a few days before Brackin's seventeenth birthday and he had been driving for almost two years. Boles' case did not rest upon Brackin's inexperience, but rather upon the allegation that Brackin was exceeding the speed limit. We therefore find that the Trial Court was correct in ruling that Brackin's violation of the licensing statute was not relevant and therefore was inadmissible.

It is clear that the causation element of the Wrongful Conduct Rule has not been satisfied as the Court of Appeals correctly determined based upon the factual circumstances existing in this case and undisputed legal precedent. Matthews' driving with a suspended license is not a contributing cause of the injury, but "merely a condition" of the injury, at best; and has no possible bearing upon the manner of his operation of the vehicle as the Court of Appeals correctly found. Matthews' licensing violation is clearly overcome by the fact that Matthews was indisputably driving carefully, prudently, and within the speed limit at the time of the accident. Several independent witness statements have been taken to confirm Mathews' total lack of culpability in the accident, as recounted in the Statement of Facts herein. (Appendix at 6b, 9b, 17b, 98b). On the other hand, the driver of the eighteen wheeler, Wyant, was issued a ticket in connection with the accident, was following too closely to the U-Haul vehicle carrying Matthews, and witnesses stated that it appeared that Wyant had fallen asleep or had a heart attack or something, and never once attempted to apply his brakes prior to or even after smashing into the rear end of Matthews' vehicle. Id. Clearly, Matthew's unlicensed status in no way contributed to either the accident or to Matthews' claims or serious injuries, which would have occurred whether Matthews was a licensed driver or a passenger, or whatever the circumstances involved.

Furthermore, the requirement also exists that the unlawful act must be at once the source of both his criminal responsibility and his civil right. As specifically made clear by this Court in Orzel, the Wrongful Conduct Rule will only be triggered "if, in order to establish [a plaintiff's] action, **he must rely** in while or in part, on an illegal or immoral act or transaction to which he is a party." Orzel, 449 Mich at 558 (emphasis provided). See also, Morrison, 301 F Supp2d 647. This Court in Orzel further explained that "where the illegal act is incidental or collaterally connected to the cause of action, the wrongful conduct rule does not apply, although the illegal act may be important as explanatory of other facts in the case. Id. at 564. This requirement is crucial in considering the application of the Wrongful Conduct Rule to the situation at hand. In the instant action, Matthews does not need to **rely** to any degree upon his driving under a suspended license in order to establish his No-Fault action. This is because the No-Fault statute provides benefits without regard to fault, and MCL §500.3111 applies to any occupant of the vehicle involved in an accident. Therefore, Matthews does not have to rely upon or even mention that he was driving the vehicle in order to maintain his No-Fault action inasmuch as he was a vehicle occupant as provided for in the statute. Matthews' complete lack of reliance upon his driving infraction is easily confirmed since Matthews' indisputable No-Fault coverage would be no different if he had actually been a passenger of the U-Haul with a licensed individual driving the vehicle at the time of the July 1996 accident caused by Wyant. Clearly, Matthews would likewise be covered by the No-Fault statute as an occupant of the vehicle inasmuch as Wyant was entirely responsible for the accident based on all witness and expert accounts.

In contrast, the case of Fick v Lustig, 1997 Mich App LEXIS 2268 (1997), is illustrative where an act constitutes the source of criminal responsibility and civil right. In Fick, the decedent illegally obtained a prescription for a certain medication and ultimately died as a result of ingesting that drug. (Appendix at 190b). In the Fick case, the decedent's obtaining a prescription illegally was

exactly the civil right that her cause of action was propounded on–her claims that she should have been advised against taking the drug. Therefore it is both the source of her criminal responsibility and her civil right.

Likewise, the Cervantes case is instructive as well. In Cervantes, an illegal alien was injured in a car accident and sued the insurance company for refusing to grant No-Fault personal protection coverage. Cervantes, 272 Mich App 410. The defendant argued that because plaintiff engaged in wrongful conduct of entering the United States illegally, he should not have been able to assert his domicile in the household of an insured who would thereby be entitled to personal protection benefits under the insurer's policies. The Court of Appeals ruled as follows:

> Plaintiff's illegal presence in the United States was not a proximate cause of their involvement in the April 2003 accident and their resulting injuries. The proximate case of the accident was [the other driver's] erratic and dangerous driving. Plaintiff's illegal presence in the United States, even if considered to be a 'but for' cause of the accident, is such a remote cause that the wrongful conduct rule does not bar them from recovering PIP benefits. Id. at 417.

See also, Hashem, 266 Mich App 61 (Plaintiff's suit was not barred by the Wrongful Conduct Rule even though the driver had engaged in the underage purchase and consumption of alcohol and drag racing since the illegal action was not prohibited by penal or criminal statute, and because there was no causal nexus shown since plaintiff was not required to prove his violation of the law in order to plead his claim.); Stringfellow v Oakwood Hosp and Med Cntr, 409 F Supp2d 866, 872 (ED Mich 2005) (Where plaintiff's executor sued hospital for failure to diagnose aortic dissection causing plaintiff's death and the heart condition was caused by plaintiff's illegal cocaine use, the Wrongful Conduct Rule did not apply because it is the defendant hospital's failure to diagnose that is the basis of the action and not the aortic dissection or its cause.); Gragg v Auburn Counseling Associates, Inc, 2002 Mich App LEXIS 950, 4-9 (2002) (Plaintiff, whose decedent was driving on a suspended driver's license, was not barred from his medical malpractice action because the action was not "based on or 'founded upon' [the] illegal conduct" and plaintiff is "not required to prove [his]

violation of the law to plead or prevail on his cause of action.") (Appendix at 220b); Haddix v Benetti, 1998 Mich App LEXIS 2089, 2 (1998) (The Wrongful Conduct Rule does not automatically bar an action when a plaintiff has violated a statute and "if a complete cause of action can be shown without the necessity of proving the plaintiff's illegal act, the plaintiff will be permitted to recover notwithstanding that the illegal act may be important in explaining the other facts of the case.") (Appendix at 201b); Marks v Childress, 1997 Mich App LEXIS 1784, 3-5 (1997) (Wrongful Conduct Rule did not apply to a gun thief's lawsuit against the defendant for shooting him with the stolen gun since the theft was "only collaterally or incidentally connected" to the thief's legal suit and also was "merely a condition and not a contributing cause of the injury" and plaintiff could prevail on his claim without ever mentioning from where the gun came.) (Appendix at 195b).

D. Even If The Causation Element Somehow Could Be Established, The Greater Culpability Exception Would Then Apply In The Instant Action To Preclude Operation Of The Wrongful Conduct Rule In Any Event.

1. Wyant, The Driver Of The Semi Truck, Is Entirely Culpable With Regard To The July 14, 1996 Accident.

There is also another well-settled exception to the Wrongful Conduct Rule which is triggered when both plaintiff and defendant have engaged in illegal conduct. See, Orzel, 449 Mich 550. As explained in the Orzel case, "a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries..."

One case which considers this exception is the Morrison case. The Morrison Court applied the Greater Culpability Exception to the Wrongful Conduct Rule where the plaintiff sued his psychiatrist, with whom he was having an adulterous affair, for medical malpractice. The Court ruled that although the Wrongful Conduct Rule would presumably apply since adultery is a felony, the Greater Culpability Exception precluded application of the doctrine since the psychiatrist was more culpable in the affair. Morrison, 301 F Supp2d 647.

In the instant action, Matthews' driving with a suspended license not only cannot be held to exhibit greater or even equal culpability on the part of Matthews for his injuries, but his conduct did not even cause the injuries to any degree. See, Section I (B)(2) of the instant Brief. In fact, not only did the Court of Appeals definitively rule in its unanimous September 15, 2000 Opinion that Matthews in no way caused the accident or contributed to his injuries, but the Court also recognized the factual record which explicitly established Matthews' total lack of culpability as follows:

> On July 14, 1996, plaintiff was driving a rented U-Haul van on southbound I-75 in Georgia heading for Atlanta where he intended to run a concession at the Olympic Games. At approximately 5:30 p.m., in traffic described as medium to light, plaintiff's van was struck from the rear by an eighteen wheel semi tractor-trailer carrying 50,000 pounds of insulation and driven by Brian Paul Wyant, an employee of Coachman Industries. According to witnesses and the police report, the semi was traveling behind and in the same lane as plaintiff's van for approximately fifteen minutes. Without slowing down, the semi came closer and closer to the van until, without braking, it hit the van, then pushed it down and off the road into some trees before also leaving the road into other trees. Following impact, the van traveled 443 feet and the semi traveled 485 feet. Wyant did not honk his horn prior to the accident, admitted at the scene that he "messed up" and did not see the van, and was ticketed for traveling too closely. Plaintiff suffered serious injuries including the loss of a leg.

9-15-00 Court of Appeals Opinion at 2 (Republic's Appendix at 81a).

In the case of Stopera v DiMarco, 218 Mich App 565; 554 NW2d 379 (1996), the Court specifically applied the Greater Culpability Exception where the defendant was attempting to assert the Wrongful Conduct Rule as a bar to the plaintiff's claims. In the Stopera case, the plaintiff was engaging in the felonious activity of adultery which resulted in her injuries (infection by a venereal disease), however, the Court refused to apply the Wrongful Conduct Rule and ruled that the defendant was more culpable since "the blame for plaintiff's contracting HPV rests largely with him because he is almost entirely responsible for that injury." In other words, the plaintiff's actions were a condition of her injuries, but not a contributing cause. See, Orzel, 449 Mich 550.

Likewise, in the instant action, the blame for Matthews' severe and permanent injuries in no way rests with Matthews, but rests solely with Wyant inasmuch as Wyant, the driver of the eighteen

wheeler, was entirely responsible for the accident and therefore clearly has a greater degree of culpability for Matthews' severe and permanent injuries. Accordingly, Republic, as the insurance company, simply stands in the shoes of Matthews regarding coverage, and consequently, application of the Wrongful Conduct Rule to the case at bar is thereby precluded by the Greater Culpability Exception. Moreover, Republic is also independently culpable by virtue of its wrongful and baseless denial of Matthews' No-Fault insurance claim for reimbursement of the substantial medical bills incurred in connection with his amputated leg, fractured neck and closed-head injuries.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF DEFENDANT/APPELLANT, REPUBLIC'S, MOTION FOR SUMMARY DISPOSITION AND SUBSEQUENT MOTION FOR JNOV AS TO WHETHER PLAINTIFF/APPELLEE, MATTHEWS, QUALIFIED FOR MICHIGAN NO-FAULT PERSONAL PROTECTION INSURANCE BENEFITS.

Standard Of Review.

Republic seeks reversal of the Court of Appeals' March 2, 2006 Opinion affirming the Trial Court's denial of Republic's motion for summary disposition and subsequent motion for JNOV regarding whether Matthews qualified for Michigan No-Fault Personal Protection Insurance Benefits. The applicable standard of review for summary disposition orders pursuant to MCR 2.116(C)(10) has been set forth in Section I herein.

The appellate standard of review for judgments notwithstanding the verdict requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Orzel, 449 Mich at 557-558. Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for judgment notwithstanding the verdict be granted. Id.

In the case of Miracle Boot Puller Co, Ltd v Plastroy Corp, 57 Mich App 443, 446; 225 NW2d 800 (1975), the Appellate Court stated as follows with respect to JNOV Motions:

> A trial judge must exercise extreme caution in removing an issue from a jury. The right to have a jury pass on questions must be protected even when only scant evidence is presented. In passing on this claim, we are bound to view the evidence

in the light most favorable to the nonmoving party.

______A motion for JNOV "should be granted only when there is insufficient evidence, as a matter of law, to make an issue for the jury." Pontiac School Dist v Miller, Canfield, Paddock & Stone, 221 Mich App 602; 563 NW2d 693 (1997); Wilson v General Motors Corp, 183 Mich App 21, 36; 454 NW2d 405 (1990); Richards v Detroit Free Press, 173 Mich App 256; 433 NW2d 320 (1988). When deciding a motion for JNOV, neither the trial court nor the appellate court may substitute its judgment for that of the jury, and "if the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper." Pontiac School Dist, 221 Mich App 602; Rice v ISI Mfg, Inc, 207 Mich App 634, 636; 525 NW2d 533 (1994); Knight v Gulf & Western Properties, Inc, 196 Mich App 119, 128; 49 NW2d 761 (1992); Mclemore v Detroit Receiving Hosp, 196 Mich App 391, 395; 493 NW2d 441 (1992); Reisman v Regents of Wayne State University, 188 Mich App 526; 470 NW2d 678 (1991); Vsetula v Whitmyer, 187 Mich App 675; 468 NW2d 53 (1991).

On February 6, 1998, Republic filed its Motion for Summary Disposition claiming, in part, that the U-Haul truck at issue had purportedly not been operated in Michigan for more than 30 days in the calendar year preceding the accident per MCL §500.3102. R. 57. The Trial Court denied Republic's motion with respect to those contentions. R. 59. On January 11, 2002, Republic filed another Motion for Summary Disposition (R. 92), again based on the 30-day rule, which was expressly denied by the Trial Court on February 15, 2002. R. 106. After Judgment was entered on April 19, 2002 in favor of Matthews pursuant to the jury trial verdict, Republic filed on May 9, 2002 its Motion For JNOV or Remittitur in the Trial Court (R. 140) which was denied on all grounds on September 16, 2003. R. 170 (Appendix at 184b).

No error has even been committed and Republic's contention that the coverage provided to U-Haul by Republic somehow did not include the subject U-Haul vehicle based on the 30-day rule utterly misses the mark in all respects especially when viewing the evidence in a light most favorable

to Matthews as required. Simply, a review of the evidence demonstrates that reasonable minds could differ on each issue of fact and that the jury's verdict was not against the overwhelming weight of the evidence. The Trial Court as well as the Court of Appeals correctly have considered and rejected on numerous occasions Republic's repeated baseless challenges based on the 30-day rule. The Trial Court properly ruled in its Judgment denying Republic's Motion For JNOV or Remittur that Republic failed to meet its "burden of proof to establish that the vehicle was not subject to the requirement of Michigan No-Fault coverage due to its not being operated in the state of Michigan more than thirty days in any year." R. 170 (Appendix 184b at p3).

On October 7, 2003, Republic filed its Claim of Appeal with the Court of Appeals, arguing that the Trial Court erred in denying its motion for summary disposition based on MCR 2.116(C)(10) regarding the 30-day rule. On March 2, 2006, the Court of Appeals issued its Opinion affirming the Trial Court's decision and expressly determining that the Trial Court's ruling contained no error whatsoever inasmuch as the "allegedly supporting" evidence presented by Republic in the record is "illegible in many instances," and the Trial Court "correctly concluded that such purported evidence did not even resolve the question as to the location of the vehicle during the relevant time period under MCL §500.3102(1) and (2) (Republic's Appendix at 15a).

A. The Trial Court And Court of Appeals Properly Ruled That Defendant/Appellant, Republic, Presented Insufficient Evidence In Order To Satisfy Its Burden Of Proof And Also Because Republic Waived Any Such Issue Regarding Plaintiff/Appellee, Matthews', Entitlement To Michigan No-Fault Personal Protection Insurance Benefits From Republic In Any Event.

1. The Trial Court And Court of Appeals Properly Ruled That Defendant/Appellant, Republic's, "30-Day Rule" Argument Is Without Merit.

Republic argues that it is not required to provide No-Fault benefits to Matthews because the U-Haul vehicle allegedly had not been present in the State of Michigan for more than 30 days in the preceding twelve months to the July 14, 1996 accident. However, Republic's position is based upon

an impermissible attempt to rewrite the plain language of the No-Fault Act. See, MCL §500.3102. Moreover, Republic has not even presented any competent or reliable evidence whatsoever to prove the vehicle's whereabouts during any time.

MCL §500.3102 provides:

> A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payments of benefits pursuant to this chapter.

The clear and unambiguous language of Section 3102 contains no exceptions whatsoever to the statute's strict requirements with respect to the obligation to continuously maintain security once a vehicle has been present in Michigan for over 30 days in any calendar year. Id. In fact, the plain language does not contain an exception for motor vehicle rental companies such as U-Haul. This Court has made it abundantly clear that statutes are to be enforced as written and therefore Republic may not simply write in an exception where none exists. Devillers, 473 Mich at 587; Rory, 473 Mich at 470-471; Helder, 462 Mich at 99; Putkamer, 454 Mich at 631; Turner, 448 Mich at 27.

Indeed, this Court, the Court of Appeals and the Sixth Circuit Court of Appeals have confirmed the applicability of the obligations of the No-Fault Act to rental vehicles and rental companies, as well as the 30-day Rule in particular. State Farm Mut Auto Ins Co v Enterprise Leasing Co, 452 Mich 25; 549 NW2d 345 (1996) (Car rental companies and their insurers must provide primary insurance coverage for liability arising out of the use of their vehicles.); Ryder Truck Rental, Inc v Auto Owners Ins Co, 235 Mich App 411, 414-416; 597 NW2d 560 (1999) (Michigan car rental agreements may not subvert the requirements of Michigan's No-Fault law); Allstate Ins Co v Thrifty Ren-A-Car Systems, Inc, 249 F3d 450 (6th Cir 2001) (Michigan's No-Fault insurance statute requires that motor vehicle owners including car rental companies maintain insurance coverage for liability arising out of the use of their vehicles.); Allstate Ins Co v Clarendon

Nat'l Ins Co, 2006 Mich App LEXIS 729 (2006) ("MCL 500.3101(1) and MCL 500.3102(1) require a nonresident owner of a motor vehicle, such as Ryder [Renter Trucks], to provide residual liability insurance coverage only if a vehicle is operated in Michigan for more than 30 days in any calendar year or is required to be registered in Michigan.") (Appendix at 247b).

MCL §500.3102 is equally unambiguous with regard to the time period the statute relates to–"an aggregate of more than 30 days in any calendar year." MCL §500.3102 (Emphasis supplied). As correctly determined by the Court of Appeals in the instant matter, the plain meaning of "calendar year" is "a period...divided into 12 calendar months, now reckoned as being January 1 and ending December 31." 3-2-06 Opinion (Republic's Appendix at 150a); citing, Random House Webster's College Dictionary (2nd ed), p 1491. By virtue of the precise language chosen by the Legislature, the statute is clear in its mandate that a vehicle that is present in Michigan for 30 days in any calendar year whatsoever will trigger the obligation to maintain security continuously thereafter. In fact, the Trial Court in the instant matter specifically ruled that "Michigan no-fault coverage is required if a vehicle is operated for more than thirty days in any calendar year," and that "[i]t is incumbent upon the Defendant to meet its burden of proof to establish that this vehicle was not subject to the requirement of Michigan no-fault coverage due to its not being operated in the state of Michigan more that thirty days in any year." R. 170 (Appendix at 184b at p3-4) (Emphasis supplied).

Indeed, the Michigan Court of Appeals has employed the unambiguous language of the statute numerous times in precisely this manner. See, Covington v Interstate System, 88 Mich App 492, 494; 277 NW2d 4 (1979) (Court of Appeals considered whether truck owner had been operated in Michigan in "any given" year when applying 30-day rule); Allstate Ins Co, 2006 Mich App LEXIS 729, 6-7 (Rental truck was not required to maintain security because it "had not been operated in Michigan for more than 30 days in a calendar year.") (Appendix at 247b); Bundles v Markel Ins Co of Can, 2004 Mich App LEXIS 2449, 9 (2004) (Court of Appeals ruled that truck was required to

be insured "because it was operated in Michigan for more than 30 days in one year.") (Appendix at 232b). By virtue of the plain meaning of the statute, if the subject U-Haul in the instant matter was present in Michigan for an aggregate of more than 30 days in any one calendar year since 1990 (the year the vehicle was purchased by U-Haul), then U-Haul would be obligated pursuant to MCR 500.3102 to continuously maintain security for the payments of benefits.

Accordingly, it is clear that no ambiguity exists whatsoever to the meaning of "calendar year." Likewise, there is no ambiguity that "any" includes the calendar year of the accident pursuant to MCL §500.3102. See, Parks v Detroit Auto Inter-Ins Exchange, 426 Mich 191, 200-201; 393 NW2d 833 (1986) (Supreme Court evaluated the year of the accident when applying 30-day rule); J.B. Hunt Transport, Inc v Adams, 2006 US Dist LEXIS 27375 (ED Mich 2006) (Court examined calendar year of the accident for purposes of the 30-day rule). (Appendix at 254b).

Applying the plainly stated "any calendar year" language of the statute ensures that the Legislature's intent is upheld–to protect tourists and other transient nonresidents from the criminal sanctions set forth in the statute. Berrien County Road Comm v Jones, 119 Mich App 315, 318; 326 NW2d 495 (1982); Drake v Gordon, 848 F2d 701 (6th Cir 1988). In such regard, the Legislature has made clear by virtue of the enactment of Section 3102 that the owner of a vehicle that spends more than 30 days in the state in any calendar year has it has lost its right to the statutory presumption intended only for tourists and transient nonresidents, and should therefore continuously maintain security for the vehicle thereafter.

In any event, Republic clearly has presented no evidence pertaining to 1996 (the calendar year of the accident) since as it solely presented purported evidence concerning the U-Haul's whereabouts during 1995. Nor has Republic presented any evidence of the vehicle's whereabouts from 1990, when ownership of the vehicle was obtained, through the date of the July 14, 1996 accident. Therefore, Republic's contentions regarding the location of the vehicle as it pertains to

MCL §500.3102 are completely meaningless. R. 170 (Appendix at 184b at p3-4); 3-2-06 Opinion (Republic's Appendix at 150a).

In addition, even if the relevant time period for the U-Haul's presence in Michigan was the calendar year prior to the accident (1995), which it is not, the evidence provided by Republic in purported support of its contention that the U-Haul allegedly had not been present in Michigan for 30 days in the calender year 1995 is faulty and worthless. As specifically noted by the Trial Court in its Judgment denying Republic's Motion For JNOV or Remittitur, it is well settled that for purposes of MCL §500.3102, the burden is entirely on Republic to prove that the U-Haul was not in the State of Michigan for an aggregate of 30 days in a given calender year. R. 170 (Appendix at 184b). See also, Grossheim v Associated Truck Lines, Inc, 181 Mich App 712; 450 NW2d 40 (1989). The Grossheim case provides that:

> MCL 500.3102 must be interpreted to impose the burden on the nonresident owner or registrant of the vehicle which is not registered in Michigan to maintain records to support the claim that the vehicle had not been operated in Michigan for more than thirty days in the previous calendar year. To impose that burden of proof on the victim of an accident in which the nonregistered vehicle is involved would be ludicrous.

Despite Republic's heavy burden, as its entire purported "proof" of its assertion, Republic attached to each of its numerous Trial Court motions and appellate briefs a blurred, illegible and undecipherable document that it described as U-Haul's Rental Income and Maintenance Reports, or RIM sheets. Along with the undecipherable document, Republic provided a meaningless affidavit of a U-Haul employee not even occupying a job position relevant to RIM sheets, which merely stated in wholly conclusory terms, without any detail or explanation whatsoever, that the RIM sheets showed that the U-Haul had not been present in Michigan for an aggregate of 30 days in the calender year preceding the accident. Despite Republic's bald contention, the documents produced by Defendant cannot even be deciphered inasmuch as the printing is too small and completely blurry

and smeared throughout each page. While it seems as though the sheets indicate code numbers for different states, it appears that the State of Michigan has two alternate codes (as many of the states appear to have), and one of the codes is completely unintelligible.

Finally, while Republic disingenuously argues in its Brief that it was somehow not given a fair shot on its alleged 30-day Rule issue and that the Trial Court purportedly ignored and never considered the evidence presented to the Trial Court by Republic, this contention is blatantly false.

Rather, on at least seven different occasions during these proceedings, Republic has argued that it is somehow exempted from providing Michigan No-Fault personal protection insurance benefits to Matthews since the U-Haul vehicle was not registered in the State of Michigan and allegedly was not present in Michigan for an aggregate of 30 days for the twelve months immediately preceding the accident. On each occasion, Republic's argument was definitively rejected at both the Trial Court and Appellate Court.

Republic raised this very argument to the Trial Court on five separate occasions. The first time was in response to the Assigned Claims Facility's (previously an alternate Defendant in this case) motion for dismissal of Matthews' claims against it (on the basis that Republic held priority as the responsible insurer). R. 7. Republic argued that the Assigned Claims Facility's motion should not be granted because Republic had a purportedly viable argument as to why it may not be the responsible insurer because the U-Haul allegedly had not been present in Michigan for 30 days during the twelve months prior to the accident. Tellingly, the Trial Court granted the Assigned Claims Facility's motion, dismissing it from this case and affirming Republic's priority as the responsible insurer thereby rejecting any viability of Republic's unsupportable assertion. R. 38.

Thereafter, Republic again raised the very same argument in its own motion for summary disposition, which was also alternatively based on the Wrongful Conduct Rule. R. 57. The Court granted Republic's motion based on the Wrongful Conduct Rule, declining to grant Republic's

motion pursuant to its contentions that Republic somehow was not obligated to provide benefits to Matthews since the U-Haul purportedly was not present in Michigan for 30 days during the twelve months prior to the accident. R. 59.

Thereafter, Republic again raised this argument in its appellate brief in opposition to Matthews' appeal of the Trial Court's grant of summary disposition pursuant to the Wrongful Conduct Rule. 10-15-98 Brief on Appeal by Republic. In such regard, Republic contended that the Trial Court's grant of summary disposition should be affirmed because the U-Haul had purportedly not been present in the State of Michigan for 30 days in the twelve months prior to the accident in addition to the Wrongful Conduct Rule. The Michigan Court of Appeals reversed the Court's grant of summary disposition, refusing to affirm the Court's grant of summary disposition on any basis, and remanded the case to the Trial Court for immediate trial. (Republic's Appendix at 83a).

Thereafter, Republic again raised its incorrect argument in its first application for leave for appeal to the Michigan Supreme Court on October 6, 2000, urging this Honorable Court to review the Court of Appeal's remand of this case back to the Trial Court based on the Wrongful Conduct Rule and Republic's argument that it was not responsible to insure Matthews since the vehicle was purportedly not present in the State of Michigan for more than 30 days within the prior twelve months to the accident. 10-6-00 Application For Leave by Republic. The Supreme Court denied Republic's application. 7-20-01 Supreme Court Order.

Thereafter, at a pre-trial which took place in the instant action before the Trial Court on or about October 11, 2001, counsel for Republic again advised the Trial Court and Matthews' counsel that he intended to bring a motion for summary disposition before the Court based on Republic's contention that it was not obligated to provide benefits to Matthews because the U-Haul vehicle allegedly had not been present in Michigan for 30 days within the prior twelve months to the accident. In response, the Trial Court explicitly indicated that it would deny any duplicative motions

filed by Republic on such a basis. 11-4-98 Reply Brief on Appeal by Matthews.

Despite the numerous rejections of Republic's baseless argument, Republic, once again raised the argument in yet another motion for summary disposition filed just prior to the February 2002 trial in this action. R. 94. At this time, Republic's meritless position was once again clearly and unequivocally rejected by the Trial Court. R. 106.

Notwithstanding the Trial Court's definitive rejection of Republic's unsupportable position, Republic yet again reiterated the identical meritless position in its post-judgment Motion For JNOV or Remittitur. R. 140. The Trial Court soundly denied Republic's Motion, ruling that Republic's purported evidence could not and did not support an exclusion of No-Fault coverage in this case. R. 170 (Appendix at 184b).

Accordingly, the Trial Court properly ruled that Republic failed to meet its burden of proof under the 30-day rule that the vehicle was not subject to the requirement of Michigan No-Fault coverage since Republic's purported support did not even pertain the proper time period. R. 170 (Appendix at 184b at p3-4). Specifically, the Trial Court ruled:

> The Defendant did not make a formal offer of proof at trial. However, the transcript implies that Mr. Balcerab (sic) would have testified consistent with (what) the Defendant attached to the motion for JNOV, that the subject truck was operated in Michigan for more than thirty days in calendar year 1995. While this is an interesting fact, it does not address the statute or the actual holding in part, which was that Michigan no-fault coverage is required if a vehicle is operated for more than thirty days in any calendar year. Mr. Balcerab's (sic) affidavit was void of any information about the year of the accident, 1996. Therefore, the Trial Court did not err in excluding the testimony of Mr. Balcerab (sic). His testimony would not have supported an exclusion of no-fault coverage for the instant claim. It is incumbent upon the Defendant to meet its burden of proof to establish that this vehicle was not subject to the requirement of Michigan no-fault coverage due to its not being operated in the state of Michigan more that thirty days in any year.

Likewise, the Court of Appeals properly affirmed the Trial Court's decision that Matthews was entitled to No-Fault coverage, confirming that Republic's purported evidence was insufficient, irrelevant, and deficient. 3-2-06 Opinion (Republic's Appendix at 150a). Specifically, the Court of

Appeals ruled as follows:

> In support of its claim that the U-Haul truck was a Kentucky vehicle which was not required to be registered in Michigan and which had not been in operation in Michigan for more than thirty days in the calendar year preceding the accident, defendant attached to its motion the U-Haul Company's rental income and maintenance ("RIM") statements allegedly providing a list of locations of the U-Haul truck for each day in the year preceding the accident, as well as the affidavit of Anthony Balcerzak, the president of U-Haul Company of Michigan. Balcerzak asserted in his affidavit that the U-Haul truck at issue had not been operated in Michigan "for more than thirty days *in the calendar year* preceding July 14, 1996, the date of the accident." [Emphasis added].
>
> We find no error in the trial court's ruling. Apart from the fact that the allegedly supporting RIM statements in the record are illegible in many instances, the trial court correctly concluded that Balcerczak's affidavit did not resolve the question as to the location of the vehicle between January 1, 1996 and the date of the accident. See random House Webster's College Dictionary (2nd ed), p 1491, defining the word "year" as "as a period...divided into 12 calendar months, now reckoned as being January 1 and ending December 31. – Also termed *calendar year."* [Italics in original]. Giving the term, "calendar year" its plain meaning, Balcerzak's affidavit must be read as addressing the location of the truck between January 1, 1995 and December 31, 1995, and not addressing the vehicles location from January 1, 1996 forward. Thus, considering this documentary evidence in the light most favorable to plaintiff as the nonmoving party, *Corley, supra* at 278, the evidence falls short of supporting judgment for defendant as a matter of law on this question.

2. Defendant/Appellant, Republic, Waived During Trial Any And All Purported Issues Regarding The "30-Day Rule" As Well As Plaintiff/Appellee, Matthews', Entitlement To Michigan No-Fault Personal Protection Insurance Benefits From Republic In Any Event.

Following the repeated rejection of Republic's numerous attempts to challenge its obligation to provide Michigan No-Fault Personal Protection Insurance Benefits to Matthews, Republic reversed course at trial and expressly waived any and all issues of Republic's insurance coverage of Matthews by conceding coverage at trial by repeatedly and specifically advising the jury on the record during trial that Republic expected and encouraged the jury to render a verdict in favor of Matthews, and that the only issue involved which specific bills and benefits were due. Trial Tr.

(Vol. I) at 39 (Appendix at 143b); Trial Tr. (Vol. II) at 99 (Appendix at 158b). See, Coddington v Robertson, 160 Mich App 406, 412; 407 NW2d 666 (1987); Kast v Citizens Mut Ins Co, 125 Mich App 309, 313; 336 NW2d 18 (1983); Association of Hebrew Teachers v Jewish Welfare Federation, 62 Mich App 54, 57; 233 NW2d 184 (1975). Accordingly, even if there existed any merit or basis for review whatsoever with respect to Republic's position regarding the 30-day Rule (which there does not), Republic has expressly and completely waived any such purported issue.

REQUEST FOR RELIEF

Plaintiff/Appellee, Lewis Matthews, III, respectfully requests that this Honorable Court affirm the April 19, 2002 Judgment in this matter, the Trial Court's September 16, 2003 Judgment denying Defendant/Appellant, Republic Western Insurance Company's, Motion for JNOV or Amendment of Judgment By Remittitur, and the Court of Appeals' March 2, 2006 Opinion.

Respectfully submitted,

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By:______________________________

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