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. 157476
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

CROSS-APPELLANTS' REPLY TO CROSS-APPELLEE'S RESPONSE TO 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

ANDREW L. FINN (P43603)
STEVEN M. HICKEY (P33142)
Attorneys for Sargent Trucking, Inc.
901 Wilshire Drive, Suite 550
Troy, MI 48084
(248) 247-3300

DAVID CARBAJAL (P41130)
ROBERT ANDREW JORDAN (P73801)
Attorneys for Great Lakes Carriers
300 Saint Andrews Road., Suite 302
Saginaw, MI 48605
(989)790-0960

BRUCE F. TROGAN (P26612)
Attorney for Plaintiff Hunt
7628 Gratiot Road
Saginaw, MI 48609
(989) 781-2060

JOHN J SHINNERS (P41337)
Attorney for Defendants/Cross-Plaintiffs Drielick
60 Harrow Lane, Suite 4
Saginaw, MI 48638
(989) 249-4900

PETER J. RIEBSCHLEGER (P30689)
Attorney for Plaintiffs Luczak
4597 State Street
Saginaw, MI 48603
(989) 790-2102

JOSEPH S. HARRISON (P30709)
Attorney for Plaintiff Huber
P.O. Box 6916
Saginaw, MI 48608
(989) 799-7609

DAVID S. ANDERSON (P31213)
Attorney for Garnishee Defendant Empire
4190 Telegraph Road, Suite 2300
Bloomfield Hills, MI 48302
(248) 593-1440

NICOLETTE S. ZACHARY (P49522)
Garan Lucow Miller, P.C.
1111 W. Long Lake Rd., Suite 300
Troy, Michigan 48098-6333
(248) 641-7600

---/

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case Law - Michigan

Case Law - Other Jurisdictions

Statutes and Court Rules - Michigan

Statutes and Court Rules - Other Jurisdictions

CROSS-APPELLANTS' REPLY TO CROSS-APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPELLANTS

I. INTRODUCTION

The Application for Leave to Appeal as Cross-Appellants filed by the Appellees/Cross-Appellants is limited to a single issue; *to wit*, whether Appellant/Cross-Appellee Empire Fire & Marine Insurance Company is responsible for prejudgment interest on the principal amount of the judgment entered against it as a garnishee-defendant for the 17 years in which it was a party and active litigant in this matter. Cross-Appellants are not seeking leave to appeal the Court of Appeals' determination that Empire is not liable for post-judgment interest on the judgment entered against its insureds, Roger Drielick d/b/a Drielick Trucking and Corey Drielick, pursuant to the terms of the Empire insurance contract. Thus, Empire devotes a substantial portion of its Response arguing issues of insurance contract interpretation, issues that are irrelevant to the Cross Appeal.

II. ARGUMENT

A. CROSS-APPELLANTS ARE ENTITLED TO PREJUDGMENT INTEREST AGAINST EMPIRE FOR THE ENTIRE TIME THAT IT WAS A PARTY TO THIS LITIGATION

Interestingly, Empire does not dispute that it has been a party to this litigation since December 4, 2000, when the applications for writs of garnishment were filed. Instead, Empire argues that December 4, 2000 is a meaningless date for judgment interest purposes, the only dates that matter are the dates that the underlying complaints were filed by the Plaintiffs in 1996 and 1997, even though Empire did not become a party until 2000.

This argument in based on *Grand Trunk Western R Co v Pre-Fab Transit Co, Inc,* 46 Mich App 117; 207 NW2d 469 (1973). In that case, a third-party complaint was filed several

years after the filing of the initial complaint in which a third party defendant was added to the case under a contribution theory. The third party defendant argued that its liability for interest as part of the judgment against it commences with the filing of the third party complaint, not the original complaint in the action. The Court of Appeals ruled as follows:

> We conclude that the trial court, when it ordered that the filing of the third-party complaint related back to the date of the original complaint of Grand Trunk, placed all the parties to the action on an equal footing. We also rule that the interest statute, M.C.L.A. s 600.6013; M.S.A. s 27A.6013, 'interest to be calculated from the date of filing the complaint' implies that only that complaint central to the overall action is relevant for purposes of determining interest. Since a third-party complaint for contribution is not by any means central to the action, but is ancillary or auxiliary thereto, the interest statute is held to contemplate that a third-party defendant's liability for interest runs from the date of filing of the original complaint.

,*Grand Trunk W R Co v Pre-Fab Transit Co, Inc*, 46 Mich App 117, 126–27; 207 NW2d 469, 474 (1973). Utilizing this logic, if, as Empire argues, the garnishment is also ancillary proceeding, interest against Empire, even though it is a later added party, should also run from the date of the original complaints.

Empire next cites *Schultz v AAA Michigan*, 1999 WL 33441320 (Mich Ct App, May 28, 1999), for the proposition that a garnishment action, like the third party complaint in *Grand Trunk, supra,* is an ancillary proceeding and not a new action. In *Schultz*, the plaintiff sought the imposition of 12% contract interest from the defendant's liability insurer under MCL 600.6013(5), rather than the variable rate under MCL 600.6013(6), because the garnishment pertained to a contractual obligation of the garnishee-defendant. The Court rejected this argument, concluding:

> Garnishment is a proceeding ancillary to the original suit; it is not a new or separate action. *Ward v Detroit Automobile Inter-Ins Exchange,* 115 Mich App 30, 35; 320 NW2d 280 (1982).

> Therefore, the filing of a writ of garnishment in this case did not start a new cause of action, but rather constituted a post-judgment continuation of the existing lawsuit to satisfy the judgment. A tort judgment cannot be transformed into an action on a written instrument simply by the filing of a writ of garnishment against an insurance company in that tort case.

Schultz v AAA Michigan, No. 201175, 1999 WL 33441320, at *3 (Mich Ct App, May 28, 1999).

Thus, all that *Schultz*, an unpublished decision with no precedential authority, establishes is that a garnishee defendant is not subject to interest at the contract rate. It does not establish that the garnishee defendant is absolved from an interest obligation as a party to the garnishment action. In reaching this conclusion, the *Schultz* court relied on *Ward v Detroit Auto Inter-Ins Exch*, 115 Mich App 30; 320 NW2d 280, 282 (1982) for the proposition that, "[r]ather than being a new or different action, a garnishment proceeding is ancillary to the original suit." However, *Ward* predates the adoption of MCR 3.101 in which this court established that a garnishment proceeding is indeed to be treated as a civil action and that the verified statement submitted with the application for the writ of garnishment is to be treated as the complaint. MCR 3.101(M)(1) and (2).

In fact, Cross Appellants' argument is based upon the fact that the garnishment is treated as a civil action against the garnishee defendant, in this case Empire, that commences with the filing of the verified statement in support of the application for the writ as so stated in the court rule. In its response, Empire has chosen not to address this issue, instead arguing that Cross-Appellants' argument is made "without any specific legal authority," either because it has no response or it does not consider the Michigan Court Rules to be "specific legal authority." Whichever it is, this argument is laid out succinctly in the Application for Leave to Appeal as Cross-Appellants at pp 8-10.

In further support of the argument that the writ of garnishment serves as the "complaint" against the garnishee defendant for purposes of the accrual of interest, Cross-Appellant cited *Hayes v Ross*, 236 Mich 208; 210 NW 292 (1926). Empire seeks to avoid the precedential value of this Supreme Court opinion merely by stating the case predated MCL 600.6013. This rather cursory attempt to distinguish this case does not address the fact that this Court recognized as early as 1926 that a garnishee defendant that unsuccessfully challenges its obligation under a writ of garnishment is liable for judgment interest from the date of the affidavit through the entry of judgment against the garnishee-defendant. Nothing about MCL 600.6013 changes the analysis, given that prejudgment interest already was an element of damage prior to the enactment of MCL 600.6013.

Empire's attempts to minimize and distinguish the case law from other jurisdictions does not create a significant distinction between these out of state cases and the situation now before the court. In *Whitney v Faulkner*, 95 P3d 270 (Utah 2000), the court recognized that where a garnishee defendant is unduly partisan, or causes unreasonable delay, the party is subject to prejudgment interest on the garnished funds. It is hard to imagine that a delay of 17 years is somehow considered reasonable. Similarly, although *Alton M Johnson Co v MAI Co*, 463 NW2d 277 (Minn 1990) interprets a Minnesota statute pertaining to prejudgment interest, this statute authorizes interest from the initiation of the "commencement of the action." Minn Stat 549.09 subd 1(b). This is analogous to the interplay between the Michigan Court Rules and MCL 600.6013 in which interest commences upon the filing of the complaint; i.e., the affidavit in support of the writ of garnishment. The Minnesota Court had no hesitation in recognizing that the garnishment proceeding is an "action" just as the garnishment proceeding in this case is a "civil action."

Empire's attempt to distinguish *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) because the garnishment at issue in that case was a prejudgment garnishment rather than a post-judgment garnishment is a distinction without a difference. The award of interest on the garnishee defendant was based on the date of the garnishment. As the court stated, "[i]nterest beginning on the date of the garnishment is proper." *Id,* at 315.

Empire does not even address *Malley v Altman*, 14 Wis 22 (1861), which was cited for the proposition that under Wisconsin law a "proceeding against a garnishee is an action" just as it is in Michigan.

Although Empire attempts, without compelling argument, to distinguish the cases from other jurisdictions that were cited by Cross-Appellants, it does not offer a single case from any jurisdiction in which a court denied the right to prejudgment interest against a garnishee defendant for the period of time in which it challenged its liability on the garnishment.

B. THE CROSS APPEAL IS PROPERLY BEFORE THIS COURT

Empire argues that Cross-Appellants have waived this issue by not filing a notice of cross appeal in the Court of Appeals. In making this argument, Empire fails to address the cases cited by Cross-Appellants in their Application for Leave in which the well established precept that a party is not required to pursue a cross appeal in order to raise alternative grounds to affirm the trial court's judgment, even if those grounds were rejected by the trial court, so long as the party is not seeking relief that is more favorable to it than was obtained in the trial court. *See, In re Estate of Herbach,* 230 Mich App 276, 284; 583 NW2d 541, 544 (1998); *Vanslembrouck ex rel Vanslembrouck v Halperin*, 277 Mich App 558, 565, 747 NW2d 311, 315 (2008); and *Assn of Businesses Advocating Tariff Equity v Pub Serv Com'n,* 192 Mich App 19, 24;480 NW2d 585,

587 (1991), cited and discussed at page 14 of Cross-Appellants' Application for Leave, as well as MCR 7.307(B), which states as follows:

> **(B) Alternative arguments; new or different relief.** A party is not required to file a cross-appeal to advance alternative arguments in support of the judgment or order appealed. A cross-appeal is required to seek new or different relief than that provided by the judgment or order appealed.

Instead of addressing this issue, Empire cites two cases in which the appellant sought to argue new grounds in the appellate court that were not raised in the trial court. *Woodman v Kera*, 425 Mich 262; 389 NW2d 412 (1986) and *Butcher v Dept of Treasury*, 425 Mich 262; 389 NW2d 412 (1986). There is no question that the issue raised in this Cross Appeal was raised both in the trial court and in the Court of Appeals. Indeed, as noted in the Application for Leave at page 11, the very first time that it was raised, it was raised by Empire at a hearing in December 2002. It was raised by Cross Appellants in both courts. (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)). Thus, neither *Woodman* nor *Butcher* have any relevance to whether this issue has been preserved.

Empire also cites two cases in which, unlike the case before this Court, the party sought relief beyond that granted by the trial court. In *Michigan Harness Horsemen's Ass'n v Racing Com'r*, 123 Mich App 388; 333 NW2d 292 (1983), the plaintiff-appellant sought a declaration that a statute be interpreted in a certain way. The trial court agreed and granted a declaratory judgment in favor of the plaintiff. The plaintiff also sought a declaration that interpreting the statute in a way contrary to that urged by plaintiff would result in constitutional violations. The trial court did not rule on this issue. Therefore, because this would provide relief beyond that

granted in the trial court, plaintiff's failure to file a cross appeal precluded judicial review of the issues.

Similarly, in *Rohl v Leone*, 258 Mich App 72; 669 NW2d 579 (2003), the appellee did not pursue a cross appeal of an order directing verdict in favor of appellant on a counterclaim. Once again, this is a case in which the court declined to consider an issue that would have expanded the relief granted to the appellee, not a request to consider an alternative ground to affirm the lower court.

Thus, because the Application for Cross Appeal merely seeks an alternative ground to affirm the interest award, it was not necessary to pursue a cross appeal in the Court of Appeals and this issue is properly preserved and before this Court.

III. CONCLUSION

In conclusion, Empire's response does not establish any basis upon which to deny Cross Appellants the right to interest for the 17 years in which Empire, as a *party* to this civil action has actively participated in this litigation in order to try to avoid meeting its obligation under its policy of insurance and to keep from paying its policy limits in satisfaction of Cross Appellants' claim.

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

Respectfully submitted,

/s/ Robert Andrew Jordan
DAVID CARBAJAL (P41130)
ROBERT ANDREW JORDAN (P73801)
Attorneys for Assignee-Defendant/Great Lakes Carriers, Inc. on Plaintiffs/Appellees
P.O. Box 1966
Saginaw, MI 48605-1966
(989) 790-0960

/s/ Andrew L. Finn
ANDREW L. FINN (P43603)
Attorney for Defendant/Appellant Sargent Trucking, Inc. on behalf Plaintiffs/Appellees
901 Wilshire Drive, Suite 550
Troy, MI 48084
(248) 247-3300

Dated: June 13, 2018