

STATE OF MICHIGAN
SUPREME COURT

Plaintiff-Appellant's appeal from the Michigan Court of Appeals
The Hon. E. Thomas Fitzgerald and Michael Talbot (the majority)
and the Hon. Douglas B. Shapiro (dissenting)

ESTATE OF MIRA E. ABAY, deceased by its
Personal Representative, Maria C. Abay,

Plaintiff/Counter-Defendant-Appellant,

-vs-

DAIMLERCHRYSLER INSURANCE COMPANY
(n/k/a CHRYSLER INSURANCE COMPANY),

Defendant/Counter-Plaintiff-Appellee,

And

DAIMLERCHRYSLER CORPORATION (n/k/a
CHRYSLER, LLC),

Defendant,

And

JAMES E. TRENT, an individual, and KELLY
ROSE BROOKS, an individual,

Defendants/Cross-Defendants,

And

AUTO CLUB GROUP INSURANCE COMPANY,
d/b/a AAA of MICHIGAN, an insurance company,
and ALVIN JEROME TAYLOR, an individual,

Third-Party Defendants.

Supreme Court No. 139725

Court of Appeals No. 283624

Oakland County Circuit Court
Case No. 06 075016 CK

**PLAINTIFF-APPELLANT'S
APPEAL BRIEF**

**ORAL ARGUMENT
REQUESTED**



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STATEMENT OF THE BASIS FOR JURISDICTION

The Michigan Court of Appeals issued its Majority Opinion on August 13, 2009. On September 24, 2009, Plaintiff-Appellant filed a timely Application For Leave To Appeal this August 13, 2009 Majority Opinion. MCR 7.302(c).

On March 24, 2010, this Court granted Plaintiff-Appellant's Application. (2064a) By this same March 24, 2010 Order, this Court granted the motions of Allstate Insurance Company (Allstate) and the Auto Club Insurance Association (ACIA or AAA) for leave to file brief *amici curiae* in support of Plaintiff-Appellant's Application.

This Court has discretionary by-leave jurisdiction to ascertain Plaintiff-Appellant's appeal pursuant to MCR 7.301(A)(2) and 7.302. So, this appeal is properly before this Court.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the majority erred when it interpreted an auto insurance policy in such a way that it results, as the dissent notes in its eight-page opinion, “in violations of the [State’s] no-fault act”?

Plaintiff-Appellant answers *yes*

2. Whether the majority erred, as the dissent also concludes, when it applied *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378; 591 NW2d 325 (1998) to completely nullify an individual named insured endorsement specifically selected by the insurer?

Plaintiff-Appellant answers *yes*

3. Whether the majority erred, as the dissent also concludes, when it found that the insurance policy was neither patently nor latently ambiguous?

Plaintiff-Appellant answers *yes*

INTRODUCTION

This application seeks this Court's summary reversal of the majority's interpretation of an auto insurance policy that results, as the eight page dissent correctly concludes, "in violations of the [State's] no-fault act."

This majority's interpretation blesses DaimlerChrysler Insurance Company's (DCIC)¹ designed avoidance of its statutory PIP duties. This avoidance, as the dissent notes, forces other state auto insurers "to pay benefits that they never contemplated assuming". And, it places the vehicle lessees, who *must* insure their leased vehicles through DCIC, "in violation" of their duties under the no-fault act.

Beyond these statutory violations, as the dissent further notes, the majority misuses *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378; 591 NW2d 325 (1998) so that it "renders multiple [policy] provisions either meaningless or nugatory." This application also seeks summary reversal of the majority's interpretation of *Pavolich*.

The events that gave rise to this litigation are simple, though tragic. On December 10, 2003, an intoxicated Kelly Rose Brooks killed Mira Abay in a vehicular homicide collision in Oakland County. Thereafter, Mira Abay's estate sued DCIC and DaimlerChrysler Corporation (DCC), among others, for a declaratory judgment that a DCIC policy applied to Ms. Abay's fatal collision. (1a-5a)

This "dec" action exposed, for the first time, an elaborate DCC/DCIC PIP-shifting scheme that violates the State's no-fault act and public policy. The scheme is underpinned by

¹ DaimlerChrysler Corporation and DaimlerChrysler Insurance Company have both recently undergone a name change. DaimlerChrysler Corporation is now known as "*Chrysler LLC*". DaimlerChrysler Insurance Company is now known as "*Chrysler Insurance Company*". For the sake of brevity and to be consistent with the names used in the Court of Appeals' August 13, 2009 decision, this brief will use the former names and the corresponding acronyms.

DCIC's manipulation of the policy's "named insured" provision, *the very devise DCIC relies upon in this case to deny coverage.*

The "dec" action also laid bare DCC/DCIC's deceit about the policy's nature (it's actually a so-called "self-insured" arrangement) and the true relationship between the policy "insurer" and the "name insured" (they are the same entity). Until discovery in this case, whenever DCC and DCIC "talked" to the courts about this policy, through their pleadings in other cases, they routinely omitted or actually misrepresented critical facts about the policy.

Ms. Abay's estate won the "dec" action. On September 20, 2007, the trial court summarily found coverage for Ms. Abay's vehicular homicide by declaring the policy ambiguous. (1936a-1941a) It rejected DCC's and DCIC's peculiar argument, given the extraordinary and undisputed facts of the case, that *Pavolich* controlled and the policy was unambiguous and excluded coverage for Ms. Abay. (1939a)

On August 13, 2009, the majority reversed the trial court's summary disposition of the "dec" action. (2004a-2011a) The majority dismisses, with little explanation, the significant factual difference between *Pavolich* and the case *sub judice* -- factual differences the trial court and dissent found determinative. It relies on *Pavolich*, but fails to address or even gesture to Plaintiff-Appellant's argument that the policy, read as DCIC urges, violates the no-fault act. Notably, the majority never even acknowledges the dissent or its detailed concern with statutory violations.

Instead, the majority disregards and/or misstates determinative facts. It mischaracterizes Plaintiff-Appellant's arguments. And, it corrupts *Pavolich*'s pragmatic reasoning and limitations until it has now rendered essentially meaningless any contractual argument based on

"ambiguity." Stated differently, if under *Pavolich* this policy is unambiguous, virtually no policy can ever be successfully challenged as "ambiguous."

The majority's complete avoidance of the "illegality" argument stands in stark contrast to the dissent's detailed analysis of the policy in the context of "mandatory statutory provisions," its conclusion that the insurer/insured relationship is "highly complex" and "out of the ordinary," and its finding that DCIC's illegal PIP-shifting scheme "may, in fact, be a calculated deception." (2013a and 2015a)

Plaintiff-Appellant's "illegality" arguments are not shrill advocacy - - as is evident from the dissent's thoughtful analysis of these claims. Nor is it idle speculation -- a legal parlor game of "what if"? The stubborn evidence of this illegality, and its real economic impact on other state auto insurers and their subscribers, is compelling and un rebutted. This conflict with the no-fault act, *which other state auto insurers have repeatedly complained about*, is "real" and "should not be ignored" -- as the dissent emphasizes. Allstate and ACIA's briefs *amici curiae emphatically* articulate this unfair economic impact on other auto insurers. (2020a-2052a); (2053a-2063a)

The concealed PIP-shifting scheme is the lucrative product of DCIC's designed but unusual use of the policy's "named insured" provision to advantageously manipulate DCIC's obligations under the no-fault act's priority provisions. Quite simply but incredibly, it forces other auto insurers to pay claims for injuries incurred by DCC employees in vehicles they lease from DCC and mandatorily "insure" through DCIC. In one case, Allstate was forced to pay over \$1.3 million for injuries incurred by a DCC employee in his DCC-leased, and DCIC-"insured", vehicle.

The micro implications of the majority decision are obvious. It deprives the estate of a drunk driving victim of its measured Oakland County jury award. The macro implications are

equally obvious. The majority's mis-"read" of this policy and its misapplication of *Pavolich* is of surpassing importance with statutory and state wide significance for other state auto insurers, as well as all consumers of auto insurance.

The Court should summarily reverse the Court of Appeals Majority Opinion and find policy coverage for the reasons set forth in the Dissenting Opinion, the trial court's opinion, and for these reasons set forth in this Plaintiff-Appellant's brief.

Absent this Court's summary reversal, the majority has now placed the benediction of the State judiciary on an auto insurance policy interpretation that clearly violates the State's no-fault act, and deforms the practical wisdom of *Pavolich*.

I. FACTS

A. The Fatal Collision

On December 10, 2003, Kelly Rose Brooks killed Mira E. Abay, a single mother of three (3) adult daughters, in a violent vehicular collision in Oakland County. Brooks was drunk (two hours *after* the fatal collision her blood alcohol level exceeded .23 percent) and "loaded" on drugs (Darvocet and Cocaine) when she killed Ms. Abay.

Brooks was driving, with permission, someone else's AAA-insured car. It is undisputed that Brooks did not have regular use of this non-owned vehicle. (See p 6 of DCC/DCIC's Court of Appeals brief.) Brooks was convicted of involuntary manslaughter with a motor vehicle and OUIL. On appeal, Brooks' conviction was upheld. *People v Brooks*, 2006 WL 3423155 (COA No. 262995), *lv den*, 477 Mich 1115.

Plaintiff-Appellant sued Brooks, who is currently jailed, and others. Based on a jury verdict, a February 13, 2008 Judgment was entered against Brooks for just over \$3.5 million. (OCCC Court Case No. 05 069199 NI.) The February 13, 2008 Judgment was *not* appealed.

B. Brooks' Parents

Brooks' father, James Trent, is a retired DCC executive. At the time of the fatal collision, he leased and insured two (2) cars through the DCC Lease Car Program (hereinafter: *DCC Car Program*). (1142a-1205a)

As the statutorily-recognized and DCC-acknowledged *owner* of his leased DCC cars (see MCL 500.3101 and *Ball v Chrysler Corporation*, 225 Mich App 284 (1997)), Mr. Trent was statutorily-required to provide no-fault insurance for his DCC-leased vehicles. So, Trent insured his leased vehicles under the *DCC Car Program*, which mandated that Trent obtain his auto insurance for his DCC-leased vehicles exclusively through the *DCC Car Program*. (1198a)

C. The DCC Car Program, Auto Insurance And Vehicle Ownership

1. The Leased Private-Passenger, Non-Commercial Vehicles

DCC, through its *DCC Car Program*, leases *private-passenger, non-commercial* vehicles to certain employees and retirees for their *personal* use. (1218a) The *DCC Car Program* is described in a DCC-issued document entitled: *DaimlerChrysler Company Car Programs Terms, Instructions and Condition Manual* (CP Manual). (1142a-1205a) There are approximately 8,000 *DCC Car Program* leased vehicles in Michigan.

These leased *DCC Car Program* vehicles are *not* “employer-furnished” or “company provided” vehicles. (1207a-1214a) They are *not* used for DCC business. (1218a) The individual lessees (DCC employees/retirees) make lease payments to DCC for these *non-commercial, private-passenger* vehicles through authorized payroll or pension deductions. (1208a; 1220a-1226a)

2. The DCC Mandated Auto Insurance For The Leased Private-Passenger, Non-Commercial Vehicles

Under the *DCC Car Program*, individual lessees **must** insure their **non-commercial, private-passenger** vehicles exclusively through the *DCC Car Program*. (1198a) These individual lessees cannot secure, from other auto insurers, additional, alternative or supplemental insurance on their **non-commercial, private-passenger** leased *DCC Car Program* vehicles. (914a-915a)

The individual lessees pay for this *DCC Car Program*-selected auto coverage through payroll or pension deductions, although the lease payments and insurance premiums are bundled. (902a-903a) The individual lessees are also responsible for some policy deductibles.

3. DCC Does Not Own The *DCC Car Program* Vehicles It Leases

DCC does **not** own the *DCC Car Program* vehicles leased in Michigan. DCC specifically admits, without qualification, that it was not the title owner, statutory owner (MCL 500.3101 (2)(g)), or registrant (MCL 500.3101(2)(g)) of Mr. Trent's two DCC-leased vehicles when his daughter killed Ms. Abay in a non-owned vehicle. (1229a-1231a)

The title owner of the vehicles is GELCO, which purchases the vehicles from DCC and then immediately leases them back to DCC. DCC then leases these vehicles to certain of its employees/retirees under the *DCC Car Program*. (1232a-1241a)

D. DCC And DCIC

DCIC is a property/casualty insurance company. It is licensed to write auto insurance in all fifty (50) States and Canada.

DCC is a Delaware corporation engaged in, among other things, the manufacture, sale and service of automobiles. It is **not** licensed to write auto insurance anywhere.

E. The DCIC “Insurance Policy” -- A “Fronted” Policy -- And DCC’s Dual Role As The Policy Declaration Sheet’s Sole “Named Insured” And the *De Facto* Insurer

1. The So-Called Commercial Policy

DCIC “issued” to DCC a so-called “commercial” policy (DCX 0004912) comprised of a series of insurance forms, *including approximately 257 DCC-selected endorsements*, for vehicles leased under the *DCC Car Program*. (1242a-1735a) Though termed a “commercial” policy, this policy applies *exclusively* to the private-passenger, *non-commercial* vehicles leased under the *DCC Car Program*. That is, the policy has no application to any other insurance arrangement DCIC may have with DCC. (896a) So, for example, this DCIC policy is inapplicable to DCIC’s arrangement with DCC car dealers. (896a-897a)

2. A “Fronted” Policy

This policy, which applied to Mr. Tent’s vehicles, is a “*fronted*” policy. (891a) This is evident from the policy itself (the policy has a \$5 million policy limit and a \$5 million deductible) and DCC/DCIC’s specific admissions. (1284a and 1738a)

Through this “fronted” policy device, DCIC “rents” its auto insurance license to DCC for an annual fee (approximately \$300,000). (900a) DCC then applied for and received State certification to “self-insure” these private-passenger, non-commercial *DCC Car Program* vehicles. (1767a-1770a)

3. DCC – The Policy’s Declaration Sheet (DEC Sheet) Sole “Named Insured”

Despite the policy’s exclusive application to these *private-passenger, non-commercial vehicles* and DCC’s utter lack of ownership interest in the vehicles, only DCC is listed on the policy DEC sheet as a “named insured.” Yet, DCC itself makes no policy claims to DCIC for “covered losses”. (1754a-1757a)

The policy, instead, provides coverage exclusively for *DCC Car Program* lessees, including Trent and his family members (including Brooks), for all Michigan no-fault required auto insurance.

4. Policy Premiums

DCC pays *no* premiums to DCIC. (1270a and 895a) Instead, as noted above, DCC pays DCIC only an annual fee (approximately \$300,000 per year) to “use” or “rent” DCIC’s auto insurance license. (900a) This annual fee is unrelated to the premiums that DCC charges, and collects from, the individual DCC employees/retirees who lease the *DCC Car Program* vehicles. (1207a-1214a and 900a-901a)

5. The Insurer’s Functions

DCC, the Dec sheet’s sole “named insured”, performs all insurer functions. Either directly or through its hired third-party administrator Gallagher Bassett Services (GBS), DCC:

- drafts and interprets the policy language;
- collects policy premiums and deductibles from individuals who lease vehicles under the *DCC Car Program*;
- administers all policy claims;
- defends all policy-related lawsuits;

- pays for any policy-related losses;
- handles all policy claims appeals;
- communicates with the individuals who lease vehicles under the *DCC Car Program* regarding the policy; and
- engages all vendors to perform policy-related duties.

DCIC performs none of these functions. (1739a-1750a; 896a; 1758a-1760a)

DCC assumes all the *insurer's* risks. It pays the covered policy losses of premium-paying *DCC Car Program* lessees and their family members.

As the dissent notes, DCC is “not only the sole named insured on the policy”, but is also the “de facto insurer of the vehicle”. (2014a)

6. DCC's So-Called “Deductibles”

Under the policy, DCC must “pay” deductibles equal to the policy coverage limits. (1284a and 1738a) So, DCC is always the *first and only* payor of all claims asserted under the policy. (1750a)

7. The DCC/DCIC Indemnification Agreement (IA)

In addition to this “deductibles-equal-policy-coverage-limits” arrangement, DCC must fully indemnify DCIC for literally *any* policy-related liability. This obligation is set forth in a separate Indemnification Agreement (IA) between DCC and DCIC. (1758a-1760a)

But, there is no actual indemnification transaction, *i.e.*, DCIC does not first pay policy claims and later “bill” DCC for indemnification. (895a; 1750a; 1284a) Instead, DCC pays *first and completely* for all eligible policy claims. DCIC does not even know when policy claims are made and, given its arrangement with DCC, is utterly uninterested in the policy terms. (891a; 912a; 917a-918a)

8. E19 -- Individual Named Insured

ITEM TWO of the policy's DEC sheet is entitled "**SCHEDULE OF COVERAGES AND COVERED AUTOS.**" A subheading within *ITEM TWO* unequivocally declares that an "*Attached Forms List*" contains the "Forms and Endorsements" that apply to the policy's coverage and are part of the policy.

The policy's "*Attached Forms List*" references approximately 257 DCC-selected endorsements, including the DCC-selected Endorsement 19 – *Individual Named Insured*. (1333a-1334a)

This Endorsement, which is also included in and appended to the policy, *specifically provides coverage for non-owned vehicles operated by resident family members*. It states in pertinent part:

A. Changes in Liability Coverage

* * * * *

2. Personal Auto Coverage

While any "auto" you own of the "private passenger type" is a covered "auto" under Liability Coverage:

a. The following is added to **Who Is An Insured:**

"Family members" are "insureds" for any covered "auto" you own of the "private passenger type" and any other "auto" described in Paragraph **2.b** of this endorsement.

b. Any "auto" you don't own is a covered "auto" while being used by you or any "family members" . . .

C. Additional Definitions

As used in this endorsement:

1. "Family members" means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

* * * * *

4. "Non-owned auto" means any "private passenger type" "auto", pick-up, van or "trailer" not owned by or furnished or available for the regular use of you or any "family member", while it is in the custody of or being operated by you or any "family member".

Endorsement 19 – Individual Named Insured (hereinafter: E19 – *Individual Named Insured*) extends liability coverage to vehicle lessees, including Trent and his family members, when they operate non-owned autos. Family members include blood relatives who *reside* in Mr. Trent’s household. (1333a) And, the policy defines “non-owned autos” as private passenger vehicles which are *not* provided to or made available for the regular use of Mr. Trent or his “family members,” *i.e.*, resident blood relatives. (1333a)

F. DCC, The State-Certified “Self-Insurer”

DCC/DCIC told the trial court, in their Affirmative Defenses and Summary Disposition brief, that DCC was *not* “a proper party” to this litigation. (11a)

While making this claim to the trial court, DCC was actually the payor of all policy-covered losses and had annually applied to the Michigan Secretary of State for certification as a “self-insurer” of the private-passenger vehicles it leases to individuals through the *DCC Car Program*. (1967a-1770a) As DCC/DCIC later admitted, this “self-insurance” specifically covered the two (2) vehicles it leased to Ms. Brooks’ father. (See Defendant DCC’s August 26, 2007 Reply to Plaintiff’s Second Request for Admissions.)

In its annual applications to the Secretary of State (over the period 2003 to 2007), DCC promised the Secretary of State that, in return for the “privilege” of being a “self-insurer,” it would fully “comply” with *all* the provisions of the Michigan No-Fault Statute. (1767a-1770a)²

II. STATEMENT OF MATERIAL PROCEEDINGS

A. The Trial Court Proceedings

1. Plaintiff-Appellant’s Lawsuit And DCC/DCIC’s Answer, Counterclaim And Third-Party Claim

On June 1, 2006, Plaintiff-Appellant sued DCC and DCIC, among others, for a declaratory judgment that the policy applied to Ms. Abay’s fatal collision.

DCIC, the entity with no policy liability and which performs no insurer functions, then filed a counterclaim seeking a declaration of non-coverage. It also filed a third-party claim against AAA, the insurer of the non-owned vehicle driven by Ms. Brooks when she killed Ms. Abay. In its third party suit, DCIC sought damages that arose, it claimed, from AAA’s failure to represent Ms. Brooks in the wrongful death action until after she was defaulted.

2. The Parties’ Cross Motions For Summary Disposition

a. DCC/DCIC’s Summary Disposition Motion And Argument

DCC/DCIC moved for summary disposition under MCR 2.116 (C)(10). They claimed that Plaintiff-Appellant’s complaint should be dismissed because:

- The policy is patently unambiguous and E19 – *Individual Named Insured*, which specifically and plainly states that it provides liability coverage to “resident relatives” (like Brooks) who drive non-owned vehicles, is merely “surplusage” and inapplicable under *Pavolich*; and

² The policy’s confusing reference to “commercial” vehicles – when only private-passenger, **non-commercial** vehicles are actually covered – becomes less confusing when considered in the context of DCC’s application to be certified as a “self-insurer” of these vehicles. If correctly described to the Secretary of State, *i.e.*, that DCC was actually seeking State approval to “self-insure” **private-passenger, non-commercial vehicles it did not own**, it undoubtedly would have raised questions and jeopardized DCC’s application to “self-insure” these vehicles. So, DCC’s selection of the term “commercial” for a policy that has no commercial implications was purposeful.

- Brooks was not a resident of her parents' home when she killed Ms. Abay. So, DCC/DCIC claimed, even if E19 – *Individual Named Insured* is applicable, Ms. Brooks does not meet the policy's resident-eligibility test.

1. E19 – *Individual Named Insured* As Surplusage

In their *Pavolich* argument, DCC/DCIC asked the trial court to nullify an entire policy Endorsement (E19 – *Individual Named Insured*) even though this Endorsement was specifically selected and approved by DCC and has been part of the policy and earlier *DCC Car Program* policies for nearly twenty (20) years. (1752a; 1771a-1774a)

The linchpin in DCC/DCIC's *Pavolich*-based argument is its urged reading of the policy word "you" and the policy phrase "named insured." DCC/DCIC claim that the word "you" has only one policy definition, *i.e.*, "you" means the "named insured." And, DCC/DCIC further argued, it is unambiguous that DCC is the policy's only "named insured." So, DCC/DCIC insisted, even a "casual reader" would realize that the policy term "you" refers exclusively to the "named insured" — DCC.

DCC/DCIC then reasoned that, because E19 – *Individual Named Insured* provides coverage only if the "named insured" is an individual and no individuals are a "named insured" (only DCC is the named insured), the policy is patently unambiguous and the entire Endorsement is merely a *Pavolich*-like "surplusage" and therefore void.

2. Brooks' Residency

DCC/DCIC declared to the trial court that Brooks' residency is "simply not relevant to the issue of coverage." Hedging their bets, DCC/DCIC also declared that they "believe" Brooks was not residing with her parents when she killed Ms. Abay. If true, DCC/DCIC argued, this disqualifies Brooks from policy coverage in any event.

To support their half-hearted eligibility argument, DCC/DCIC relied solely on a February 7, 2007 letter from the 48th District Court. (1775a-1776a)

b. Plaintiff-Appellant's Summary Disposition Motion And Argument And Its Opposition To DCC/DCIC's Motion

Plaintiff-Appellant filed her own MCR 2.116 (C)(10) summary disposition motion seeking a declaration that E19 – *Individual Named Insured* provided coverage for the fatal collision. (421a-659a) Plaintiff-Appellant argued that, by its terms, E19 – *Individual Named Insured* applied because Ms. Brooks was operating a non-owned auto and was, as a matter of law, a resident of her father's household at the time of the fatal collision.

In opposing DCC/DCIC's cross-motion for summary disposition, Plaintiff-Appellant argued that, even before the trial court could address DCC/DCIC's *Pavolich*-based claims of policy unambiguity, the trial court had to consider the fact that the DCC/DCIC-urged policy interpretation resulted in an illegal contract. Addressing this threshold contract-construction issue, Plaintiff-Appellant claimed that DCC/DCIC's policy-interpretation argument failed because it:

- a) violated the Michigan No-Fault Statute (MCL 500.3101 *et seq.*) in that it placed DCC (or its fronting agent DCIC) in an improperly favored, competitive position *vis a vis* other State auto insurers, *i.e.*, it authorized and approved DCC's efforts to provide only "contingent" or "conditional" PIP benefits and shift its Michigan no-fault insurance obligations onto other auto insurers, even for vehicles DCC leased to its own employees/retirees and "insured" or "self-insured";
- b) placed the individual lessees of the DCC vehicles in violation of MCL 500.3113(b), which specifically requires all vehicle owners to maintain State-mandated auto insurance, not "contingent" or "conditional" insurance;
- c) violated the Financial Responsibility Act (MCL 257.531) (FRA), under which DCC applied for the "privilege" of "self-insuring"

(oxymoronically enough) *non-commercial, privately-owned* vehicles it admittedly does *not* own but instead leases to its employees/retirees who (incongruently enough) pay DCC monthly insurance premiums; and

- d) directly contradicts DCC's specific representations to the Michigan Secretary of State that it will, as a "self-insurer" of these *non-commercial, privately-owned* vehicles, comply with *all* provisions of the Michigan No-Fault Statute. (1767a-1770a)

Apart from these illegalities, Plaintiff-Appellant also argued that the substantial and un rebutted material differences between *Pavolich* and the case *sub judice* rendered *Pavolich* inapplicable.

3. The Trial Court's Opinion And Order

In its September 20, 2007 "Summary Disposition Opinion and Order," the trial court first specifically rejected *Pavolich's* application to this case because of undisputed material facts. There are, the trial court found, "many material differences between the *Pavolich* case and the facts presented in this case." Specifically, the trial court noted that:

The policy was not sloppily or inartfully drafted, as was the case in *Pavolich*;

There was "no arm's length insurer/insured relationship," as there was in *Pavolich*;

DCC and DCIC are "closely linked" and that linkage raised "questions regarding which entity drafted and administers the Car Program insurance policies";

The *DCC Car Program* vehicles are "not commercial" and DCC is not the "statutory owner, title owner or registrant" of these private passenger, non-commercial vehicles;

There is a comprehensive indemnification provision that "effectively transforms" DCC into the "*de facto* insurer"; and

DCC "pays no premiums" to DCIC and the "individual lessee is responsible for paying all premiums" to DCC.

(1936a-1941a)

The trial court also found the policy patently ambiguous because of the obvious conflict between the DCC-selected *individual named insured* endorsement (E19 – *Individual Named Insured*) and the policy DEC sheet’s naming of a *business entity*, DCC, as the sole “named insured.” Because of this ambiguity, the trial court found the policy applicable.

Finding also that Brooks was a resident of her parents’ home when she killed Ms. Abay, and therefore eligible for policy coverage, the trial court applied the policy to Ms. Abay’s fatal collision.

The trial court granted Plaintiff-Appellant’s summary disposition motion, denied DCC/DCIC’s summary disposition motion and also denied AAA’s summary disposition motion on DCIC’s third party claim.

B. The Court Of Appeals’ Decision

1. The Majority Opinion

In a majority opinion, the Court of Appeals reversed the trial court and remanded for entry of an order granting summary disposition in favor of DCIC.³

In conclusionary fashion, the majority declared that Mr. Trent had coverage only “because he leased a car from DaimlerChrysler and thereby used with permission a covered vehicle DaimlerChrysler owned, hired or borrowed.” (2007a) Then, using what it describes as a “plain and ordinary reading” of the policy, the majority concluded as follows:

Defendants are correct that the policy references to “you” are references to the named insured, which is stated as DaimlerChrysler. The endorsement specifically states that the changes provided within it apply “If *you* are an individual.” The

³ As the majority notes, only DCIC is now “involved in this appeal”. *Abay v DCIC*, Michigan Court of Appeals Docket No. 26 for COA No. 283624.

term “you” as used in the policy refers to the named insured: DaimlerChrysler. Thus, because the “you” in this policy is not an individual, the endorsement E19 – *Individual Named Insured* does not apply.

The majority relied solely on *Pavolich* and specifically rejected the trial court’s reliance on the factual differences between *Pavolich* and the case *sub judice*. The majority found the factual differences “not relevant”. Instead, the majority reasoned, the focus must be on “the language of the insurance policy” only.

The majority never addressed or referenced Plaintiff-Appellant’s “illegality” argument and never even acknowledged the existence of a dissent that found persuasive this “illegality” argument, among other things.

Finding the policy unambiguous and inapplicable, the majority never addressed DCIC’s residency arguments regarding Ms. Brooks.

2. The Dissenting Opinion

a. PIP-Shifting

The dissenting opinion noted, at the threshold, that the majority adopts a policy interpretation that permits DCIC to unlawfully shift its PIP obligations and places *DCC Car Program* lessees in violation of Michigan no-fault law.

The dissent explained that, by naming DCC the DEC sheet’s sole “named insured” on a “commercial” policy, DCC dodged its PIP obligation whenever there is also a non-DCIC auto policy in the *DCC Car Program* lessee’s household. As the dissent explains:

While the policy also defines a PIP “insured” as anyone else occupying the covered auto, it excludes from coverage “anyone entitled to Michigan no-fault benefits as a named insured under another policy.” This shifts the burden of PIP coverage from this policy to the policy on any other vehicle in the same household.

The reality is that DCC never has to pay PIP benefits where there is a second policy in the household. The lessee cannot receive PIP benefits as a named insured under the policy as he is not a named insured. He cannot receive PIP benefits as a family member of the named insured as no one can be a family member of an entity. Finally, his rights under the policy to PIP coverage simply as an occupant do not apply if either he is a named insured or a family member of a named insured on any other policy on any other vehicle. *When a lessee or any member of his family is injured while occupying the Car Program vehicle, the Car Program insurance company does not pay as the primary PIP provider if there is another insured car in the household.* (Emphasis added.)

(2015a)

So, the dissent noted, the majority opinion sanctions a policy interpretation that victimizes other State auto insurers. Although DCC “purport to be providing the required no-fault insurance”, the dissent explained, its policy actually causes “insurers who should be secondary under the no-fault act” to become “primary” and allows DCC to avoid “its duty to provide PIP benefits required by law.”

The dissent also rejected the majority opinion because it adopts a policy interpretation that, the dissent claimed, forces *DCC Car Program* lessees to violate Michigan’s no-fault law. As owners of their leased vehicles, lessees are statutorily obligated to provide *primary* coverage required by Michigan No-Fault law. *State Farm Mutual Auto Ins Co v Enterprise Leasing Co.*, 452 Mich 25, 27 (1996). By providing only *contingent* PIP benefits, and barring a lessee from obtaining alternate or supplemental insurance coverage for these leased *DCC Car Program* vehicles, the dissent explained, DCC/DCIC “forces the lessees to violate the no-fault act in the context of PIP coverage.”

b. The Policy’s Patent Ambiguity

The dissent also refuted the majority’s “plain meaning” interpretation.

The dissent observed that, in this “fronted” policy, DCC is both the *de facto* insurer and DEC sheet “named insured”. DCIC is merely the marginalized renter of its insurance license, performing no insurer functions. The dissent noted that this “fronting” arrangement is evident from the policy itself (the \$5 million policy limit is swallowed up by the \$5 million deductible). As such, it makes the policy patently ambiguous.

The dissent reasoned that this “fronting” arrangement, which facilitates DCC’s dual role as the DEC sheet’s sole “named insured” and the *de facto* insurer or self-insurer, is fatal to the majority’s finding of unambiguity. As the dissent explained:

The policy’s definition of “you” also renders many other provisions meaningless, particularly since the policy defines “we” and “our” as “the Company providing this insurance,” creating the absurd result that both “you” and “we” are the same entity under the policy. The anomaly of the insured and insurer being the same wreaks havoc with the entire policy and belies any notion that the policy can simply be read as “plain language.” The policy is replete with provisions that are meaningless, ambiguous or confusing given the identity of “you” and “we.” For example, the policy provides:

“you must give us or our authorized representative prompt notice” of an accident or loss;

“you must make no payment without our consent;”

“[you must] immediately send us copies of any request, demand ...;”

[you must] cooperate with us in the investigation, settlement or defense of the claim or suit;” and

[you must] authorize us to obtain medical records or other pertinent information ... [and] submit to an examination.”

These are but a few examples, as the terms “you,” “your,” “we,” and “our” appear repeatedly throughout the policy. And these provisions cannot be rationally understood unless “you” is interpreted to mean the lessee.

c. **Interpreting E19 - Individual Named Insured As A Mere Nullity**

The dissent also rejected the majority analysis because it renders E19 - *Individual Named Insured* a complete nullity. As the dissenting opinion explains:

Finally, the majority concludes that an entire endorsement, i.e. **Endorsement No. 19, that DCC, both as insured and as the de facto insurer, chose to include in the policy**, can simply be read out of existence. A “plain language” approach would suggest that if, as DCIC suggests, the endorsement was intended never to apply and to be completely nugatory, then it simply would not have been included in the policy. This is even more so given that the endorsement is captioned by the phrase “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” Under a “plain language” approach to drafting, the endorsement now claimed to be nugatory would never have been included at all, or at least would have been captioned by the phrase “THIS ENDORSEMENT DOES NOT CHANGE THE POLICY AND DOES NOT APPLY. DO NOT BOTHER TO READ IT.” (Emphasis added.)

(2017a)

d. ***Pavolich* Is Inapposite**

The dissent rejected the notion that *Pavolich* requires that E19 - *Individual Named Insured* be read out of existence. Like the trial court, the dissent found significant material differences between *Pavolich* and this case. These differences, the dissent reasoned, render *Pavolich* inapplicable.

The dissent surveyed some of the factual differences between *Pavolich* and this case. It noted that in *Pavolich*, unlike here, the Township purchased policy coverage on police vehicles which *it* owned, the police officers paid no premiums and had no ownership interest in these Township vehicles.

The dissent also noted that, in *Pavolich*, the “insured and the insurer were distinct and wholly separate entities”, unlike this case where the “insurer” and the “named insured” are the same entity. The dissent further noted that, in *Pavolich*, the Township “policy provided for proper PIP benefits under the no-fault act”.

The dissent found probative the fact that in *Pavolich*, unlike here, the vehicles were “only driven by Township employees on Township business” and that the policy in *Pavolich* was “a true commercial policy”.

Beyond these factual differences which, the dissent said disqualifies *Pavolich*'s applicability, the dissent also observed that other states that follow *Pavolich* reasoning have rejected the efforts of insurers to read an entire *Individual Named Insured* endorsement out of a policy. The dissent explained:

. . . when the *Pavolich* Court found that the policy definition rendered the uninsured motorist provision surplusage, it examined cases from other jurisdictions for guidance on whether that required interpretation of the policy beyond that language. The Court cited several cases in which other states approved the view that the provision was surplusage and so declined to reform the contract. However, many of these same states have concluded that, where an entire endorsement, rather than an isolated provision, would be rendered surplusage, the contract must be reformed. See *Greenbaum v Travelers Ins Co*, 705 FSupp 1138, 1142 (ED Va, 1989) (“the court must give meaning and effect to the individual named insured endorsement as an integral part of the agreement between the parties. Having appended the endorsement to the policy, Travelers cannot be allowed to now argue it is meaningless.”); *Apgar v commercial Union Ins Co*, 683 A2d 497 (Me, 1996); *Home Folks Mobile Homes, Inc v Meridian Mut Ins Co*, 744 SW2d 749, 750 (Ky App, 1987) (Holding that an “ambiguity [is] created by the inclusion of the endorsement in the policy which by its own terms would never have any effect.”); *Purcell v Allstate Ins Co*, 310 SE2d 530, 533 (Ga App, 1983) (Concluding that there was no reason to include an “individual named insured” endorsement if the intent of the policy was to cover only a business auto and not extend any personal coverage);

Kissondath v Safeco Ins Co, unpublished opinion of the Minnesota Court of Appeals, issued November 19, 1996 (Docket No. CX-96-1462) (Holding that where a policy lists a company as the named insured, but the policy speaks to the named insured as an individual and includes an endorsement for an individual named insured, “the policy is facially ambiguous” and is construed against the insurance company to provide coverage). Footnote omitted.

(2018a)

e. Brooks’ Residency

The dissent too did not reach the issue of Ms. Brooks’ residency.

ARGUMENT

I. THE LEGAL STANDARD

This Court reviews *de novo* a decision to grant a motion for summary disposition. *Brown v Brown*, 478 Mich 545 (2007). A motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

II. THE DISSENT IS CORRECT, THE MAJORITY INTERPRETATION OF THE POLICY RENDERS IT ILLEGAL

A. Rules Of Construction

Courts disfavor contract interpretations that would render a contract illegal and invalid. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 497 (2001) (citing *Corbin Contracts*, §546 for the proposition that “it is very commonly stated that when the terms of the agreement have two possible interpretations, by one of which the agreement would create a valid contract and by the other it would be void or illegal, the former will be preferred”).

B. DCC/DCIC’s PIP-Shifting Scheme

DCC/DCIC has never offered an explanation for listing DCC as the DEC sheet sole “named insured” on a policy. And, the majority’s tortured effort to explain this unexplainable arrangement, *i.e.*, why the premium-paying owner of the leased-vehicle is not listed as a “named insured” yet the “insurer” (read: “self-insurer”), who makes no claims under the policy, is the sole “named insured”, simply fails.

The unrebutted evidence shows simply that DCC is listed as the DEC sheet’s sole “named insured” for one purpose -- as part of a scheme to unlawfully shift PIP benefit obligations to other auto insurers and, in this case, to nullify completely the application of a DCC-selected individual named endorsement.

This is illustrated in a DCIC-initiated lawsuit (note: *not* a DCC suit) against Allstate and *DCC Car Program* lessee Richard Bluhm in 2002. *DaimlerChrysler Insurance Co v Allstate Ins*, Oakland County Circuit Court Case No. 02-041634-NF. Richard Bluhm and his wife sustained severe and costly injuries in *their DCC Car Program* vehicle. DCIC, nonetheless, sued for a declaratory judgment that Allstate, which had issued a policy on another Bluhm household vehicle (not a *DCC Car Program vehicle*), had to pay Bluhm’s PIP benefits.

In this *Allstate* case, DCIC invoked the priority provisions of Michigan’s no-fault law. DCIC argued that, under the statute, the policy that identifies the injured person as a “named insured” is the first in line to pay PIP benefits. MCL 500.3114(1). Of course, Mr. Bluhm was *not* a “named insured” under the DCIC policy (the same policy at issue here) but was a “named insured” on the Allstate policy.

So, according to DCIC, Allstate had to pay PIP benefits for the Bluhms’ serious injuries even though they were sustained in their *DCC Car Program* leased and “insured” vehicle. This, DCIC piously argued, was a matter of Michigan no-fault law.

In the *Allstate* case, DCIC actively misrepresented the policy as a “commercial” policy in which it was an arms-length insurer of its “named insured” – DCC. Indeed, filing suit in the name of DCIC, which had no financial stake in the outcome of the case, was a threshold act of deception.

DCIC never informed the *Allstate* court or Allstate’s counsel that the policy was a “fronted” policy in which DCC is actually the *de facto* insurer. DCIC never mentioned to the court or Allstate’s counsel that DCC was neither the title owner, statutory owner, nor registrant of *DCC Car Program* vehicles in Michigan.

Without these critical facts and assuming a traditional, uncomplicated “insurer/named insured” arrangement, the court accepted DCIC’s argument. The result: Allstate paid over \$1.3 million in PIP benefits to a lessee and his spouse who were injured in a *DCC Car Program* leased and “insured” vehicle. (1813a-1818a)

Once paid by Allstate, DCIC immediately endorsed the check to DCC to reimburse DCC for *its* payment of PIP benefits prior to the court’s judgment. Both DCC’s initial payment of PIP benefits and this later reimbursement confirmed DCC’s role as the *de facto* insurer. It turned the DCC/DCIC so-called Indemnification Agreement on its head. (1758a-1760a)

DCIC has shifted its PIP obligation to other insurers in other matters. In these suits, as in the *Allstate* suit, the critical facts regarding the true nature of the policy and the common identify of the “insurer” and “named insured” were never disclosed to the court. *See e.g. Allstate v DCIC*, Oakland County Circuit Court Case No. 08-089794-NI; *AAA v DCIC*, Oakland County Circuit Court Case No. 08-093529-CK; *State Farm v DCIC*, Oakland County Circuit Court Case No. 05-063494-CK; *Amerisure v DCIC*, Oakland County Circuit Court Case No. 01-032032-CK.

C. DCIC’s PIP-Shifting Is Unlawful

Nothing in the Michigan no-fault statute permits an insurer to make its PIP benefit obligation *contingent* on the absence of another policy which identifies the injured party as a “named insured.” Nor does the Michigan no-fault statute permanently or uniformly favor one specific auto insurer over another.

But, DCC/DCIC’s “named insured” artifice, relied upon in the *Allstate* and other cases, makes their PIP obligation conditioned on the absence of any other household auto insurance that could be used to pay claims. The PIP-shifting, while violative of the statute, is particularly offensive given DCC’s role as the *de facto* insurer of captive *DCC Car Program* lessees who *must* insure through the *DCC Car Program*.

More to the point, *DCC Car Program* lessees *must* insure their vehicles solely and exclusively through the *DCC Car Program*. Yet, these lessees are given only a contingent policy. And, DCIC reaps the benefits of compelled premiums from all lessees under the *DCC Car Program* while it carries only a contingent responsibility to provide PIP benefits.

DCC/DCIC can cite no case where they prevailed on their vocabulary-driven, walk-between-the-raindrops “named insured” argument yet fully revealed to a court or the opposing party the “fronting” arrangement and/or the common identity of the “insurer” and the DEC sheet’s “named insured”. None exists.

Under the policy, as the dissent notes, DCIC does not function as an insurer issuing a “commercial” policy covering DCC’s losses and liabilities. Rather, DCC functions as the *de facto* insurer of *DCC Car Program* lessees and their family members (renting DCIC’s license for this purpose), by collecting premiums from *DCC Car Program* lessees, paying policy claims made by *DCC Car Program* lessees and their family members and providing policy coverage in connection with vehicles which are owned by the individual lessees under Michigan no-fault law

and used for personal purposes. This successful, but concealed, gerrymandering of the PIP priority provisions is contrary to Michigan no-fault law and violates the clear legislative intent regarding the proper apportionment of PIP duties among insurers.

This is not merely Plaintiff-Appellant's position and the dissent's finding. It is also the position of other State auto insurers though, in the past, they did not possess all the facts which fully revealed this statutory-violative scheme. AAA, in fact, had successfully challenged DCC/DCIC's "named insured" gimmick in pre-litigation disputes with DCC/DCIC.

In sternly-toned letters, AAA reminded DCIC of the insurance and statutory risks their policy argument creates for individual lessees, *viz.*, that it would leave individual lessees without statutorily-required auto insurance -- *a precursor to the very argument made by the dissent here.* (1819a-1824a) MCL 500.3114.

Now, of course, both Allstate and AAA have articulated, in their *amicus curiae* briefs, their opposition to this manipulation of a policy to shift PIP-benefit liability to other insurers.

The policy interpretation urged by DCIC and approved by the majority, when spun to its logical conclusion, results in an illegal or invalid contract. And, DCIC's self-serving observation that this is not a PIP case is not responsive to Plaintiff-Appellant's claims.

Neither DCIC nor the majority can balkanize one policy interpretation from another. A policy interpretation which serves DCIC's purpose in this suit but renders the policy illegal or invalid in another context is improper. But, that is the end product of the majority's conclusionary adoption of DCIC's "you" as the sole "named insured" argument.

The fact that the same "named insured" artifice is used by DCIC both to deny coverage here and also to shift PIP benefits is beyond dispute. In urging denial of coverage here, DCIC argued:

The ‘you’ referenced in [Endorsement 19] is defined in the policy as ‘refer[ing] to the Named Insured shown on the Declarations.’ Here, the Named Insured shown in DCIC policy’s Declarations is Daimler Chrysler Corporation and/or Chrysler Corporation and Its U.S. Subsidiaries. ... Since Mr. Trent was not the named insured shown in the declaration, Endorsement No. 19 does not apply to him... [and] there was no coverage for Kelly Brooks. ... DCIC’s appeal brief at 12, footnote omitted.

In a contemporaneously-pending PIP-shifting case, DCIC uses an identical argument to justify its PIP-shifting scheme that unfairly burdens AAA:

In the present [AAA] case, the DCIC policy identifies the ‘Named Insured’ under its policy as follows:

‘DaimlerChrysler Corporation, DaimlerChrysler Motors Company, LLC, Chrysler Corporation, and its United States subsidiaries. ...’

Thus, in the present case, the Corwins are not named insureds under the DCIC policy. John Corwin is, however, a ‘named insured’ under the ACIA and Foremost policies. Vera-Anne Corwin was and is his spouse. Accordingly, under MCL 500.3114(1), ACIA and/or Foremost is responsible for any PIP benefits due to the Corwins. *AAA v DCIC*, Oakland County Circuit Court Case No. 08-093529-CK; (See Appellant’s Reply Brief in Support of Abay’s Application to the Supreme Court.)

From these arguments, which could be used interchangeably by merely shuffling names, nothing could be clearer – DCIC’s rationale for denying coverage in this *Abay* case and its rationale for shifting PIP benefit obligations to ACIA in *AAA v DCIC* are identical. Even a “casual” read of these two DCIC arguments reveals their sameness.

DCC/DCIC’s tactics here to avoid coverage are identical to those it uses in their PIP-shifting cases. Here, in their affirmative defenses and motion for summary disposition, DCC/DCIC told the court that DCC—the party that is the “*de facto*” insurer -- is not a “proper party.” And, both the counterclaim against Plaintiff-Appellant and the third-party claim against AAA were brought solely by DCIC -- the mere “renter” of its insurance license.

So, just as they did in the PIP-shifting cases, DCC/DCIC sought first to deceive Plaintiff-Appellant and the trial court into believing that the policy was a traditional “commercial” policy in which DCIC insured DCC in an arm’s-length, insurer-insured relationship. And, just as they did in the PIP-shifting cases, DCC/DCIC used the “you” and “named insured” semantic construct to dodge its policy obligations under E19 – *Individual Named Insured*.

D. The Majority Opinion Failed To Address Plaintiff-Appellant’s PIP-Shifting Argument

The majority opinion failed to even address Plaintiff-Appellant’s argument or the dissent’s finding that DCIC’s policy interpretation is illegal. This silence would be curious under any circumstances. But, it is particularly odd given the dissenting opinion’s detailed, compelling argument that the majority’s policy interpretation results in a violation of the no-fault act that victimizes other State auto insurers, and places thousands of *DCC Car Program* lessees in violation of their statutory obligation to purchase *primary* insurance coverage.

Rather than addressing Plaintiff-Appellant’s “illegality” argument, the majority summarily mischaracterized it. The majority claimed that Plaintiff-Appellant’s is “arguing that the policy should be declared contrary to public policy if Endorsement 19 does not apply.” (2010a) Based on this re-cast argument, the majority then concluded that because residual liability coverage for non-owned autos is optional, not mandatory, a failure to provide such coverage does not run afoul of public policy.

This is a contrived and contorted argument. Plaintiff-Appellant’s “illegality” claim is *utterly unrelated* to any public policy consideration of Endorsement 19. Indeed, Plaintiff-Appellant makes no public-policy claims whatsoever regarding Endorsement 19. This part of Plaintiff-Appellant’s argument concerns only the unlawful PIP-shifting that arises from a policy

interpretation that gives credence to DCIC's "named insured" construct-- the very same construct DCIC relies on to deny Plaintiff-Appellant's claims.

For the reasons set forth herein and those contained in the dissent and in the trial court's decision, the majority opinion should be summarily reversed because its policy interpretation results in "violations of the [State's] no-fault act." (2013a)

III. THE TRIAL COURT AND THE DISSENT ARE CORRECT -- THE UNDISPUTED MATERIAL FACTS RENDER *PAVOLICH* INAPPLICABLE

In considering the parties' dueling summary disposition motions, the trial court rejected DCC/DCIC's *Pavolich* argument, finding *Pavolich* inapplicable based on the undisputed material facts. The dissent agreed.

They are correct. The undisputed material facts disqualify *Pavolich's* applicability. And, as a matter of law, Plaintiff-Appellant is entitled to judgment.

In its appeal brief, DCIC glosses over the trial court's threshold reliance on the undisputed material facts to disqualify *Pavolich's* application. Instead, it argued only that *Pavolich* is applicable because of similar policy language -- a semantic argument the majority adopts largely without analysis. As demonstrated below, DCIC has good reason to be bashful about the undisputed material facts. And, the majority's reliance on language alone -- its utter disregard of these inconvenient but material facts -- is error.

The trial court and the dissent cite several examples of the material factual differences between *Pavolich* and the case *sub judice*. A more detailed examination of these undisputed material facts makes clear the wisdom of the trial court and the dissent that *Pavolich* is inapplicable.

Listed below is a side-by-side comparison of the significant, undisputed material fact differences between this case and *Pavolich*.

**Abay and
DCC Car Program**

Pavolich

INSURER: DCIC, but the policy-envisioned and de facto insurer is DCC – the state-certified “self-insurer” and DEC sheet’s only “named insured”
POLICY DRAFTER: DCC – the DEC sheet “named insured”
POLICY INTERPRETER/ADJUSTER: DCC – the DEC sheet “named insured”
VEHICLES INSURED: Private passenger, non-commercial vehicles of individual employees and retirees
NAMED INSURED ON DEC SHEET: DCC – the policy-envisioned and de facto insurer or state-certified self-insurer
OWNER OF INSURED VEHICLES: The individuals who lease the vehicles from DCC for their exclusive use as private-passenger, non-commercial vehicles
WHO DRIVES THE CARS AND WHY: The individual owners of the vehicles (both DCC employees/retirees) drive the vehicles exclusively for their private, non-commercial use
DEC SHEET “NAMED INSURED” PREMIUMS: No premiums. DCC, the DEC sheet “named insured” and the state-certified “self-insurer” for these privately-owned vehicles, pays no premiums to DCIC – the ostensible insurer
INDIVIDUAL EMPLOYEE/RETIREE PREMIUMS: Yes. The individual employees/ retirees pay DCC insurance premiums for coverage on their private-passenger, non-commercial vehicles in return for policy coverage
SELF-INSURER: DCC – the DEC sheet “named insured”- was certified by the State as the so-called “self-insurer”
INDEMNIFICATION UNDER POLICY: DCC (the DEC sheet “named insured”) completely indemnifies DCIC (so-called insurer)
POLICY PROVISION CONSIDERED: E19 – Individual Named Insured – an Endorsement selected by DCC

INSURER: Michigan Township Participating Plan (MTPP)
POLICY DRAFTER: MTPP, the insurer
POLICY INTERPRETER/ADJUSTOR: MTPP, the insurer
VEHICLES INSURED: Only the Township’s own commercial vehicles
NAMED INSURED ON DEC SHEET: Township of Linden
OWNER OF INSURED VEHICLES: Only the Township, the “named insured”
WHO DRIVES THE CARS AND WHY: Only the Township’s active employees drive the Township’s commercial vehicles exclusively for Township business
DEC SHEET “NAMED INSURED” PREMIUMS: The Township – the “named insured” – pays premiums to its insurer, MTPP
INDIVIDUAL EMPLOYEE/RETIREE PREMIUMS: None. The Township’s active employees pay no premiums for the Township’s commercial vehicles. No retiree pays premiums or even drives the Township’s commercial vehicles
SELF-INSURER: None
INDEMNIFICATION UNDER POLICY: None
POLICY PROVISION CONSIDERED: A UM-UIM Endorsement

As this comparison demonstrates, virtually every material fact of this case differs substantially from *Pavolich*'s material facts.

The *Pavolich* Court noted that the policy it considered was a "sloppily and inartfully drafted" "standard policy" not "tailored" to Village needs. This was not a basis, the *Pavolich* Court reasoned, to interpret the policy term "you" to include Village police officers.

In this case, there is no sloppy or inartful drafting. Nor is there evidence of a "standard policy", ill-fitted to DCIC's needs. Rather, the undisputed facts reveal that DCC, the "named insured", in conjunction with its agent, Marsh USA, drafted the policy and specifically selected the policy endorsements, including E19 – *Individual Named Insured*.

In fact, Marsh USA "constructed" the policy for DCC. (1964a) Marsh USA gave DCC a "template" for the policy and DCC issued the policy on its stationary. *Id* at (1952a) ("They send us the whole forms and everything.") Marsh USA "has been an insurance agent for DCC, and its predecessors, for more than 20 years." (1076a)

Indeed, even after the policy was issued, DCC routinely reviewed it and periodically added endorsements. (1964a-1965a; 1967a)

Unlike *Pavolich*, the policy at issue here provides only *DCC Car Program* lessees with insurance covering *their* losses (read: *not* DCC's losses). Individual *DCC Car Program* lessees purchase policy coverage by paying premiums (to DCC, it turns out, not DCIC) for *their* own losses and those of their family members.

Pavolich, on the other hand, involved a genuine commercial policy covering only Township-owned vehicles, used only in the Township's business, and only for Township losses. No Township employee used the vehicles for personal use or paid premiums for coverage for *their* personal losses.

Quite simply, the material *Pavolich* facts do not comport with the unusual “fronting” arrangement and facts of this case. And, unlike here, *Pavolich* does *not* address an “Individual Named Insured” policy endorsement.

So, this *Abay* case is the proverbial “square peg” to the *Pavolich* “round hole.” The trial court and dissent correctly recognized this difference and correctly ruled *Pavolich* inapplicable.

DCIC claims, and the majority agreed, that these differences are immaterial. Relying solely on the similar policy vocabulary, DCIC and the majority contort the wisdom and compelling pragmatism of the *Pavolich* decision to rescue DCC (the “named insured”) from specific policy language it vetted, selected, and applied in an unusual arrangement where the policy’s “named insured” (the policy’s “you”) suffers no losses and is, in fact, the policy’s insurer.

This argument, of course, is nonsense and comes from the very parties’ – DCC and DCIC – that initially and repeatedly told the trial court that DCC (the self-insurer of these privately-owned vehicles) was not a “proper party” to this litigation. Indeed, AAA has characterized DCC/DCIC’s invocation of the *Pavolich* reasoning as a “*semi-fraudulent attempt to avoid coverage.*” (1996a) Significantly enough, AAA took this position contrary to its own apparent interests, *i.e.*, when it was being sued by DCIC for contribution and would have benefited from a court declaration that no coverage existed.

IV. THE MAJORITY ERRS WHEN IT IGNORES THE POLICY’S PATENT AMBIGUITIES

A. Rules Of Construction

“An insurance policy is much the same as any other contract.” *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566 (1992). An insurance contract is to be read as a whole and

meaning must be given to all terms. *Id.* “If the language of the contract is clear and unambiguous, it is to be construed according to its clear sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity.” *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342 (1965).

There are two types of ambiguities: patent and latent. A patent ambiguity is one that “appears on the face of a document, arising from the language itself.” *Blacks Law Dictionary* (7th Ed.); *Hall v Equitable Life Assurance Society*, 295 Mich 404, 409 (1940) An insurance contract is patently ambiguous if, after reading the entire contract, its language can reasonably be understood in different ways. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566-67 (1999); *Eagle v Zurich-American Ins Group*, 216 Mich App 482, 487 (1996).

A latent ambiguity is one “that does not readily appear in the language of a document, but instead arises from a collateral matter when the document’s terms are applied or executed.” *Black’s Law Dictionary* (7th Ed). “[E]xtrinsic evidence is obviously admissible to prove the existence of the ambiguity as well as to resolve any ambiguity proven to exist.” *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575 (1964); *Meagher v Wayne State University*, 222 Mich App 700, 721-22 (1997).

If possible, an ambiguity in an insurance contract is to be resolved first by resort to extrinsic evidence. *Klapp v United Ins Group Agency*, 468 Mich 459 (2003). Where the meaning of an ambiguous contract cannot be gleaned from extrinsic evidence, the rule of *contra proferentem* is to be invoked. That rule requires ambiguities to be construed against the drafter and in favor of coverage. *State Farm Mutual Auto Ins Co v Enterprising Leasing Co*, 452 Mich 25, 38 (1996); *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362 (1982).

Here, the trial court and the dissent are right. The policy is patently ambiguous and the extrinsic evidence resolves the ambiguity in Plaintiff-Appellant's favor.

B. The Policy Is Patently Ambiguous – A “Fronting” Agreement

A “fronting” agreement is a relatively unusual insurance device. It generally permits a self-insuring entity, that is unlicensed to operate as an insurer, to pay a fee to a licensed insurer for its licensing capability. As a practical matter, the unlicensed entity is “renting” a licensed insurance company's credentials. *White et al v The Ins Co of Pennsylvania*, 405 F3d 455 (6th Cir 2005).

As a “fronting” agreement, this policy's terms must be read in the context of the unusual arrangement it memorializes, *viz.*, *where DCC, the so-called “named insured,” is actually on all sides of the transaction (in the dual role of “insured” and “insurer”) and DCIC, the so-called “insurer,” assumes no risks whatsoever and is completely marginalized.* When read as a “fronting” agreement, the policy is patently and obviously ambiguous. Its terms are rendered chameleon-like or opaque.

This clear and patent ambiguity is evident from the policy's beginning. In the DEC sheet itself, DCIC clearly promises insurance to DCC. DCC, in turn, clearly promises premiums to DCIC. The DEC sheet states:

“IN RETURN FOR THE PAYMENT OF THE PREMIUM,
AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE
AGREE WITH YOU TO PROVIDE THE INSURANCE AS
STATED IN THIS POLICY.” (1244a)

Yet, throughout the policy itself, DCC just as clearly declares its obligation as a first payer to assume all policy risks and insurer's duties. (1284a and 1289a) There is simply, under the policy's plain and clear terms, no shifting or assumption of any risk whatsoever between

DCC and DCIC. The *initial* and *ultimate* risk of loss lies solely with DCC, the DEC sheet's "named insured."

From this threshold relational ambiguity (i.e., where the actual insurer and "named insured" are synonymous and the apparent insurer is an "empty suit"), the policy's repeated interweaving references to DCC (through the pronouns "you" or "your") and DCIC (through the pronouns "we" or "our") yield only further patent ambiguities.

These personal pronouns, which are braided over 1,400 times throughout this 494 page policy, are strangely out of place in a document where only one party (DCC) is both the sole risk taker and the sole DEC sheet "named insured." Ultimately, these policy terms loop back to the same party -- DCC, because it is both a "named insured" and the "insurer" of *all* policy coverage.

The policy coverage limits, ostensibly promised by DCIC to DCC, are swallowed by DCC's policy "deductibles," which equal the policy coverage limits. So, the term "deductible" loses its meaning. Under the policy's plain terms, it becomes a code word for DCC's duty to be the first-payor of all policy claims limits.

Repeatedly, the use of the words "you" or "your," and "we" or "our," when read as synonyms for DCC and DCIC, renders large portions of the policy senseless. Only a few examples are necessary to make the point. Plaintiff has bullet-pointed several policy terms with editorial notes to demonstrate how the policy is patently ambiguous if DCC/DCIC's rigid definitional argument is obeyed. (1825a-1826a)

In some cases, DCC/DCIC's argument results in an amusing reading of the policy where, according to the policy's plain terms, DCC must negotiate with itself from both sides of the table. *See e.g.*, Section IV, A, 1 of the policy where the language explains the procedure to be

followed by the “insurer” (“we”) and the “named insured” (“you”) if *they* disagree on the amount of a “loss.” (1252a)

The genesis of this ambiguity is obvious. The policy here actually provides coverage to individuals, *viz.*, premium-paying *Car Program* lessees who purchase policy coverage on their personal vehicles. So, not surprisingly, large portions of the policy are dedicated to the rights and responsibilities of these individuals. These policy provisions (*e.g.*, the obligation to report accidents, submit to medical exams, refrain from settlements not approved by the insurer, etc.) are entirely sensible when the terms “*you*” and “*your*” are read as the premium-paying lessees. But, they are utterly unintelligible when those terms are regarded as DCC. DCIC admits that these policy terms are actually applied in a manner which regards the individual *Car Program* lessees as the “*you*” and “*your*”. (1755a-1757a)

Despite its piety about “plain meaning”, DCIC makes no effort to reconcile these obviously ambiguous provisions with its strict definitional approach. The majority opinion too confines its analysis to E19 – *Individual Named Insured* and the DEC Sheet. Any attempt to apply their strict definitional approach to the policy as a whole fails miserably. So, instead, both the majority and DCIC examine these policy provisions singly, without the reference to the rest of the policy, to support their “plain meaning” conclusion and argument.

This will not do. These provisions are not abstractions independent of the policy as a whole. Over 1,400 times, the terms “*you*” or “*your*” (the named insured) and “*we*” and “*our*” (the insurer) are used in the policy. A determination of whether these terms are ambiguous requires a holistic examination of the policy, *i.e.*, how the terms are used throughout the entire policy, not merely a discrete comparison of two policy provisions.

As the dissent correctly notes:

The anomaly of the insured and insurer being the same wreaks havoc with the entire policy and belies any notion that the policy can be read as “plain language”.

(2017a)

The majority opinion failed to recognize the policy’s patent ambiguity or even the semantic tension created by DCC’s dual role as both “insurer” and the DEC sheet’s sole “named insured”.

Instead, the majority opinion characterized this consideration of DCC’s dual role as “looking outside the policy language in determining meaning.” (2008a) This too is nonsense. The policy itself -- without reference to anything outside the policy -- reveals its fronted nature (the policy limits equals deductible provision) and DCC’s dual status as the DEC sheet’s sole “named insured” and “insurer”.

The majority opinion improperly disregarded the policy’s facial ambiguity. This is error. The trial court and dissent correctly found the policy patently ambiguous.

C. The Policy Is Patently Ambiguous - Inclusion Of The E19 – *Individual Named Insured*

Although the policy’s DEC sheet lists only DCC as the “named insured,” the policy also includes an *Individual Named Insured* endorsement. The trial court and dissent correctly found that this creates a patent ambiguity. This patent ambiguity exists *independent of* the policy’s “fronted” nature.

In finding this patent ambiguity, the trial court broke no new ground. Indeed, several courts that follow the *Pavolich* reasoning have still specifically found a patent policy ambiguity when presented with policies that identify a business entity as the sole named insured and include an “individual named insured” endorsement.

In doing so, these courts have soundly rejected the precise argument urged by DCIC and hastily adopted by the majority. See *Home Folks Mobile Homes, Inc v Meridian Mutual Ins Co*, 744 SW2d 749 (Ky App 1988) (“we believe an ambiguity has arisen simply by virtue of the insurer’s inclusion of an endorsement (*i.e.*, the Individual Named Insured endorsement) in the policy”); *Kissondath v Safeco Ins Co*, 1996 WL 665906 (Minn App) (“An endorsement to the policy is termed “INDIVIDUAL NAMED INSURED;” although this endorsement is for liability coverage and not UIM coverage, the endorsement creates further confusion as to whether Kissondath, as an individual, is a named insured ... Construing the policy against Liberty Mutual as the drafter results in a conclusion that Kissondath as an individual is a named insured”); *Greenbaum v Travelers Ins Co*, 705 FSupp 1138 (ED Va 1989) (“the court must give meaning and effect to the individual named insured endorsement as an integral part of the agreement between the parties. Having appended the endorsement to the policy, Travelers cannot be allowed to now argue it is meaningless”); *Apgar v Commercial Union Ins Co*, 683 A2d 497 (Me 1996) (holding that the Individual Named Insured endorsement in a business policy created an ambiguity as to whether an individual was a named insured under the policy); *Purcell v Allstate Ins Co*, 168 Ga App 863 (1983) (holding that inclusion of the Individual Named Insured endorsement in business auto policy created “a reasonable inference that the intent was to make what would otherwise be a ‘business auto policy’ ... in effect a ‘personal’ policy for at least some coverages afforded thereunder.”) (1860a-1881a)

Significantly enough, the refusal of these courts to extend the *Pavolich* reasoning to cases involving “individual named insured” endorsements did not diminish their continued adherence to the *Pavolich* reasoning in the appropriate case. See *Russell v Cincinnati Ins Co*, 2004 WL 2633618 (Ky App 2004); *Kaysen v Federal Ins Co*, 268 NW2d 920 (Sup Ct Minn 1978); *Stone v*

Liberty Mutual Ins Co, 478 SE2d 883 (Va Sup Ct 1996); *Seaco Ins Co v Davis-Irish*, 180 F Supp2d 235 (D Me 2002).

In articulating their rejection of the same argument advanced here by DCIC and adopted by the majority, these courts have eloquently and firmly highlighted the folly of the argument. *Home Folks, supra*, is emblematic of a *Pavolich*-adhering court's rejection of the DCIC argument. And, *Home Folks* is particularly instructive because of the similar facts to the *Abay* case: a company official's daughter caused an accident while driving a borrowed car. The *Home Folks* court stated: (*Id.*)

The trial court's determination, however, overlooks the ambiguity created by the inclusion of the endorsement [an endorsement identical to Endorsement 19] in the policy which by its own terms would never have any effect. . . . Meridian insists that CA 99 17 [an endorsement identical to Endorsement 19] does not contain any language which creates an ambiguity. Nevertheless, we believe an ambiguity has arisen simply by virtue of the insurer's inclusion of an endorsement in the policy. In its brief Meridian states that the endorsement was included "for exactly the reason stated in the endorsement itself, to change the policy if the named insured was an individual as opposed to a corporation." This explanation is nonsensical as the insurance carrier was obviously aware that the named insured was not an individual but a corporation. (Emphasis and parenthetical material added.)

As these cases show, business (commercial) auto policies with both a declaration sheet identifying a business entity as the "named insured" and an Individual Named Insured endorsement are patently ambiguous.

Here, the evidence is even more damaging to DCIC's claims. Specifically, this policy applies to the *privately-owned, non-commercial* vehicles leased by premium-paying employees and former employees -- not DCC-owned, commercial vehicles -- and is a fronted policy with a DEC sheet named insured that is also the insurer.

The trial court and dissent properly recognize that the E19 – *Individual Named Insured* endorsement creates a patent ambiguity. The majority, on the other hand, simply ignored this case law. This debases the practical wisdom of *Pavolich*. It reduces *Pavolich* to a blunt, judicial “hammer” and every ambiguity claim a nail.

Pavolich is more nuanced. *Pavolich* interpreted the UIM endorsement to provide coverage to persons injured while occupying police vehicles and merely read a phrase within the UIM provision to be “surplusage”. This was also noted in the cases *Pavolich* relies upon and which are also cited by DCC/DCIC. See *Grain Dealers Mut Ins Co v McKee*, 943 SW2d 455 (Texas, 1997) (“McKee claims that any policy interpretation that denies family member status to Kelly is illusory ... we disagree. While the family member language provides no coverage for Kelly in this insurance ... the UM/UIM would have covered Kelly if she had been riding in a covered auto”); *General Ins Co of America v Icelandic Builders, Inc*, 24 Wash App 656 (1979) (“The incapability for a corporation to sustain bodily injury does not excuse the insurer from any possible liability arising from the endorsement” because coverage existed for “any other person ... while occupying an insured highway vehicle.”)

Neither DCIC nor the majority cite a single case involving an Individual Named Insured endorsement. *Pavolich*, of course, does not involve an Individual Named Insured endorsement. Rather, *Pavolich* addressed an uninsured and underinsured motorist (UIM) provision. And, neither DCIC nor the majority cite any case which renders an entire endorsement a complete nullity. None exists.

D. The Policy Is Latently Ambiguous -- The Trial Court And Dissent Are Correct

The un rebutted extrinsic evidence further undresses the charade of the “insured”/“insurer” relationship. The evidence establishes that E19 – *Individual Named Insured*

has been part of the insurance policies applicable to the *DCC Car Program* for about fifteen (15) years and very likely longer. (1754a; 1771a-1774a)

The extrinsic evidence also illuminates the “fronting” arrangement beyond what is evident from the policy itself. It reveals DCC (the sole “named insured”) as a State-certified “self-insurer” solely responsible, in the first instance, for literally *all* policy coverage. And, it reveals DCC’s assumption of all of the *insurer’s* functions.

Even more revealing, the extrinsic evidence establishes that DCC does not even own the vehicles it oxymoronically is certified to “self-insure.” And, the “self-insured” losses are *not* those of DCC, the ostensible “self-insurer”, but rather those of premium-paying *DCC Car Program* lessees and their family members.

The extrinsic evidence also revealed the ambiguity of the policy term “premiums.” The policy plainly states that DCC is to pay premiums to DCIC. But, the unrebutted testimony is that DCC does *not pay premiums* to DCIC, but *collects premiums* from individual lessees. (1207a-1214a; 902a-903a) This testimony also raised the head-scratching incongruity of the concept of “premiums” in the context of “self-insurance.”

Even more damaging to DCIC’s claims, the unrebutted extrinsic evidence establishes that DCC/DCIC’s attorneys admitted, in a March 7, 2002 letter to counsel for a deceased *DCC Car Program* lessee, that E19 – *Individual Named Insured* was specifically “applicable” to individual lessees. Without reservation, DCC/DCIC counsel said:

Enclosed are the following materials regarding automobile insurance coverage applicable to Mr. Coin:

...

. . . *Individual named insured Endorsement No. 19*
(Emphasis added.)

(1829a-1830a) So, a year and a half **before** Ms. Abay's death, DCIC formally acknowledged that E19 – *Individual Named Insured* applied to individual lessees under the *DCC Car Program*.

GBS also believed, five (5) months **after** Ms. Abay's death, that E19 – *Individual Named Insured* was designed to fit this so-called “commercial” policy to provide coverage for the individual *DCC Car Program* lessees, such as Ms. Brooks' father and his resident relative daughter. (1333a) Lisa Pape, GBS branch manager, “read” this endorsement in a May 21, 2004 email to DCC:

I'm assuming this endorsement [i.e., E19 -- Individual Named Insured endorsement] applies to the individual lessees and if this is the case, the word “you” used throughout this particular endorsement refers to the lessee” and “the purpose of the Individual Named Insured endorsement is to tailor the Business Auto Coverage Form to personal auto coverage. Id. (Emphasis added.)

(1828a)

Three days later, Ms. Pape underscored her conclusion that E19 – *Individual Named Insured* applied to individuals:

I can find no exclusion in the auto cov form under the individual named insd endorsement and have written to Mark Pitchford [a DCC employee] on my analysis.

(1827a)

Thus, prior to this litigation, *i.e.*, **before** and **after** Ms. Abay's fatal collision, the viability of E19 – *Individual Named Insured* as part of the policy coverage was uniformly acknowledged by DCIC.

After the case *sub judice* was filed, however, DCIC reversed course and for the first time regarded E19 – *Individual Named Insured* as a nullity. This was unique treatment for an

endorsement. The un rebutted testimony establishes that, out of the 257 DCC-selected endorsements, only E19 - Individual *Named Insured* is now deemed a nullity. (1754a)

The extrinsic evidence also established that the hand-picked, third-party policy administrator, GBS, a seasoned and sophisticated “reader” of insurance policy terms (*cf* DCIC’s “casual reader” claim), admitted that applying the policy terms “you” or “your” as synonyms for DCC is nonsensical. She admitted that, with respect to many policy provisions, the term “you” is regarded as the individual lessee. (1755a-1757a)

For example, Ms. Pape testified about Section IV.A.2 of the policy, which states that: “you must give us or our authorized representative prompt notice” of an accident or loss. Emphasis added. But, DCC (the defined “you”) never gives notice of the accident or loss to DCIC (the defined “us” and “our”). In fact, DCIC has no knowledge of claims made under the policy. (907a-908a; 918a) Rather, it is the *DCC Car Program* lessee that must give such notice to DCC’s third-party administrator and DCC. (1755a-1757a)

The extrinsic evidence also showed that in the *Allstate* case (*DCIC v Allstate, et al*, OCCC Case No. 02-041634 NF), DCIC specifically declared that the:

DCIC insurance policy is a contract between DCIC and Mr. Bluhm [the individual lessee]. (Emphasis added.)

(1783a)

In the *Allstate* case, DCIC argued that Mr. Bluhm’s reliance on the *DCC Car Program* terms was precluded by the policy provision stating that “[t]his policy contains all agreements between you and us” So, in direct contradiction to DCIC’s argument here, DCIC linked for the *Allstate* trial court the policy term “you” to the individual lessee and the policy term “us” to DCIC, thereby giving the policy phrase “named insured” a more common sense meaning. *Id.*

The majority opinion simply ignored this extrinsic evidence of DCIC's inconsistent, but self-serving, interpretation of the policy. This is an error.

The majority should have considered this extrinsic evidence and reached the same conclusion articulated by DCC and its third-party administrator *prior* to this litigation -- that numerous policy provisions (including E19 - *Individual Named Insured*) make sense only if the term "you" is regarded as the *DCC Car Program* lessee.

E. Plaintiff-Appellant's Extrinsic Evidence Was Unrebutted

As noted above, the policy is replete with patent ambiguities and also contains latent ambiguities. So, extrinsic evidence is a proper tool to interpret the policy.

Plaintiff-Appellant produced significant extrinsic evidence in support of the argument that E19 - *Individual Named Insured* must be given effect. Apparently content with their *Pavolich* argument, DCC/DCIC submitted no extrinsic evidence and did not rebut Plaintiff-Appellant's evidence.

V. RELIEF SOUGHT

Plaintiff-Appellant asks this Court to enter an order reversing the majority decision of the Court of Appeals and finding policy coverage for the reasons stated by the dissent, the trial court, and as argued in this brief.

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