STATE OF MICHIGAN
IN THE SUPREME COURT

MARIE HUNT, Personal Representative of the Estate of EUGENE WAYNE HUNT, Deceased,

Plaintiff/Garnishor Plaintiff/Appellee,

vs

DRIELICK, et al

Defendants/Garnishor Plaintiffs/Appellees,

vs

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Garnishee Defendant/Appellant.

Supreme Court No. 1574776
COA No.333630

Lower Court No. 96-3280-NI
Bay County Circuit Court

BRANDON JAMES HUBER,

Plaintiff/Garnishor Plaintiff/Appellee,

vs

DRIELICK, et al

Defendants/Garnishor Plaintiffs/Appellees,

vs

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Garnishee Defendant/Appellant

Supreme Court No. 157477
COA No. 333631

Lower Court No. 97-3238-NI
Bay County Circuit Court

APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPELLANTS

THOMAS LUCZAK and NOREEN LUCZAK,

Plaintiff/Garnishor Plaintiff/Appellee,

vs

DRIELICK, et al

Defendants/Garnishor Plaintiffs/Appellees,

vs

EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Garnishee Defendant/Appellant

Supreme Court No. 157478
COA No. 333632

Lower Court No. 96-3328-NI
Bay County Circuit Court

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STATEMENT IDENTIFYING OPINION APPEALED FROM AND RELIEF SOUGHT

Cross-Appellants[1] respectfully request leave to appeal that portion of the Court of Appeals' December 14, 2017 Opinion reversing the trial court's award of interest for the period of time commencing after the entry of judgments against Cross-Appellee Empire Insurance Company's insureds, Roger Drielick d/b/a Drielick Trucking and Corey Drielick, in favor of the Plaintiffs (Exhibit A), as well as the Court of Appeals' February 20, 2018 Order denying reconsideration of this issue. (Exhibit B). Specifically, Cross-Appellants appeal the Court of Appeals' refusal to award judgment interest against Empire for the past *17 years* in which Empire was a party to this litigation. This Court should grant the Cross-Application, reverse and reinstate the trial court's award of judgment interest for the time that Empire was a party.

In short, Cross-Appellants seek the imposition of judgment interest against Empire for the period commencing the date that Empire became a party to these cases, December 4, 2000, when the Applications for Writs of Garnishment were filed and the Writs issued against Empire as a Garnishee Defendant. From that date forward, the only issue that was litigated was Empire's obligation to indemnify its insureds for the judgments entered against them on March 14, 2000.

WHEREFORE, Cross-Appellants respectfully request that this Court reverse that part of the Court of Appeals' December 14, 2017 Opinion in which the Court of Appeals reversed the award of interest during the period in which Empire was a party to this litigation as well as the Court of Appeals' February 20, 2018 Order denying their Motion for Partial Reconsideration.

[1] The Cross-Appellants are Plaintiffs Marie Hunt, Personal Representative for the Estate of Eugene Wayne Hunt, Brandon James Huber, Thomas Luczak and Noreen Luczak (collectively, Plaintiffs), Great Lakes Carriers, Inc. and Sargent Trucking, Inc.

STATEMENT OF QUESTION PRESENTED

Whether Cross-Appellants are entitled to the award of prejudgment interest against Empire for the period of time in which Empire was a party to these three consolidated cases as a garnishee-defendant, which is now been more than 17 years, during which time the only issue litigated was whether Empire was obligated to indemnify its insureds, an issue that was ultimately determined in favor of Cross-Appellants by the Court of Appeals in Part III of its December 14, 2017 Opinion.

Cross-Appellants answer:	Yes
Cross-Appellee answers:	"No"
The trial court answered:	"Yes"
The Court of Appeals answered:	"No"

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This litigation arises out of a multiple vehicle accident that occurred on January 12, 1996 on M-13 in Bay County. Corey Drielick was operating a 1985 Freightliner tractor owned by Roger Drielick d/b/a Drielick Trucking when it was involved in this accident. Plaintiffs Luczak, Hunt and Huber filed lawsuits alleging personal injuries against Defendants Roger Drielick, d/b/a/ Drielick Trucking, Corey Drielick (collectively, the Drielicks), Great Lakes Carriers (GLC) Corporation and Sargent Trucking, Inc.

The Drielicks tendered their defense to Empire Fire and Marine Insurance Company. Empire declined the tender. The Drielicks, the Plaintiffs, GLC and Sargent entered into settlement negotiations after Empire declined any obligation under its insurance contract. Ultimately, Plaintiffs, GLC, Sargent and the Drielicks entered into settlement agreements. As part of those agreements, the parties agreed that the trial court would enter consent judgments against the Drielicks, but that Plaintiffs, Great Lakes and Sargent agreed to execute on those consent judgments only against the Empire insurance contract. The settlement agreements included partial assignments of any recovery from Empire to GLC and Sargent. The consent judgments were entered on March 14, 2000. The consent judgments concluded the litigation between Plaintiffs and Defendants GLC and Sargent, leaving the execution against Empire as the sole remaining issue in the litigation.

On December 4, 2000 Plaintiffs, with the assistance of GLC and Sargent, secured Writs of Garnishment against Empire. Empire filed objections to the Writs of Garnishment and additional discovery was undertaken as to the issues raised by Empire. After several rounds of briefs and several hearings, judgments were entered against Empire on January 17, 2003.

Empire appealed those judgments. The Court of Appeals affirmed in part, reversed in part and remanded to the trial court in an opinion dated October 5, 2004.

On remand, the parties, including Empire, undertook additional discovery and briefing and a bench trial was held. Judgments again were entered against Empire and Empire again appealed. In an opinion dated November 20, 2012, the Court of Appeals reversed the trial court. Plaintiffs, GLC and Sargent sought leave to appeal to this court. Leave was granted and in an Opinion dated June 26, 2014, this Court reversed the Court of Appeals and remanded the case to the trial court to make factual determinations as to whether there was a lease in effect between Drielick Trucking and GLC and, if so, whether Corey Drielick was acting in furtherance of a particular term of the lease agreement.

The trial court held a bench trial and made the factual determinations requested by this Court, finding that there was no lease between GLC and Drielick Trucking, and that Corey Drielick was not acting in furtherance of any term under any leasing agreement at the time of the accident. The trial court entered judgments on June 2, 2016, in favor of Plaintiffs, GLC and Sargent for the entire amount of Empire's insurance policy plus judgment interest from the dates Plaintiffs' cases were filed through entry of the judgment against Empire.

Empire again appealed to the Court of Appeals. In its Opinion dated December 14, 2017, the Court of Appeals affirmed the trial court with respect to its findings of fact, but partially reversed the interest award, finding that Empire was only responsible for interest from the date of the filing of the complaints through the March 14, 2000 entry of the consent judgments. Cross-Appellants sought reconsideration of the interest issue, pointing out that the Court of Appeals did not address the argument that Empire, as a party to this litigation since December 4, 2000, should

have been responsible *as a litigant* for prejudgment interest.[2] The Court of Appeals denied the motion for reconsideration in an order dated February 20, 2018. Empire filed an Application for Leave on April 3, 2018 and Cross-Appellants timely filed this Cross-Application.

[2] Cross-Appellants note that the Court of Appeals, while reversing the trial court's award of post-judgment interest against Empire after the date of the consent judgments, did not address the alternative argument raised both in the trial court and the Court of Appeals that Empire is subject to pre-judgment interest in its capacity as a litigant. This issue is the subject of this Cross-Appeal.

STANDARD OF REVIEW

"A trial court's interpretation and application of MCL 600.6013 is a legal issue, reviewed de novo. *Heinz v Chicago Rd Investment Co,* 216 Mich App 289, 295, 549 NW2d 47 (1996)." *Shivers v Schmiege*, 285 Mich App 636, 653–54, 776 NW2d 669, 680 (2009).

ARGUMENT

I. INTRODUCTION

Empire has been a party to this litigation for more than 17 years. During that time, Empire has engaged in discovery; has litigated this matter extensively in the trial court; has filed three separate appeals in the Court of Appeals; has litigated in this Court; and is now requesting this Court for a second round of review. Denying more than 17 years of interest for the time that Cross-Appellants were forced to overcome Empire's aggressive litigation tactics defies both the language and intent of the judgment interest statute.

The litigation can be broken down into three periods with respect to the imposition of judgment interest:

a. The period of time in which the underlying actions were pending against Empire's insureds, Roger Drielick d/b/a Drielick Trucking and Corey Drielick. This time period ended on March 14, 2000 with the entry of the Consent Judgments against the Drielicks. The Court of Appeals ruled that Empire was responsible for this period of prejudgment interest.

b. The period of time between March 14, 2000 and the issuance of the Writs of Garnishment on December 4, 2000. The Court of Appeals ruled that Empire was not responsible for any post-judgment interest on the judgment against its insureds based on language contained in the policy.

c. The period of time in which Empire was a party to this action as a garnishee-defendant from the filing of the Applications and Issuance of Writs of Garnishment on December 4, 2000 through the entry of judgment against Empire on June 2, 2016, and indeed, through the ultimate conclusion of this long and protracted litigation.

Cross-Appellants raised this issue both in the trial court and in the Court of Appeals. (See Garnishor Plaintiffs' Trial Brief re: Empire's Responsibility for Interest on Judgment, at pp 11-12 (Exhibit C) and Appellees' Brief on Appeal at 46-47 (Exhibit D).

II. THIS COURT SHOULD GRANT THE CROSS-APPLICATION TO RESOLVE THE JURISPRUDENTIALLY SIGNIFICANT ISSUE OF THE SCOPE OF MICHIGAN'S JUDGMENT-INTEREST STATUTE

Cross-Appellants have been litigating with Empire over Empire's obligations under the terms of its insurance policy since 2000, with the Court of Appeals recently affirming the trial court's finding of facts and rejecting once and for all Empire's claim that its policy provides no coverage for the judgments against its insureds. The Court of Appeals' decision to deny Cross-Appellants the statutory interest for the nearly two decades in which the *only* matter in litigation was Empire's insurance policy is jurisprudentially significant, MCR 7.305(B)(3), and was clearly erroneous, causing a material injustice to Cross-Appellants, MCR 7.305(B)(5)(a). The whole purpose of the judgment-interest statute is to compensate the prevailing party for the time-value of money. *E.g.*, *Heyler v Dixon*, 160 Mich App 130, 152; 408 NW2d 121 (1987) (purpose of the judgment-interest statute is "to compensate prevailing parties for expenses incurred in bringing suits for money damages, and for any delay in receiving such damage").

In addition, this Court resolved the issue of the accrual of interest during the period in which a garnishee defendant's liability is being litigated in *Hayes v Ross*, 236 Mich 208; 210 NW 292 (1926), discussed at length below. The Court of Appeals' contrary decision here conflicts with *Hayes*, which has never been overruled and thus remains controlling precedent on the issue. Accordingly, leave to appeal is appropriate under MCR 3.205(B)(5)(b) as well.

III. CROSS-APPELLANTS ARE ENTITLED TO PREJUDGMENT INTEREST FROM THE DATE OF FILING OF THE WRITS OF GARNISHMENT ON THE JUDGMENT ENTERED AGAINST EMPIRE

Under MCL 600.6013(1) "Interest is allowed on a money judgment recovered **in a civil action**, as provided in this section." (Emphasis added). MCL 600.6013(8) then provides for prejudgment interest as of the date of the filing of the complaint.

In enacting MCR 3.101, this Court specifically recognized that a garnishment proceeding is, in fact, a "civil action" in which the verified statement filed in support of the application for writ of garnishment serves as the complaint:

> **(M) Determination of Garnishee's Liability**
>
> (1) If there is a dispute regarding the garnishee's liability ... the issue shall be tried in the same manner as *other civil actions*.
>
> (2) The *verified statement acts as the plaintiff's complaint* against the garnishee, and the disclosure serves as the answer.
>
> * * *
>
> (**P**) **Appeals.** A judgment or order in a garnishment proceeding may be set aside or appealed in the same manner and with the same effect as judgments or orders in *other civil actions*. (Emphasis added).

In short, this Court had decreed that a garnishee defendant, such as Empire, is a party to a civil action. The application for writ serves as the complaint per MCR 3.101(M)(2) and thus triggers the running of prejudgment interest under MCL 600.6013(8). Such a ruling makes sense in the context of this litigation. Once the writs of garnishment were issued, Empire became a party to these cases and is in the same position as any other party subject to interest under MCL 600.6013.

In fact, Empire was the *only* party contesting Cross-Appellants' claims. The rationale for the imposition of interest as recognized in the cases cited by the Court of Appeals in its Opinion is to encourage settlement and to provide compensation for the delay in payment and expenses of litigation. See, *e.g.*, *Heyler v Dixon*, 160 Mich App 130, 152; 408 NW2d 121 (1987). For 17 years, Empire has been a party to this case, actively litigating in the trial and appellate courts,

and has had more than ample opportunity to participate in and control its own defense against the writs of garnishment.

As a result, interest in the disputed period is not interest that accrued on the consent judgments against Empire's insureds; it is interest that accrued on the amount of Empire's contractual liability under the terms of its insurance policy during the time that it contested its own obligations as a party to a civil action.

The imposition of interest on the amount of Empire's liability for the period of time that is was a party to this action is consistent not only with the express language of the statute, but with the purpose of the statute, as recognized by the Court of Appeals in its opinion in this case:

> MCL 600.6013 is remedial and primarily intended to compensate prevailing parties for expenses incurred in bringing suits for money damages, and for any delay in receiving such damage. *Heyler v Dixon*, 160 Mich App 130, 152; 408 NW2d 121 (1987). Because it is remedial, the statute should be liberally construed in favor of the plaintiff. See *Denham v Bedford*, 407 Mich 517, 528; 287 NW2d 168 (1980).

Hunt v Drielick, 2017 WL 6390073, at 6 (Mich App).

Empire was a party to this case in its own right since December 4, 2000. For more than 17 years, the only thing litigated in this action was Empire's liability to pay the garnishments, with Empire being the primary combatant in that dispute. Certainly, MCL 600.6013 was intended to protect against this very circumstance in which a garnishee defendant contests its own liability, rather than that of the principal defendant. Indeed, exempting a garnishee defendant from MCL 600.6013 defeats the intent of the statute; i.e., to compensate the prevailing party for expenses and delay in receiving the money damages to which they are entitled.

Ironically, Empire argued for this very application of MCL 600.6013 long ago in this litigation. This issue was argued before Judge Caprathe on December 16, 2002. Before Judge

Caprathe ruled that the appropriate date upon which interest against Empire begins to run is the date that the Writs of Garnishment were filed in the Circuit Court, December 4, 2000, Empire's counsel argued for the imposition of interest as of the dates of the Writs of Garnishment, the very same premise which Cross-Appellants now propose:

> MR. ANDERSON: This is a judgment, your Honor. That's what they're seeking, a judgment against Empire. which seems *it would stand to reason that if the judgment is against Empire. it runs from the date of the filing of the Writ. which is the complaint in this case.*
>
> THE COURT: Okay, that sounds logical to me and unless you can come up with some specific law to the contrary. I'm gonna rule that way. You can make a motion for reconsideration and -- if you can cite law to that effect.

Transcript of Proceedings, December 16, 2002, pp. 19-20 (Exhibit C at Exhibit 2).

As noted above, this Court has long recognized that in a garnishment proceeding, interest accrues on the principal amount of the garnishment at the prevailing legal rate. For example, in *Hayes v Ross*, 236 Mich 208, 212-213; 210 NW 292, 293 (1926), this Court awarded interest against the garnishee defendant from the date of the affidavit of garnishment that initiated the garnishment proceedings:

> The affidavit for the writ of garnishment alleged that the amount 'now due' the plaintiff from the principal defendant 'is the sum of $3,500.' There was no allegation that the interest rate had been agreed upon. In the absence of such an agreement, that sum then due bore only the statutory rate of interest.
>
> * * *
>
> The judgment will be vacated, and the case remanded, with direction to enter judgment for $3,500, and interest at 5 per cent. *from the date of the affidavit* to the date of the judgment. (Emphasis added).

There is no reason for this Court to set aside that precedent, and as an intermediate appellate court bound by this Court's precedents, the Court of Appeals lacked the authority to do so.

Given the purpose of awarding judgment interest, it is unsurprising that many other jurisdictions similarly recognize that when a garnishee defendant delays payment while pursuing its own interest in retaining the garnished funds, the award of interest is proper:

> Although rule 64D is designed to facilitate collection and should not be used to place undue burdens or risks on garnishees, a trial court has the discretion to award prejudgment interest when a garnishee becomes unduly partisan, or otherwise obstructs the process.

Whitney v Faulkner, 95 P3d 270, 275 (Utah 2004).

> The stipulated judgment sought to be enforced under the garnishee's indemnity policy does, however, represent pecuniary damages, and, consequently, it seems to us this is the kind of action where *prejudgment interest applies from the time of the commencement of the garnishment action to entry of the garnishment judgment*. (Emphasis added).[3]

Alton M Johnson Co v MAI Co, 463 NW2d 277, 280 (Minn 1990).

See, also, *Glen L Olson, Inc v RL Thompson Enterprises, Inc*, 88 Or App 309, 315; 745 P2d 1227, 1230 (1987), rev'd on other grounds 306 Or 320; 759 P2d 1087 (1988), for the proposition that prejudgment interest runs from the date of garnishment under Oregon law; and *Malley v Altman*, 14 Wis 22 (1861) for the proposition that under Wisconsin law a "proceeding against a garnishee is an action."

IV. CROSS-APPELLANTS WERE NOT REQUIRED TO FILE A CROSS APPEAL

Cross-Appellants expect Empire to argue that they have waived the right to pursue the argument that they are entitled to interest on the principle amount of the judgment against

[3] In fact, this case is similar to the case at bar in which the insurer did not defend the insured, a stipulated judgment was entered against the insured and the plaintiff initiated a garnishment proceeding against the insurer. The Minnesota Supreme Court awarded *prejudgment* interest against the insurer from the date of the initiation of the garnishment action.

Empire because they did not file a cross appeal of a ruling by the trial court that interest began to accrue on the dates that the original complaints were filed against the Drielicks.

Such an argument, however, would have no merit. The trial court entered judgment against Empire that included interest from the date that the underlying cases were filed. During the proceedings regarding interest in the trial court, Cross-Appellants requested interest from the date of filing the original complaints. As an alternative argument, Cross-Appellants requested interest from the date of the issuance of the writs of garnishment. The trial court awarded interest for the entire period from the dates the complaints were filed against the Drielicks (*Hunt*: March 21, 1996; *Luczak*: March 26, 1996; and *Huber*: April 11, 1997) through the entry of judgment against Empire on June 2, 2016. Empire claimed an appeal from the entire judgment. Cross-Appellants maintained the alternative position espoused herein that if they were not entitled to interest for the entire period, that they were entitled to prejudgment interest on the judgment against Empire for the entire time that Empire was a party. Because Cross-Appellants were not seeking relief beyond that awarded by the trial court, they were not required to file a cross appeal from the judgment.

The Court of Appeals affirmed the award of prejudgment interest from the date of filing through the date that judgments were entered against the Drielicks, March 14, 2000, but reversed as to any interest after that date. Cross-Appellants seek leave to appeal that part of the Court of Appeals opinion denying the recovery of prejudgment interest during the time that Empire was a party to the case.

Cross-Appellants were not required to file a cross appeal to preserve this issue in the Court of Appeals as it was merely an alternative ground for affirming the trial court judgment as to the award of judgment interest and was not seeking additional relief:

> Although a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court.

In re Estate of Herbach, 230 Mich App 276, 284; 583 NW2d 541, 544 (1998). Accord, *e.g.*, *Vanslembrouck ex rel Vanslembrouck v Halperin*, 277 Mich App 558, 565, 747 NW2d 311, 315 (2008); *Assn of Businesses Advocating Tariff Equity v Pub Serv Com'n*, 192 Mich App 19, 24; 480 NW2d 585, 587 (1991) ("It is well established that an appellee who has taken no cross appeal may still urge in support of the judgment in its favor reasons that were rejected by a lower court.").

V. CONCLUSION

Empire has been an active party in this litigation since December 2000 when it was added as a garnishee defendant. During the last 17 years, Empire has taken depositions, filed and opposed motions, defended its position in three bench trials, initiated and litigated three appeals to this Court and pursued its position in the Michigan Supreme Court, including its pending Application for Leave. Because the Michigan Court Rules treat garnishment proceedings as civil actions and that the writs of garnishment served on the garnishee defendant are treated as the complaints in the civil actions, interest began accruing under MCL 600.6013 with the filing of the writs of garnishment.

Accordingly, Cross-Appellants respectfully request that this Court grant leave to appeal that part of the Court of Appeals opinion vacating the trial court's award of some 17 years of prejudgment interest.

Respectfully submitted,

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Dated: April 27, 2018

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