STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff-Appellee/Cross-Appellant

vs

ROGER DRIELICK, ET AL
Defendants-Appellees/Cross-Appellants
vs

EMPIRE FIRE AND MARINE
INSURANCE COMPANY,
Garnishee Defendant-Appellant/Cross-Appellee.

MSC No. 157476
COA No. 333630
Lower Court No. 96-3280-NI
(Bay County)
CONSOLIDATED

GARNISHEE DEFENDANT-APPELLANT/CROSS-APPELLEE EMPIRE FIRE & MARINE INSURANCE COMPANY'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO FILE CROSS-APPEAL - CORRECTED

ORAL ARGUMENT REQUESTED

BRANDON JAMES HUBER,
,

Plaintiff-Appellee/Cross-Appellant
vs

ROGER DRIELICK, ET AL
Defendants-Appellees/Cross-Appellants
vs

EMPIRE FIRE AND MARINE
INSURANCE COMPANY,
Garnishee Defendant-Appellant/Cross-Appellee.

MSC No. 157477
COA No. 333631
Lower Court No. 97-3238-NI
(Bay County)
CONSOLIDATED

THOMAS LUCZAK and NOREEN LUCZAK,
Plaintiff-Appellee/Cross-Appellant,

vs

ROGER DRIELICK, ET AL
Defendants-Appellees/Cross-Appellants
vs
EMPIRE FIRE AND MARINE
INSURANCE COMPANY,
Garnishee Defendant-Appellant/Cross-Appellee.

MSC No. 157478
COA No. 333632
Lower Court No. 96-3328-NI
(Bay County)
CONSOLIDATED

WARD, ANDERSON, PORRITT,
BRYANT, LORD, & ZACHARY
NICOLETTE S. ZACHARY (P49522)
Atty for Garnishee Def-Appellant/Cross-Appellee
Empire Fire and Marine Ins Co
4190 Telegraph Road, Suite 2300
Bloomfield Hills, Michigan 48302
248/593-1440
nzachary@wardanderson.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

SUMMARY OF ARGUMENT

On November 27, 2019, this Court issued an Order denying Empire's application for leave to appeal on the substantive liability issues and directing that oral argument be scheduled on the application for leave to appeal as cross-appellants. The Order further directed the parties to file supplemental briefs:

> … addressing the period of time for which garnishee-defendant Empire Fire and Marine Insurance Company, as the Drielick defendants' insurer, is liable for the payment of judgment interest pursuant to MCL 600.6013 or any post-judgment interest, and the proper method of calculation, see *Matich v Modern Research Corp*, 430 Mich 1 (1988).

As a preliminary matter, when Empire appealed the trial court's decision in the Court of Appeals with respect to the judgment interest issue, **Empire did not appeal the portion of the trial court's ruling that the relevant Complaints for purposes of determining pre-judgment versus post-judgment interest are the original 1996 and 1997 Complaints filed by the three underlying plaintiffs and not the December 2000 writs of garnishment. That issue was not before the Court of Appeals and is not before this Court despite Cross-Appellants' attempt to revive the issue through their application for cross-appeal in this Court**. The trial court's ruling on this issue remains the law of the case. **As such, Cross-Appellants are precluded from arguing that the December 2000 writs of garnishment were new complaints beginning a new pre-judgment interest period**. The only relevant periods for purposes of judgment interest are: (1) the **pre-judgment interest period**, which runs from the dates of the original 1996 and 1997 Complaints through the date of the underlying March 14, 2000 Consent Judgments against the Drielicks; (2) the **post-judgment period**, which runs from the date of the March 14, 2000 Consent Judgments forward; and (3) possibly the period from the date of the June 2, 2016 judgments on the writs of garnishment through the present. Any judgment interest obligation Empire may have is limited to the pre-judgment interest period from the dates of the 1996 and 1997 Complaints through March 14, 2000.

The Court of Appeals 2017 decision engaged in an articulate, well-reasoned analysis of the judgment interest issue. See ***Cross-Appellants' Appendix p 11a.*** The Court of Appeals correctly held that Empire's

judgment interest obligation is limited to pre-judgment interest from the date of the original underlying 1996 and 1997 complaints through the date of the March 2000 Consent judgment. The Court of Appeals further correctly held that that pursuant to *Matich, supra*, the terms of the Empire policy control with respect to any obligation for payment of post-judgment interest in excess of the policy limits. Regarding post-judgment interest, the Empire policy provides that:

> 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.
>
> * * *
>
> SECTION V – DEFINITIONS
>
> * * *
>
> L. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage," or "covered pollution cost or expense," to which this insurance applies are alleged. "Suit" included an arbitration proceeding alleging such damages or "covered pollution cost or expense" to which you must submit or submit with our consent. (Emphasis added.) *Cross-Appellants' Appendix, p 672a, 679a, Empire Insurance Policy*.

It is undisputed that the March 14, 2000 Consent Judgments against the Drielicks are in excess of the $750,000 Empire policy limit and that Empire did not defend the Drielicks in the underlying personal injury lawsuits filed by the plaintiffs. Therefore, based on the clear, unambiguous, valid, enforceable terms of the Empire Non-Trucking Policy, Empire is not subject to liability for payment of post-judgment interest in excess of the $750,000 policy limits after March 14, 2000.

The Court of Appeals holding regarding the judgement interest issue states:

> We also hold that Empire is obligated to pay prejudgment interest on the policy limits from the date the complaints in the underlying actions were filed until the date the consent judgements were entered, but that Empire is not obligated to pay postjudgment interest because Empire did not defend the underlying suits. *Cross-Appellants' Appendix, p 11a, 2017 COA decision*.

The Court of Appeals ruling on the judgment interest issue should be affirmed pursuant to *Matich,*

supra. and other applicable law. Empire's judgment interest obligation in this case is limited to pre-judgment interest from the dates of the original 1996 and 1997 Complaints through the date of the March 14, 2000 Consent Judgments.

SUPPLEMENTAL STATEMENT OF FACTS

Empire incorporates by reference the statement of facts set forth in its application for leave to appeal and response to the application for leave to cross-appeal. Empire further incorporates the facts, law, and arguments set forth in the various briefs filed in the trial court and Court of Appeals. Cross-Appellants have attached Empire's various trial court briefs addressing the judgment interest issue to their appendix. See *Cross-Appellants' Appendix, p 189a, 254a, 352a, 388a*. Empire also attaches its 11-23-2016 Brief on Appeal to the Court of Appeals and its 2-15-2017 Reply Brief on Appeal to the Court of Appeals. See *Cross-Appellee's Appendix A, p 1b-61b, and B, p 62b-81b*, respectively.

I. Any Judgment Interest Obligation Empire May Have In This Case Is Limited to the Pre-Judgment Interest Period from The Date of the Original 1996 and 1997 Complaints To March 14, 2000.

A. Analysis

Empire has not disputed the Court of Appeals ruling that it is subject to liability for pre-judgment interest from the date of the original 1996 and 1997 Complaints filed by Plaintiffs to the date of the March 14, 2000 Consent Judgments against the Drielicks. The only issue before this Court relative to the application for leave to cross-appeal is whether Empire is liable for post-judgment interest after March 14, 2000, and if so, the proper calculation of such post judgment interest, which will be addressed in the Section II of this Supplemental Brief.

B. The Proper Calculation Of Pre-Judgment Interest from the date of the 1996 and 1007 Complaints to the date of the March 14, 2000 Consent Judgments

For purposes of calculating pre-judgment interest, the original March 14, 2000 Consent Judgments must be reduced pro-rata so as not to exceed policy limits. See *Matich, supra at 17-23*. The pro-rata judgment amounts

(without interest) are Huber ($48,076.92), Hunt ($528,846.16), Luczak ($173,076.92).The following tables show Empire's calculation of the amount of each of the three consent judgments reduced pro-rata to the policy limits plus the accumulated pre-judgment interest.

HUNT
PRE-JUDGMENT

DATE	RATE	FACTOR	#DAYS	INTEREST	TOTAL
3/21/1996					$528,846.16
3/21/1996-6/30/1996	6.9530%	0.000189973	101	$10,147.10	
7/1/1996	7.1620%	0.03581		$18,937.98	$557,931.24
1/1/1997	7.3400%	0.0367		$20,476.08	
7/1/1997	7.4970%	0.037485		$20,914.05	$599,321.37
1/1/1998	6.9200%	0.0346		$20,736.52	
7/1/1998	6.6010%	0.033005		$19,780.60	$639,838.49
1/1/1999	5.8335%	0.0291675		$18,662.49	
7/1/1999	6.0670%	0.030335		$19,409.50	$677,910.48
1/1/2000-3/14/2000	6.7563%	0.000184598	73	$9,135.30	$687,045.78

HUBER
PRE-JUDGMENT

DATE	RATE	FACTOR	#DAYS	INTEREST	TOTAL
					$48,076.92
4/11/1997	7.3400%	0.000201096	80	$773.45	
7/1/1997	7.4970%	0.037485		$1,802.16	$50,652.53
1/1/1998	6.9200%	0.0346		$1,752.58	
7/1/1998	6.6010%	0.033005		$1,671.79	$54,076.89
1/1/1999	5.8335%	0.0291675		$1,577.29	
7/1/1999	6.0670%	0.030335		$1,640.42	$57,294.60
1/1/2000-3/14/2000	6.7563%	0.000185104	73	$774.20	$58,068.80

LUCZAK
PRE-JUDGMENT

DATE	RATE	FACTOR	#DAYS	INTEREST	TOTAL
3/26/1996					$173,076.92
3/26/1996-6/30/1996	6.9530%	0.000189973	96	$3,156.47	
7/1/1996	7.1620%	0.03581		$6,197.88	$182,431.27
1/1/1997	7.3400%	0.0367		$6,695.23	
7/1/1997	7.4970%	0.037485		$6,838.44	$195,964.94
1/1/1998	6.9200%	0.0346		$6,780.39	

7/1/1998	6.6010%	0.033005		$6,467.82	$209,213.15
1/1/1999	5.8335%	0.0291675		$6,102.22	
7/1/1999	6.0670%	0.030335		$6,346.48	$221,661.85
1/1/2000-3/14/2000	6.7563%	0.000184598	73	$2,987.04	$224,648.90

Empire's liability for judgment interest is limited to the following total amounts, which constitute the pro-rata March 2000 Consent Judgment plus pre-judgment interest from the dates of the original underlying 1996 and 1997 Complaints through March 14, 2000:

HUNT	HUBER	LUCZAK	TOTAL
$664,902.40	$56,755.56	$217,435.43	$939,093.39

II. The Court Of Appeals Properly Held That Empire Is Not Subject To Post-Judgment Interest From The Date Of The Underlying March 2000 Consent Judgments Forward Pursuant To The Express Terms Of The Empire Policy And Applicable Law.

A. Analysis

While a prevailing party may be entitled to interest on a money judgment obtained against a party defendant (the Drielicks), MCL 600.6013 does not mandate that the defendant's liability insurer (as a garnishee defendant) must pay money judgment interest on a judgment entered against an insured in excess of the insurance policy limits where the plain, unambiguous terms in the insurance policy state that it is not obligated to do so. The insurer's obligation is determined from the plain, unambiguous language of the insurance policy because an insurer is permitted to contractually limit the risk it assumes, including the obligation to pay judgment interest in excess of its limits, when it issues an insurance policy. See *Matich, supra, p 23-28*. Moreover, underlying consent judgments cannot create "substantive rights and obligations" on the subject of judgment interest. *Id*. The issue of judgment interest in excess of policy limits should be resolved under the terms of the subject insurance policy and the law of the state of Michigan. *Matich, supra*. See also *Cottrill v Michigan Hospital Service*, 359 Mich 472; 102 NW2d 179 (1960); *Westchester Fire Ins Co v Ring Bros Heating Co*, 491 F 2d 711 (WD Mich 1974); *Cosby v Pool*, 36 Mich App 571; 194 NW2d 142

(1971). See also *Canadian Universal Ins Co v Hartford Ins Co*, 184 Mich App 546; 458 NW2d 657 (1990) (excess insurer had not undertaken any obligation to pay post-judgment interest under its policy and therefore was not required to pay any portion of post-judgment interest.)

The *Matich* Court drew a definite distinction between pre-judgment and post-judgment interest. In deciding the post-judgment interest issue, *Matich* looked at the specific language in the insurance policy's interest clause, which provided that in addition to the policy limits, the insurer would 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." *Matich, supra* at 24.

The *Matich* Court acknowledged that an insurer may limit the risk that it assumes. *Id*. at 24-25. In fact where exclusions are clear and specific, they must be given effect. *Auto-Owners Ins Co v Churchman,* 440 Mich 560, 567; 489 NW2d 431 (1992). "It is impossible to hold an insurance company liable for a risk it did not assume." *Id*. With respect to judgment interest, the *Matich* Court stated in part:

> [W]e proceed on the basis that the [underlying] consent judgment did not create "substantive rights and obligations" on the subject of judgment interest, and that the parties intended to leave their differences concerning judgment interest to be resolved through litigation "under the terms of [the insurer's] insurance polic[ies] or…under the laws of the State of Michigan." *Id*. at 23-24.

In other words, with respect to post-judgment interest in excess of the policy limits, the *Matich* Court held that the insurer's obligation is determined based on the law and the terms of the insurance policy at issue. The policy in *Matich* did not limit the insurer's obligation to pay post-judgment interest to suits its defends. Therefore, the Court held that the insurer was obligated to pay post-judgment interest in excess of the policy limits based on the express language of the policy. The Empire policy in the instant case did make such a limitation, and as such, Empire is not subject to liability for post-judgment interest.

In *Key Safety Systems, Inc v AIG Specialty Ins Company*, 2017 WL 3085485 (ED Mich 2017), the U.S. District Court for the Eastern District of Michigan, addressed the issue of whether an insurer may be held liable for post-judgment interest in excess of its policy limits where the express terms of its policy do not

provide for payment of post-judgment interest. The District Court held that the express terms of the insurance policy were dispositive on and controlled the issue. The District Court explained that under the plain language of the policy post-judgment interest was not included as a covered loss and that the defendant insurer was not obligated to pay post-judgment interest under the terms of the policy. *Id*. The *Key Safety Systems* case also notes that judgment and post-judgment interest are separate and distinct entities. *Id*. *See Appellee's Appendix C, Key Safety Systems, Inc case, p 82b-85b*.

In the instant case, the Empire interest clause provides that "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…" (Emphasis added.) *Appx. 672a.* Therefore, Empire chose to limit its contractual obligation to its insured, Roger Drielick, for payment of post-judgment interest in excess of policy limits to suits it defends. The language in the Empire policy is clear, unambiguous, and there is no law holding that it is unenforceable. Neither Cross-Appellants nor the trial court cited any legal authority holding that the judgment interest clause in the Empire Policy has been ruled unenforceable or void as against public policy. Pursuant to *Matich, supra*, the plain, unambiguous, judgment interest provision in the Empire policy must be enforced as written. The trial court erred in disregarding the express language of the Empire policy and ruling that Empire is obligated to pay post-judgment interest in excess of policy limits. Michigan Courts resolve disputes regarding an insurer's obligation for payment of post-judgment interest based on the express contractual language of the insurance policy. See *Cottrill, supra; Matich, supra; Cosby, supra; Westchester Firs Ins, supra*. The Court of Appeals properly held that pursuant to the express terms of the Empire policy, it is not subject to liability for payment of any post-judgment interest in excess of policy limits, and its decision with respect to post-judgment interest should be affirmed.

B. The Proper Calculation Of Post-Judgment Interest if it is determined that Empire is subject to liability for post-judgment interest in excess of its policy limits, which it is not.

Since Empire is not subject to liability for post-judgment interest, it is not necessary to calculate the

amount of any post-judgment interest. However, in the event it is ultimately determined that Empire is subject to payment of any post-judgment interest in excess of its policy limits, which Empire denies, such obligation is limited to post-judgment interest accruing from the June 2, 2016 date of the judgments on the writs of garnishment to the present. The calculation of that limited amount of post-judgment interest is on the entire amount of the March 14, 2000 Consent Judgments, which amount Empire currently approximates at $110,139.86 as of December 31, 2019.

RELIEF REQUESTED

WHEREFORE, Garnishee Defendant Empire respectfully requests that this honorable Court deny Cross-Appellants' Cross-Application for Leave to Appeal from the December 14, 2017 Court of Appeals decision holding that Empire is not subject to liability for post-judgment interest after entry of the underlying March 14, 2000 Consent Judgments against the Drielicks and the February 20, 2018 Court of Appeals Order denying Cross-Appellants' motion for partial reconsideration.

Respectfully submitted,
WARD, ANDERSON, PORRITT,
BRYANT, LORD & ZACHARY

/s/ Nicolette S. Zachary

NICOLETTE S. ZACHARY (P49522)
Attorney for Defendant
4190 Telegraph Road, Suite 2300
Bloomfield Hills, MI 48302
248-593-1440; 248-593-7920 fax
nzachary@wardanderson.com
rgalloway@wardanderson.com

DATED: January 8, 2020