IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

MARIE HUNT, Personal Representative of the Estate of EUGENE WAYNE HUNT, Deceased,
Plaintiff/Cross-Appellant,
vs
DRIELICK, et al
Defendants/Cross-Appellants,
vs
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
Garnishee Defendant/Cross-Appellee.

Supreme Court No. 157476
COA No.333630

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

BRANDON JAMES HUBER,
Plaintiff/Cross-Appellant,
vs
DRIELICK, et al
Defendants/Cross-Appellants,
vs
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
Garnishee Defendant/Cross-Appellee.

Supreme Court No. 157477
COA No. 333631

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

THOMAS LUCZAK and NOREEN LUCZAK,
Plaintiffs/Cross-Appellants,
vs
DRIELICK, et al
Defendants/Cross-Appellees,
vs
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
Garnishee Defendant/Cross-Appellee.

Supreme Court No. 157478
COA No. 333632

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

Cross-Appellants' Supplemental Brief
Oral Argument Requested

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Table of Contents

Index of Authorities

Cases

Statutes

Rules

Basis of Jurisdiction

This matter is an Application for Leave to Appeal as Cross-Appellants from a Court of Appeals Opinion dated December 14, 2017 and from the Court of Appeals' Order Denying Reconsideration dated February 20, 2018. An Application for Leave to Appeal was timely filed by the Appellant, Empire Fire and Marine Insurance Company on April 3, 2018, pursuant to MCR 7.305(C). Cross Appellants timely filed their Application for Leave to Appeal as Cross-Appellants on April 27, 2018.

This Supplement Brief is submitted as requested in the November 27, 2019 Order of this Court.

Statement of Questions Involved

I. Whether an insurer that refused to defend or indemnify its insureds based upon a policy exclusion that is later found to be inapplicable, is obligated to pay prejudgment insurance from the date of filing the complaint through the entry of judgment against its insureds.

The Trial Court answered "yes"
The Court of Appeals answered "yes"
Plaintiffs/Cross-Appellants answered "yes"
Garnishee Defendant/Cross-Appellant answered "no"

II. Whether an insurer that refused to defend or indemnify its insureds based upon a policy exclusion that is later found to be inapplicable, is obligated to pay post-judgment interest from the date of entry of judgment against its insureds based upon the language of a provision in the insurance contract that obligates the insurer to pay post-judgment interest on suits that it defends.

The Trial Court answered "yes"
The Court of Appeals answered "no"
Plaintiffs/Cross-Appellants answered "yes"
Garnishee Defendant/Cross-Appellant answered "no"

III. Whether an insurer that defends its own interests in a garnishment action as a party to that proceeding is subject to judgment interest pursuant to MCR §600.6013 commencing upon the filing of the application for writ of garnishment at which time it became a party to a civil action pursuant to MCR 3.101.

The Trial Court answered "no"
The Court of Appeals did not answer this question
Plaintiffs/Cross-Appellants answered "yes"
Garnishee Defendant/Cross-Appellant answered "no"

STATEMENT OF FACTS AND PROCEDURAL HISTORY

These consolidated cases, which were filed 1996 and 1997, arise from a January 16, 1996 multi-vehicle collision that occurred in Bay County, Michigan. Corey Drielick was driving a 1985 Freightliner tractor that was owned by Roger Drielick d/b/a Drielick Trucking. *Appendix 23, Hunt v Drielick, Court of Appeals Docket Nos. 299405, 299406 and 299407, November 20, 1012 (Hunt II)* at 444a. The vehicle was insured by Empire Fire & Marine Insurance Company pursuant to an "Insurance for Non-Trucking Use" policy. *Appendix 33, Empire Fire & Marine Ins. Co. Policy No NT 410920*, at 661a. Plaintiff Marie Hunt's decedent, Eugene Wayne Hunt, was killed in the accident. Plaintiffs Brandon James Huber, and Noreen Luczak were injured in the accident.

Among the defendants in these cases were the Drielicks, sued as the owner and operator of the tractor, and two trucking companies, Great Lakes Carriers, Inc. (GLC) and Sargent Trucking, Inc. The Drielicks sought a defense from their insurer, Empire, who declined. *Appendix 30, Deposition of Roger Drielick, July 30, 1998,* at 590a; and *Appendix 26, Trial Court Transcript, December 16, 2002,* at 480a. After Empire declined to participate in the defense or indemnification of its insureds, Plaintiffs, GLC, Sargent and the Drielicks entered into settlement negotiations which ultimately culminated in the filing of consent judgments against the Drielicks. The consent judgments were entered on March 14, 2000. *Appendix 9, Consent Judgments,* at 109a et seq.

On December 4, 2000 Plaintiffs, with the assistance of GLC and Sargent, secured Writs of Garnishment against Empire. *Appendix 10, Applications and Writs of Garnishment,* at 119a et seq. Empire filed its Garnishee Disclosures on January 10, 2001 denying liability to the

Plaintiffs. *Appendices 6, 7 & 8, Registers of Action, at 41a, 70a, and 94a*.[1] In short, Empire denied liability under the Non-Trucking Use policy based upon the "Business Use" exclusion. It has been actively litigating its position for the past 19 years. In fact, the only matter that has been at issue since the issuance of the Writs of Garnishment in December 2000 has been the question of whether Empire's policy applies to the Drielicks' liability to Plaintiffs. The applicability of the policy finally has been conclusively established with this Court's November 27, 2019 denial of Empire's Application for Leave to Appeal. *Appendix 25, Supreme Court November 27, 2019 Order, at 469a.*

After filing the Disclosure, Empire served discovery and a Motion to Quash the Writs of Garnishment. *Appendix 6, Hunt Register of Action, Docket No. 208* at 41a. Empire also took at least one deposition, that of Roger Drielick on May 24, 2001, prior to the hearing on the Motion to Quash the Writs. *Appendix 30, Deposition Transcript, R. Drielick*, at 572a.

The trial court denied Empire's Motion to Quash in orders dated October 5, 2001 and November 8, 2001. *Appendix 6, Docket Nos. 244 & 246* at 44a. Judgment was entered on the Writs of Garnishment on January 17, 2003. *Appendix 11*, at 123a. Empire appealed the Judgments on Writs of Garnishment. The Court of Appeals reversed and remanded the matter to the trial court with instructions to take evidence on the issue of the applicability of the business use exclusion. *Appendix 22, Hunt v Drielick, Court of Docket Nos. 246366, 246367 and 246368, Hunt I*, at 433a.

After further discovery in which Empire was a participant,[2] the trial court again overruled Empire's objection. *Appendix 6, Docket No. 366,* at 52a. Empire sought

[1] The specific docket entries are Docket Nos. 202 (Hunt), 139 (Luczak) and 106 (Huber). In future references, only the Hunt docket number will be referenced where the pleadings and entries are contained in each of the three Registers of Action.

[2] See, for example, *Appendix 32, Deposition Transcript, J. Bateson, July 22, 2015,* at 641a.

reconsideration of the Court's ruling. *Appendix 6, Docket No. 369* at 53a. This motion was denied and Empire again appealed the trial court's orders overruling its objections and denying reconsideration. *Appendix 6, Docket No. 380* at 53a. The Court of Appeals reversed the trial court, finding that both clauses of the business use exclusion precluded coverage for the Drielick's liability. *Appendix 23, Hunt II,* at 440a.

Plaintiffs, along with GLC and Sargent, filed an Application for Leave to Appeal with this court. Leave was granted and the court ultimately reversed the Court of Appeals, finding that the first clause of the business use exclusion is inapplicable and the remanding the case to the trial court for a factual determination as to whether the second clause of the exclusion precludes coverage. *Appendix 24, Hunt v Drielick, Supreme Court Docket Nos. 146433, 146434 and 146435, Opinion dated June 26, 2014,* at 449a.

The trial court conducted a hearing on this issue as directed by this court. The trial court, in an opinion and order dated September 28, 2015 determined that the second clause of the exclusion was inapplicable. *Appendix 12, Opinion and Order, September 28, 2015,* at 136a. After further briefing on the amount of interest that should be awarded, final judgments were entered on June 2, 2016. *Appendix 3, Judgments Entered Against Empire, June 2, 2016,* at 7a.

Empire again appealed. The Court of Appeals affirmed the inapplicability of the business use exclusion, affirmed the award of prejudgment interest through the date of the Consent Judgments, but reversed the award of interest accruing after the entry of the Consent Judgments based upon language in the Empire policy The Court of Appeals did not address whether interest should accrue against Empire based upon its status as a party to these actions. *Appendix 4, Hunt v Drielick, Docket Nos. 299405, 200406 and 299407 (Hunt III),* at 11a.

Plaintiffs, GLC and Sargent sought reconsideration of the reversal of the award of interest

after the Consent Judgments, which was denied. *Appendix 5, Order Denying Motion for Reconsideration, February 20, 2018,* at 26a. Empire filed its Application for Leave to Appeal in this court. Plaintiffs, GLS and Sargent filed the Application for Leave to Appeal as Cross-Appellants as to the interest issue.

This court, in an Order dated November 27, 2019, denied Empire's Application for Leave and directed the parties to file supplemental briefs on the issue of the period of time in which Empire is liable for interest. *Appendix 25, Michigan Supreme Court Order, November 27, 2019,* at 469a.

In short, for the past 19 years, Empire has been a party to these cases and actively litigating the question of whether it is obligated to indemnify its insureds for their liability to Plaintiffs. Empire's liability under its insurance policy has been the *only* matter at issue during this entire period.

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 the past 19 years. During that time, the only issue that has been in dispute has been whether Empire's Non-Trucking Use insurance policy is applicable to the judgments entered against the Drielicks. During these past 19 years, Empire has engaged in discovery; has litigated this matter extensively in the trial court; has filed three separate appeals in the Court of Appeals; and has twice litigated in this Court.

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.

Empire's obligation for the imposition of interest rests on both its capacity as the Drielicks' insurer and on its status as a party litigation.

As an insurer, there is no question that Empire, as the Drielicks' insurer, is liable for prejudgment interest under MCL 600.6013 at least through the entry of the Consent Judgments on March 14, 2000. Empire argues that, as an insurer, it is not liable for post-judgment interest

after that date because it breached its duty to defend the lawsuits and thus its policy excuses it from the payment of post-judgment interest.

Empire, however, is more than just an insurer in these cases. It is also a party. Empire became a party on December 4, 2000 when the trial court issued the Writs of Garnishment against it. Empire first appeared in these cases on January 10, 2001 with the filing of its Garnishee Disclosures. As a party, therefore, Empire is liable for judgment interest starting with the filing of the Applications for Writs of Garnishment on December 4, 2000.

II. MCL §600.6013(8) APPLIES TO THIS CASE AND BECAUSE IT IS REMEDIAL IN NATURE, IT IS TO BE LIBERALLY CONSTRUED IN FAVOR OF THE PARTY SEEKING JUDGMENT INTEREST

In considering the application of MCL §600.6013, it is imperative to recognize that the purpose of the statute is remedial in nature as it is intended to compensate parties both for the expense of litigation as well as for the delay in the recovery of damages:

> The statute 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 damages. Heyler v Dixon*, 160 Mich App 130, 152, 408 NW2d 121 (1987), lv den 428 Mich 922 (1987). Because it is remedial, the statute should be liberally construed in favor of the plaintiff. *Denham v Bedford*, 407 Mich 517, 528, 287 NW2d 168 (1980).

Coughlin v Dean, 174 Mich App 346, 352; 435 NW2d 792, 794 (1989).

This conclusion derives from this Court's opinion in *Denham v Bedford*, 407 Mich 517; 287 NW2d 168 (1980):

> To begin with, it is clear that the Prejudgment Interest Statute Is a remedial statute entitled to liberal interpretation. As has been noted, the Prejudgment Interest Statute is part of the RJA. Section 102 of the RJA specifically enunciates the construction which should be applied to provisions of that act:

> This act is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof. MCL §600.102; MSA §27A.102.
>
> Thus, there can be no question of the remedial nature of the interest statute.

Denham v Bedford, 407 Mich 517, 528–29; 287 NW2d 168, 171 (1980).

These consolidated actions were filed on March 21, 1996 (Hunt), March 26, 1996 (Luczak) and April 11, 1997 (Huber), respectively. Therefore, under MCL §600.6013(6), interest is calculated pursuant to MCL §600.6013(8), which provides in pertinent part as follows:

> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer. and compounded annually. according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. ...

In cases resolved by consent judgments, the prevailing party is entitled to prejudgment interest:

> Reviewing all of the decisions. it becomes clear that Michigan courts apply the statute only to situations within its express terms, "interest ... on a money judgment." and draw a distinction under the statute between judgments and consent judgments on the one hand, and settlements which result in dismissal on the other. There is a right to prejudgment interest in the former but not the latter case.

Commercial Union Ins Co v Shelby Mut Ins Co, 563 F Supp 803, 805 (ED Mich 1983). citing *McGrath v Clark*. 89 Mich App 194, 280 NW2d 480 (1979).

III. EMPIRE'S LIABILITY FOR INTEREST AS THE DRIELICKS' INSURER

A. EMPIRE IS LIABLE FOR PREJUDGMENT INTEREST FROM THE DATE OF THE FILING OF PLAINTIFFS' COMPLAINTS

The Empire Non-Trucking Use policy contains the following language pertaining to judgment interest:

> 2. COVERAGE EXTENSIONS
>
> A. Supplementary Payments. In addition to the Limit of Insurance, we will pay for the "Insured":
>
> * * *
>
> (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

Appendix 33, Empire Policy, at 672a.

In *Matich v Modern Research Corp*, 430 Mich 1; 420 NW2d 67 (1988), this court analyzed the liability of an insurer for prejudgment interest utilizing the "standard interest clause" which obligated the insurer to pay:

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

Id, at 18.

Like the clause in the Empire policy, nothing in the "standard interest clause" addresses the insurer's liability for prejudgment interest. In *Matich*, a judgment was entered that exceeded the combined liability limits of the defendant's primary and excess insurers. At issue in the case was whether and to what extent the insurers would be liable for pre- and post-judgment interest

and in what proportion. As to the prejudgment interest, the Court was unequivocal in stating that the insurers were liable for prejudgment interest:

> However, the law of Michigan with respect to an insurer's liability for *pre* judgment interest is well settled, at least to this extent: ***An insurer whose policy includes the standard interest clause is required to pay prejudgment interest from the date of filing of a complaint until the entry of judgment***, calculated on the basis of its policy limits, not on the entire judgment, and interest on the policy limits must be paid even though the combined amount exceeds the policy limits.[3] (Emphasis added).

Id, at 23.

This is precisely the reasoning adopted by the Court of Appeals in this case:

> The interest clause in the instant case is similarly devoid of language related to prejudgment interest, and it therefore does not contractually limit Empire's risk in that regard. Pursuant to *Matich*, Empire is therefore responsible for prejudgment interest calculated based on the policy limit, even if the judgment amount plus prejudgment interest exceeds the policy limits. See *Matich*, 430 Mich at 23; *Cochran v Auto Club Ins Ass'n*, 169 Mich App 199, 202; 425 NW2d 765 (1988).

Estate of Hunt by Hunt v Drielick, 322 Mich App 318, 336; 914 NW2d 371, 382 (2017).

In conclusion, insofar as Empire's status as the Drielick's insurer, Plaintiffs are entitled to prejudgment interest, calculated on the basis of the policy limits, from the respective dates of filing of the complaints through the entry of the consent judgments on March 14, 2000.

B. EMPIRE IS LIABLE AS INSURER FOR POST-JUDGMENT INTEREST FROM THE DATE OF THE ENTRY OF THE CONSENT JUDGMENTS

In June 2016, the trial court entered judgment after adjudicating that Empire has the duty to indemnify the Drielick's for the Consent Judgments entered against them in these cases. The Court of Appeals affirmed that decision and this court denied Empire's application for review. Thus, it cannot be controverted that Empire's Non-Trucking Use policy covers the Drielicks for

[3] Although the consent judgments in these cases total $780,000, Plaintiffs agree that *Matich* holds that prejudgment interest is limited to interest on the $750,000 policy limits.

their liability arising from the accident. Empire's policy imposes upon it the "the right and duty to defend any 'suit' asking for [covered] damages." *Appendix 33*, at 672a. Although Empire's policy purports to excuse any obligation to pay post-judgment interest because it did not defend the Drielicks, Plaintiffs submit that Empire cannot rely on this provision because the *only* reason that it did not defend this case is that it *breached* its duty to defend. To deny post-judgment because Empire breached its duty to defend would serve no purpose other than to reward Empire for failing to meet its obligation under the policy and to litigate the consequences of that breach for more than 19 years.

In *Sederholm v Michigan Mut Ins Co*, 142 Mich App 372; 370 NW2d 357 (1985), the insurer similarly declined to defend its insured, erroneously believing that its policy had been cancelled prior to the loss giving rise to the lawsuit against its insured. Despite policy language to the contrary, this Court held that the insurer was obligated to pay prejudgment interest on the limit of its policy from the date of the filing of the complaint against its insured:

> The issue raised is whether defendant is nonetheless liable for prejudgment interest commencing August 21, 1980, on grounds that it had effective notice of the suit filed against its policyholder. ***Defendant argues that because it in good faith believed the policy was cancelled it had no control over the suit against Salmi and thus was not liable for prejudgment interest until judgment was taken against defendant in the second action. We disagree.***
>
> Although defendant refused to defend its policyholder in the good-faith belief that the policy had been cancelled, as it subsequently developed the policy was not cancelled. Under the express provisions of the policy, the insurer retained control over the investigation and litigation process. Contrary to defendant's claim that Denham requires actual control, we believe the thrust of the *Denham* decision rests on the control retained over the settlement and litigation process. The potential for that control existed in the instant case and defendant was given prompt notice by its insured of the action. ***Under these circumstances we believe that defendant's liability should include prejudgment interest on its policy liability from the original filing date.***

Sederholm v Michigan Mut Ins Co, 142 Mich App 372, 389-390; 370 NW2d 357, 364 (1985) (emphasis added).

To the same effect is *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989), which held that an insurer always bears the consequences from its wrongful refusal to defend:

> When an insurer breaches its own policy of insurance by refusing to fulfill its duty to defend the insured, the insurer is bound by any reasonable settlement entered into in good faith between the insured and the third party. *The Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 144, 301 NW2d 832 (1980). An insured is released from any agreement not to settle without the insurer's consent where the insurer has denied liability and wrongfully refused to defend. *Giffels, supra*, 19 Mich App p 153, 172 NW2d 540. Upon notice, there is some burden on the insurer to act to protect its interests or those of its insured. ***The insurance carrier will not be permitted to benefit by sitting idly by, knowing of the litigation, and watching its insured become prejudiced***. *Burgess v American Fidelity Fire Ins Co*, 107 Mich App 625, 630, 310 NW2d 23 (1981). (Emphasis added).

Alyas v Gillard, 180 Mich App 154, 160; 446 NW2d 610, 613 (1989).

Empire likewise should not profit from its breach by wrongfully retaining its entire policy limit interest free for nearly 20 years. Empire had timely notice of the lawsuit against its insureds but chose to decline to defend them, pointing to the inapplicable "Business Use" exclusion. Empire's decision to breach the contract and abdicate its responsibility to defend its insureds leads to the natural consequence that Empire is responsible for prejudgment interest from the date that the Complaints were filed.

In its Brief to the Court of Appeals, Empire cited four cases in support of its contention that it is relieved of liability to pay post-judgment interest. None of these cases actually support Empire's contention.

In *Cotrill v Michigan Hospital Service*, 359 Mich 472; 102 NW2d 179 (1960), the Court interpreted a policy provision pertaining to coverage under a health care policy for successive hospitalizations within six months. This case has nothing whatsoever to do with whether an insurer that breaches its duty to defend is obligated to pay prejudgment interest on the resulting judgment against its insureds.

In *Westchester Fire Ins Co v Ring Bros Heating Co*, 491 F2d 711 (CA6, 1974), the insurer, unlike Empire, defended its insured. In that case, the policy provision provided for the payment of postjudgment interest on the entire amount of the judgment entered against the insured from the date of the entry of judgment. Again, this case does not address the wrongful failure of the insurer to provide a defense, though required to do so under the policy terms. More importantly, In *Denham, supra*, this court expressly disapproved of the Sixth Circuit's analysis of *Cosby, infra:*

> With all due respect to the Westchester court, we view its interpretation as a misreading of *Cosby*. *Cosby* was not so much concerned with contract interpretation as it was in indicating that whatever contractual language existed would be amended to conform with the interest statute.

Denham v Bedford, 407 Mich 517, 532; 287 NW2d 168, 173 (1980)

Cosby v Pool, 36 Mich App 571; 194 NW2d 142 (1971), similarly does not address the consequences of the insurer's failure to defend with respect to prejudgment interest. What this case does address, however, is that, despite language in the policy that purports to limit the insurer's liability to post-judgment interest, the insurer is liable for interest from the date of filing of the complaint against the insured, but only with respect to the amount of the judgment for which it is responsible; i.e., it is liable for prejudgment interest on its policy limits. Unlike the Empire policy, the *Cosby* policy limited post-judgment interest to interest on the amount of the judgment for which the insurer is liable.

In summary, of all the cases cited to this Court, the only case addressing the consequence of an insurer's breach of the duty to defend is *Sederholm, supra,* in which this Court noted that the opportunity for the insurer to exercise the duty to defend and the breach of that duty subjects the insurer to liability for both pre- and post- judgment interest.

III. EMPIRE'S LIABILITY FOR INTEREST AS A PARTY

A. EMPIRE IS LIABLE FOR PREJUDGMENT INTEREST ON THE JUDGMENT ENTERED AGAINST IT FROM THE FILING OF THE APPLICATIONS FOR WRITS OF GARNISHMENT

If this court determines that Empire is not liable for post-judgment interest on the Consent Judgments by virtue of the language in the Coverage Extensions provision of the policy, Empire nevertheless is responsible for prejudgment interest from the date of filing of the Applications for Writs of Garnishment, December 4, 2000 as a party to this litigation.

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) provides for the accrual of judgment interest as of the date of the filing of the complaint:

> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals ***from the date of filing the complaint*** ... (Emphasis added).

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 has decreed that a garnishee defendant, such as Empire, is a party to a civil action. Empire, like any litigant in a civil action, had, and exercised, the opportunity to conduct discovery, participate in bench trials, multiple motion hearings, three separate appeals to the Court of Appeals and two appeals to this tribunal.

The applications for writ served as the complaints per MCR 3.101(M)(2) and thus triggered the running of judgment 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 actively participated as a party in the same manner as any other party subject to interest under MCL §600.6013.

In fact, Empire was the *only* party contesting Cross-Appellants' garnishment actions. The rationale for the imposition of interest 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 19 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 period from the issuance of the writs through Empire's satisfaction of the judgments entered against it 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[4] under the terms of its insurance policy during the time that it contested its own obligations as a party to a civil action.

Empire has been a party to this case in its own right since December 4, 2000. For more than 19 years, the only thing litigated in this action was Empire's liability to pay the garnishments, with Empire being the sole party that contested that liability. Certainly, MCL §600.6013 was intended to apply to 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 in the Bay County Circuit Court 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 against Empire as of the dates of the Writs of Garnishment:

> 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.

[4] Empire's contractual liability would, of course, include prejudgment interest for which Empire is responsible under the insurance contract. See, *Matich*, *supra*.

Appendix 26, Transcript of Proceedings, December 16, 2002; pp. 19-20, at 493a-494a.

This Court long ago 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.

Previously, Empire cited *Schultz v AAA Michigan*, 1999 WL 33441320 (Mich Ct App, May 28, 1999), for the proposition that a garnishment action is an ancillary proceeding and not a new action, which somehow relieves it of any obligation to pay interest for the 19 years in which it contested its liability. 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 any interest obligation as a party to the garnishment action. In fact, the court concluded that the garnishee-defendant insurer was obligated to pay interest at the rate proscribed by MCR 600.6013(6). *Id*, at *3. 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 court rule that provides 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.

Given the purpose of 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).[5]

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, like Michigan law, a "proceeding against a garnishee is an action."

Recently, the Colorado Supreme Court had the opportunity to address the applicability of Colorado's judgment interest statute in the context of the garnishment of a liability policy. In *Thompson v Catlin Ins Co (UK) Ltd*, 431 P3d 224 (Colo 2018), the insurer litigated its liability under an errors and omissions policy in a garnishment proceeding that lasted almost ten years during which it contested its obligation to pay a judgment against its insured through four separate appeals to the Colorado Court of Appeals and finally an appeal to the state supreme court. The Colorado Supreme Court noted that the amount owed under the policy was due to the claimants on the date it was demanded and that the insurer "has delayed paying this money for almost a decade."

5 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.

The Court concluded that the insurer indeed owed interest from the date of the garnishments:

> Applying similar reasoning, we long ago (albeit in a case that preceded our current statute) ruled that a garnishor was entitled to prejudgment interest on a garnishment amount based on the garnishee's unreasonable delay in paying the sums due. *See Colo. Nat'l Bank of Denver v. Simpson,* 109 Colo. 53, 121 P.2d 663, 666 (1942). More recent cases applying statutes similar to section 5-12-102 have likewise authorized an award of prejudgment interest against a garnishee who wrongfully delayed paying the garnishment amount. *See, e.g., McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 633–34 (6th Cir. 2000) (applying Kentucky law);*Nw. Airlines, Inc. v. Prof'l Aircraft Line Serv.,* No. 11-368 (JRT/TNL), 2013 WL 6275013, at *6–7 (D. Minn. Dec. 4, 2013) (applying Minnesota law), *aff'd,* 776 F.3d 575 (8th Cir. 2015); *see also Whitney v. Faulkner*, 95 P.3d 270, 274–75 (Utah 2004).

431 P3d at 232.

Northwest Airlines, Inc v Profl Aircraft Line Serv, No. CIV. 11-368 JRT/TNL, 2013 WL 6275013, *aff'd* 776 F3d 575 (CA8 2015) involved an insurance policy that included a provision for the payment of post-judgment interest similar to that in the Empire policy in that the insurer agreed to pay post-judgment interest with respect to suits that it defended. Like Empire, that insurer refused to defend its insured, although its refusal was based upon the insured's failure to comply the notice of suit provisions in its policy. In that case, judgment was entered against the insured in 2005. In December 2010, the plaintiff filed a garnishment action against the insurer in Minnesota state court. The insurer removed the action to federal court and the plaintiff initiated a "ancillary garnishment action." After affirming that the insurer, while excused from its duty to defend due to the notice issue, was nonetheless obligated to pay the judgment based on Minnesota's compulsory insurance doctrine, the court held that the insurer was obligated to pay prejudgment interest running from the date of the garnishment through the entry of judgment against the insurer on the garnishment. The court rejected the insurer's claim that the policy language pertaining to

post-judgment interest precluded the assessment of interest for the time that the insurer was a party to the action:

> Westchester argues that it is not required to pay prejudgment interest under a portion of the Policy providing that Westchester will pay "prejudgment interest awarded against the insured on the part of the judgment Westchester pays" only "with respect to any claim or suit [Westchester] defend[s]." (*Id.*, Ex. B at 14.) ***The Policy does not shield Westchester from an obligation to pay prejudgment interest in this case for two reasons. First, the present garnishment action is a suit that Westchester is defending. Second, any prejudgment interest this Court awards with respect to the present garnishment action is not against PALS, the insured, but is instead awarded against Westchester itself.*** Therefore, the Policy's limitations on the assessment of prejudgment interest are inapplicable. (Emphasis added).

Northwest Airlines, Inc v Profl Aircraft Line Serv, at 7.

This is precisely the rationale advanced by Cross-Appellants. Once the Writs of Garnishment were issued, Empire became a party to this case and was defending its own interest, not that of its insureds.

Prejudgment interest continues to accrue against Empire, as a party in this case throughout the period that this case has been on appeal. *See, Morales v Auto-Owners Ins Co*, 469 Mich 487; 672 NW2d 849 (2003):

> The *Dedes* decision is wholly inconsistent with MCL 600.6013, which states that prejudgment interest is calculated "from the date of filing the complaint...." MCL 600.6013(8). The statute makes no exception for periods of prejudgment appellate delay. In the face of the Legislature's clearly expressed intent, this Court will not read such an exception into the statute. ... Under MCL 600.6013, Ms. Morales is entitled to an award of prejudgment interest that includes the four-year period during which this case was on appeal. (Citations omitted).

Morales v Auto-Owners Ins Co, 469 Mich 487, 491–92; 672 NW2d 849 (2003).

In conclusion, Empire has been a party to this action from filing of the applications for writs of garnishment on December 4, 2000. As a party, therefore, prejudgment interest would accrue through the entry of judgment, following which post-judgment interest would accrue until the judgment is satisfied. MCL 600.6013(1).

IV. CONCLUSION

In conclusion, pursuant to its obligations under the insurance contract, Empire is obligated to pay prejudgment interest on behalf of its insureds from the date that each complaint was filed against the Drielicks. Empire has been adjudicated to have a duty to pay the damages awarded in these cases. It is therefore axiomatic that Empire had a duty to defend these cases. Having breached that duty, Empire cannot profit from that breach by being excused from paying interest on a judgment because of a provision that obligates it to pay post-judgment interest in cases that it actually defends.

In the alternative, if Empire is excused from paying post-judgment interest on the basis of the language of the Coverage Extensions provisions, Empire itself has been a party to this civil action as a garnishee defendant for the past 19 years. Therefore, it is liable for prejudgment interest under MCL §600.6013(8) from December 4, 2000 through the entry of judgment against it and for post-judgment interest thereafter. The judgment against Empire upon which interest accrues as of the issuance of the writs, however, includes prejudgment interest assessed against its insureds from the filing of the underlying complaints through the entry of the consent judgments.

Accordingly, Cross-Appellants respectfully request that this Court reverse that part of the Court of Appeals' Opinion in which it reversed the award of interest that accrued after the entry of the Consent Judgments against the Drielicks.

Respectfully submitted,

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