

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. E. Thomas Fitzgerald, Presiding, the Hon. Michael J. Talbot
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 Cross-Plaintiff and Third-Party
Plaintiff,

and

DAIMLERCHRYSLER CORPORATION
(n/k/a OLD CARCO LLC),

Defendant, Counter-Plaintiff,
Cross-Plaintiff and Third-Party
Plaintiff,

and

JAMES E. TRENT and KELLY ROSE BROOKS,

Defendants and Cross-Defendants,

and

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

Third-Party Defendants.

Supreme Court No. 139725

Court of Appeals No. 283624

Lower Court No. 06 075016 CK

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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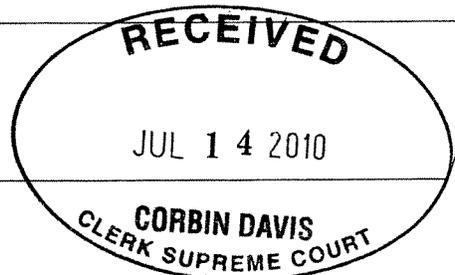


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STATEMENT OF JURISDICTION

Appellee has no objection to the Statement of Jurisdiction provided by Appellant.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. IS THE POLICY ISSUED BY APPELLEE UNAMBIGUOUS, WHERE IT CLEARLY DEFINES “YOU” WHENEVER USED IN THE POLICY TO MEAN THE NAMED INSURED, THE NAMED INSURED IN THE POLICY IS THE CORPORATE DEFENDANT, AND THE ENDORSEMENT UNDER WHICH PLAINTIFF SEEKS COVERAGE SPECIFICALLY STATES THAT IT ONLY APPLIES “IF YOU ARE AN INDIVIDUAL?”**

The Trial Court said “No.”

The Court of Appeals said “Yes.”

The Appellant says “No.”

The Appellee says “Yes.”

- II. DOES THE INSURANCE POLICY ISSUED BY APPELLEE VIOLATE ANY PROVISIONS OF THE NO-FAULT ACT?**

The Trial Court said “Yes.”

The Court of Appeals majority opinion did not explicitly answer this question.

The Court of Appeals majority impliedly answered this question in the negative when it found that the insurance policy did not violate public policy, because an insurer is not required by the no fault act to carry residual liability insurance for non-owned vehicles.

The Appellant says “Yes.”

The Appellee says “No.”

COUNTER-STATEMENT OF FACTS

Introduction

This case requires the Court to examine a contract that provided automobile insurance for Mr. James Trent, a Chrysler retiree who leased two vehicles through the Company Car Program (Trent dep, pp 23-24; 819a). Mr. Trent never allowed his adult daughter, Kelly Brooks, to drive the Chrysler vehicles because he knew she had a substance abuse problem (Trent dep, pp 68-69; 830a). Tragically, Ms. Brooks borrowed a car from a friend on December 10, 2003, and while driving that car (a 2001 Oldsmobile Intrigue), caused the fatal accident that took the life of the Plaintiff's decedent. The question in this case is whether the policy of insurance covering Mr. Trent's lease vehicles applies to the judgment for tort liability that a jury assessed against Kelly Brooks and against the individual who loaned her the Oldsmobile. When this policy is applied according to its clear and unambiguous terms, it does not supply coverage for an accident caused by a vehicle that was neither owned nor operated by any insured, nor used with the permission of any insured.

Plaintiff in this case never asserted any claim under the policy for personal insurance protection benefits pursuant to the Michigan no fault act, MCL 500.3101(1). The question of any potential liability for personal insurance protection benefits under the policy is thus an entirely hypothetical issue in this case. Further, because the liability that is actually at issue in the case – liability for a non owned vehicle – is not a liability for which coverage is required by the no fault act, this case is governed wholly by the contract of the parties. That contract must be applied as unambiguously written.

Summary of Proceedings

This case arises from a fatal collision in which Kelly Brooks, the adult daughter of Chrysler retiree James Trent, drove a car owned by an unrelated third party, Deborah Jean Lee, and loaned to Ms. Brooks by Ms. Lee's boyfriend, Alvin Jerome Taylor. Ms. Brooks drove Ms. Lee's vehicle while under the influence of intoxicants and struck a vehicle occupied by the Plaintiff's decedent, Mira Abay. Ms. Abay died as a result of injuries she received in the collision.

Ms. Abay's estate filed a tort action against Ms. Brooks, as well as the owner of the vehicle Ms. Brooks drove at the time of the accident, Deborah Jean Lee, and the owner's boyfriend Alvin Jerome Taylor, who allowed Ms. Brooks to drive the car (Complaint and Jury Demand, 8/16/05; 66a-70a). The case was eventually tried to a jury, resulting in a verdict against Ms. Brooks in the amount of \$3,510,419.77 (Final Judgment on Jury Verdict, 2/13/08; 118b).

While the tort action was pending, Plaintiff filed a declaratory action against Daimler Chrysler Insurance Company (now Chrysler Insurance Company) and DaimlerChrysler Corporation (now Old Carco, LLC), as well as Mr. Trent and Kelly Brooks, asking the Court to determine "that the liability coverage of the DaimlerChrysler Insurance Company policy applies to the fatal accident of December 10, 2003 . . ." (Declaratory Complaint, 6/1/06, p 5; 5a). DaimlerChrysler Corporation and DaimlerChrysler Insurance Company filed a counter claim for declaratory action as well as a third party complaint against AAA, the insurer of the vehicle driven by Ms. Brooks (DaimlerChrysler Insurance Company's Counterclaim, Cross-Claim, and

Third-Party Claim for Declaratory Relief, 6/19/06; 12a-23a).¹ DaimlerChrysler Insurance Company and DaimlerChrysler Corporation filed a Motion for Summary Disposition, and Plaintiff filed a Cross Motion for Summary Disposition. The trial court denied Defendants' motions and granted Plaintiff's motion. The Court of Appeals reversed, finding that the policy issued by DaimlerChrysler Insurance Company did not apply to Kelly Brooks. Plaintiff sought leave to appeal to this Honorable Court, which was granted on March 24, 2010. This Honorable Court instructed the parties to brief the following issues: "(1) whether the insurance policy issued by DaimlerChrysler Insurance Company is ambiguous, and (2) whether the insurance policy violates any provisions of the no-fault act, MCL 500.3101, et seq."

The Appellees

DaimlerChrysler Insurance Company (also referred to herein as "DCIC") is a Michigan stockholder property and casualty insurer with its principal place of business located in Farmington Hills, Michigan. DaimlerChrysler Insurance Company issued the policy of insurance that is at issue in this case.

DaimlerChrysler Corporation (now Old Carco LLC, hereinafter referred to as "Old Carco") is a Limited Liability Company organized under the laws of Delaware with its principal office located in Auburn Hills, Michigan. DaimlerChrysler Corporation, along with its U.S. subsidiaries, is the named insured on the DCIC policy of insurance involved in this case. Old Carco currently remains under bankruptcy protection. Pursuant to 11 USC Sec. 362(a)(1), DaimlerChrysler Corporation's filing of its bankruptcy petition automatically stayed the

¹ The claim against AAA was resolved by AAA's payment, on behalf of Deborah Jean Lee, of its policy limits for tort liability to the Estate of Mira Abay (10/27/06 letter from Michael John to Christopher Legghio; 16b). This payment also settled the underlying tort claim against Ms. Lee (*Id.*).

continuation of this judicial action against it. The Chrysler that reemerged from bankruptcy on June 10, 2009, is not a party to this action. For the sake of clarity, the parties will be referred to by their names at the time of the relevant events.

The Policy

The policy at issue in this case, DaimlerChrysler Insurance Company Commercial Lines Policy Number DCX 004912, was issued by Appellee, DaimlerChrysler Insurance Company to “DaimlerChrysler Corporation and/or Chrysler Corporation and its U.S. Subsidiaries.” (Declaration sheet; 26a). Pursuant to an amendatory endorsement, the named insured under the policy is “DaimlerChrysler Corporation, Chrysler Corporation, and its United States Subsidiaries, and its present and future subsidiaries, owned, controlled and managed companies and corporations, any associated or affiliated companies, now or hereafter constituted, or previously existing” (Endorsement No. IL-A; 1277a).

Vehicles Covered

This policy is not limited to Chrysler lease vehicles as Plaintiff has asserted. It is a very broad commercial policy. The policy covers complimentary Chrysler vehicles provided for journalists, product evaluation vehicles supplied to vendors, product evaluation vehicles supplied to employees, promotional vehicles provided to racing groups, and “pool cars,” as well as vehicles leased to Chrysler employees and retirees (Collins dep, pp 134-135; 53b) (Omilion dep, pp 29-30; 1954a-1955a) (Pape dep, p 71; 85b). Pool cars are company cars owned by Chrysler (Collins dep, pp 42-43; 30b). Such a car would be provided for use by a

Chrysler executive flying to another part of the country, for example (Collins dep, p 43; 30b).² Dawn Omilion, supervisor of corporate programs at DCIC, testified that the policy applies to fleet cars that DCC had and used for business (Omilion dep, p 28; 1954a).

In southeast Michigan, the cars that were leased to Chrysler employees or retirees under the DCC Car Program were owned by Gelco, which leased them to DCC, which in turn subleased them to lease participants (Pape dep, p 118; 97b). Outside of southeast Michigan, DCC owned the lease vehicles (Pape dep, pp 118-119; 97b), and the majority of lease vehicles are owned by DCC (Collins dep, p 180; 64b), as are the pool cars that are also covered under the policy (Collins dep, p 42; 30b). The ownership of other vehicles covered under the policy, such as promotional vehicles and product evaluation vehicles, is not stated in the record.

The Policy is a Fronted Policy

Because much has been made of the status of the policy in question as a “fronted policy,” Appellee will demystify this business practice. Curtis Geisler, Corporate Programs Manager for Appellee, explained that DCIC was paid a fronting fee to allow DCC to use its paper to issue insurance certificates (Geisler dep, p 28; 894a). The policy is issued on DCIC paper (Geisler dep, p 28; 894a). However, there is an indemnification agreement whereby DCC adjusts all losses, pays all claims, and indemnifies DCIC one hundred percent (Geisler dep, p 28; 894a)

² Appellant’s statement that the policy applies exclusively to lease cars relies upon citation to the testimony of Curtis Geisler, Corporate Programs Manager for DCIC (Appellant’s Brief, p 7, citing to 896a). However, Mr. Geisler clearly indicated that because this is a fronted policy, DCC adjusted all the losses, paid all the claims, and indemnified DCIC one hundred percent (Geisler dep, p 28; 894a). Mr. Geisler freely admitted that he did not have a working knowledge of what type of coverage was provided under the policy (Geisler dep, p 99; 912a). On the other hand, Lisa Pape and Michael Collins, who testified concerning the various classes of vehicles covered, are employees of Gallagher Bassett Services, Inc., hereinafter referred to as Gallagher Bassett, the company that actually adjusts claims for DCC (Pape dep, p 7; 69b) (Collins dep, pp 22, 56; 25b, 33b).

(Indemnity Agreement; 7b). Mr. Geisler testified that this is “pretty common” in the insurance business (Geisler dep, p 29; 894a). Basically, Mr. Geisler testified the fronting arrangement allows DCC to use DCIC’s license (Geisler dep, p 30; 895a). However, DCC acts as a self insurer, and is licensed with the State of Michigan as a self insurer (Geisler dep, p 32; 895a) (Application for Self Insurance Status; 1767a). Michael Collins, a claims supervisor for Gallagher Bassett (third party claims administrator for DCC), similarly described the fronting policy as self insurance (Collins dep, pp 62-65; 35b). DaimlerChrysler Corporation has a policy through DaimlerChrysler Insurance Company, with a deductible that is equal to the liability limit (Collins dep, p 61; 34b).

This is a characteristic fronting policy. There is nothing unusual about the policy providing for coverage and deductible in the same amount. “In typical fronting policies, the deductible matches the limit of liability, such that the business bears the entire risk of loss.” *White, et al v The Insurance Company of the State of Pennsylvania*, 405 F3d 455, 457 (6th Cir. 2005). “[A] fronting policy arises when the insured agrees to administer all claims and agrees to reimburse the insurer for all settlements and judgments paid. Under this type of policy, the insurer acts as a surety as to the insured’s ability to pay covered claims. This is not an indemnity agreement, but, rather, is used as a means to satisfy state financial responsibility laws.” 22-140 Appleman on Insurance Sec. 140.5, citing Douglas R. Richmond, Issues and Problems in “Other Insurance,” Multiple Insurance, and Self-Insurance, 22 Pepp. L. Rev. 1373, 1447 (1995) (emphasis added). Fronting policies are commonly used by large businesses, such as DCC, operating in a number of states in order to avoid the formal legal requirement for qualifying as a self-insurer in each state. 27-169 Appleman on Insurance, Sec. 169.3. Former Judge and now Justice Sotomayor observed after citing various commentators and INSURLAW Thesaurus, that

the use of fronting policies is “very much a custom in the industry.” *Insurance Company of North America v Pyramid Ins Co*, United States District Court for the Southern District of New York, No 92 Civ 1816 (1994) (1b). The policy at issue here is a national policy (Geisler dep, p 91; 910a). However, DaimlerChrysler Corporation did qualify as a self insurer under the no fault act pursuant to the certificate filed with the state of Michigan (Application for Self Insurance Status; 1767a).

DCC and DCIC are separate entities

Plaintiff incorrectly insinuates that DCC and DCIC shared the same identity. The reality of the separate identities of these entities is rather dramatically illustrated by the fact that the former DaimlerChrysler Corporation, now known as Old Carco, LLC, is under bankruptcy protection at this time. Pursuant to 11 USC Sec. 362(a)(1), DaimlerChrysler Corporation’s filing of its bankruptcy petition automatically stayed the continuation of this judicial action against it.³ Also, DaimlerChrysler Insurance Company, although it acted as a fronting company with respect to the policy at issue, underwrites insurance on several other auto fleets, including Mercedes Benz of U.S.A., Freightliner, DaimlerChrysler North America Holding, Detroit Diesel, DaimlerChrysler Financial Services and Employees Mercedes Benz Vehicle (Geisler dep, p 67; 904a). DCIC has exposure for payment on these policies (Geisler dep, p 68; 904a).

The Policy Provisions

The question in this declaratory judgment action is whether the tort judgment against Ms. Brooks is an obligation covered under the DaimlerChrysler Insurance Company Commercial Lines Policy Number DCX 0004912 that DCIC issued to “DaimlerChrysler Corporation,

³ The Court of Appeals granted Plaintiff’s Motion to Enlarge the Record to include the bankruptcy petition (120b; 150b; 153b).

Chrysler Corporation, and its United States Subsidiaries, and its present and future subsidiaries, owned, controlled and managed companies and corporations, any associated or affiliated companies, now or hereafter constituted, or previously existing” (Endorsement No. IL-A; 1277a). More specifically, the question is whether Ms. Brooks qualifies as a person insured by the policy under the facts of the case.

Appellant relies upon policy endorsement No. 19 in claiming that Ms. Brooks is insured under the policy. The endorsement reads, in relevant part:

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
BUSINESS AUTO PHYSICAL DAMAGE COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form [Business Auto Coverage Form] apply unless modified by this endorsement.

If you are an individual, the policy is changed as follows:

A. Changes in Liability Coverage.

....

2. Personal Auto Coverage.

....

b. Any “auto” you don’t own is a covered “auto” while being used by you or by any “family member” except:

(1) Any “auto owned by any “family members”.

- (2) Any “auto” furnished or available for your or any family member’s regular use.
- (3) Any “auto” used by you or by any of your “family members” while working in a business of selling, servicing, repairing or parking “autos.”
- (4) Any “auto other than an “auto” of the “private passenger type” used by you or any of your “family members” while working in any other business or occupation.

(Policy endorsement 19; 63a) (emphasis added). The critical question presented is whether “you” includes Mr. Trent.⁴

The Business Auto Coverage Form to which Endorsement No. 19 applies, defines “you,” as used in the endorsement, as follows:

Throughout this policy, the words “you” and “your” refer to the Named Insured shown in the Declarations. The words “we”, “us” and “our” refer to the Company providing this insurance.”

(Business Auto Coverage Form, 117a). It is undisputed that the Named Insured shown in the DCIC policy’s Declarations is DaimlerChrysler Corporation and/or Chrysler Corporation and Its U.S. Subsidiaries (Business Auto Declarations; 26a), and by amendatory endorsement, “DaimlerChrysler Corporation, Chrysler Corporation, and its United States Subsidiaries, and its present and future subsidiaries, owned, controlled and managed companies and corporations, any associated or affiliated companies, now or hereafter constituted, or previously existing” (Endorsement No. IL-A; 1277a).

⁴ If that question were answered in the affirmative, then coverage would hinge on whether Ms. Brooks was a “family member” of Mr. Trent. This depends on whether Ms. Brooks was a resident of Mr. Trent’s household (63a), a question that the trial court answered in the affirmative (1940a), but that the Court of Appeals did not reach (2010a).

The Underlying Tort Action

The underlying action by the Estate of Mira Abay against Kelly Brooks, Deborah Jean Lee and Jerome Taylor alleged negligence as to Ms. Brooks and Mr. Taylor, and liability under the “civil liability of owners and operators of motor vehicle statute,” MCL 257.401, as to Ms. Lee (Complaint, 8/16/05, ¶¶ 14, 15, 16; 4a). Ms. Brooks was defaulted in the underlying action (Default, 83a). The tort action proceeded to trial before a jury on January 4, 2008. On January 8, 2008, the jury returned a verdict in favor of the Estate and against Defendants Kelly Brooks and Alvin Taylor in the total amount of \$3,194,674.34 (Final Judgment on Jury Verdict, 2/13/08; 117b). The jury allocated 75% of the fault to Kelly Brooks and 25% of the fault to Alvin Taylor (*Id.*, 119b). On February 13, 2008, a judgment was entered against Ms. Brooks in the amount of \$3,510,419.77 (*Id.*, 118b).

The Declaratory Action

This declaratory action was initially filed by the Estate of Mira Abay on June 1, 2006 (Complaint for Declaratory Relief, 6/1/04; 1a), while the underlying tort action was still pending. Plaintiff’s Complaint sought a declaration “that the liability coverage of the DaimlerChrysler Insurance Company policy applies to the fatal accident of December 10, 2003, in which defendant Kelly Brooks caused the death of plaintiff’s decedent . . .” (*Id.*, 5a). Plaintiff did not seek any determination of PIP benefits (*Id.*). In fact, PIP benefits were never sought from the DCIC policy by anyone in connection with the fatal accident that underlies this case.

Defendants DCIC and DCC filed a Counter-Complaint for Declaratory Judgment, seeking *inter alia* a declaration “that DCIC, pursuant to the policy of insurance number DCX 0004912 is not and will not be obligated to indemnify Cross-Defendant Kelly Brooks for any settlement or judgment made or rendered in the suit filed by Maria C. Abay, as personal

representative of the Estate of Mira C. Abay, deceased v Kelly Rose Brooks, Deborah Jean Lee and Alvin Jerome Taylor . . .” (DaimlerChrysler Insurance Company’s Counterclaim, Cross-Claim, and Third-Party Claim for Declaratory Relief, 6/19/06; 12a, 19a).

The Motions for Summary Disposition

On or about January 27, 2007, DCIC and DCC moved for summary disposition pursuant to MCR 2.116(C)(10) (DCIC/DCC Motion for Summary Disposition, 1/27/07; 87a). DCC and DCIC argued that the policy was unambiguous, and that endorsement 19 did not apply to provide coverage for Kelly Brooks, because the endorsement only applies “if you are an individual”; the policy expressly defines “you” as the named insured; and the named insured was not an individual, but was “DaimlerChrysler Corporation and/or Chrysler Corporation and its U.S. Subsidiaries” (*Id.*, p 4; 89a, 100a-101a). DCIC and DCC submitted that the case was controlled by *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378; 591 NW2d 325 (1997) (102a-107a).

In her response to DCC and DCIC’s motion, Plaintiff introduced the theme that the nature of the DCIC policy as a fronting policy rendered the policy “patently ambiguous at the threshold” (Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Disposition, pp 16-17; 1131a-1132a). Plaintiff appeared to contend that the use of “you” in the policy to refer to the named insured, DCC, and “we” to refer to the fronting insurer, DCIC, created patent ambiguities because DCC actually assumed the risk of the insurer (*Id.*). Plaintiff also contended that the existence of a fronting policy distinguished this case from *Pavolich*, *supra* (*Id.*, p 18; 1133a).

Plaintiff argued that the policy interpretation urged by Defendants would violate the no fault act (citing MCL 500.3101 et seq.) “resulting in an illegal or invalid contract” (*Id.*, p 13;

1128a). Plaintiff argued that “by designating DCC only as the ‘named insured,’ DCC/DCIC have successfully laid off their PIP obligations, on cars leased under the DCC Car Program, to other auto insurers” (*Id.*, p 15; 1130a).⁵ Plaintiff further contended that the policy interpretation urged by Defendants would place individual lessees in violation of the statutory provision that requires all vehicle owners to provide statutorily mandated auto insurance (*Id.*, p 12; 1127a).

Plaintiff’s Counter Motion for Summary Disposition and Defendants’ Response reiterated similar arguments. DCC and DCIC’s Response specifically addressed the question of fronting policies, noting that they are not new, they are not illegal, and that GM has a similar fronting policy⁶ (Defendants DaimlerChrysler Corporation and DaimlerChrysler Insurance Company’s Response to Plaintiff’s Motion for Summary Disposition, p 4; 926a).

The trial court granted summary disposition in favor of the Plaintiff. The court opened its discussion of this issue by noting that “[t]he DaimlerChrysler insurance policy at issue in this lawsuit is a complicated one. It appears that DC Ins has issued to DC Corp a commercial policy comprised of a series of standard forms and endorsements.” The Court went on to state, incorrectly, that “[t]he policy applies exclusively to the private passenger, non commercial vehicles leased under the Car Program by employees and or retirees” (Opinion and Order, p 3; 1938a). As noted in this Counter-Statement of Facts, *supra*, the policy covers complimentary vehicles provided for journalists, test vehicles supplied to vendors, product evaluation vehicles supplied to employees, promotional vehicles provided to racing groups, and “pool cars” and fleet cars that DCC had and used for business (Collins dep, pp 134-135; 53b) (Omilion dep, pp 28-30; 1954-1955a).

⁵ Plaintiff conceded that “this is not a PIP case” (Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Disposition, p 13; 1128a).

⁶ See *Redd v National Union Fire Co of Pittsburgh Pa.*, 241 F Supp 2d 819 (S.D. Ohio 2003).

Turning to the question whether the policy was ambiguous, the trial court initially noted that “[a] plain reading of the policy would preclude coverage because under the terms of the policy ‘you’ only refers to the named insured and that is DC Corp” (Opinion and Order, p 4; 1939a). Nevertheless, the trial court went on to find the policy patently ambiguous. The trial court, like Plaintiff, distinguished the *Pavolich* case on a variety of factual grounds (*Id.*, p 4; 1939a). The court went on to find “that there is a patent ambiguity in the language of the policy which contains both an ‘individual named insured’ endorsement and a listed named insured business entity as the sole ‘named insured’” (*Id.*, p 5; 1940a). The court construed the ambiguity “liberally in favor of the insured and strictly against the insurer” (*Id.*). “Therefore, the Court [found] that Endorsement No. 19 applies in this case and extends liability coverage to non-owned autos operated by Trent or his resident family members” (*Id.*).

DCC and DCIC appealed as of right to the Court of Appeals on February 8, 2008.⁷ On August 13, 2009, the Court of Appeals issued its decision reversing and remanding for entry of summary disposition in favor of the Defendants. The majority opinion concluded that the policy was unambiguous and the trial court was required to apply the policy as written (Slip op, p 5; 2008a). The majority held that the trial court “erred in creating an ambiguity where none exists and looking outside the policy language in determining its meaning.” (*Id.*) The majority further found the analysis of the *Pavolich* case to be relevant, and Plaintiff’s factual distinctions of the case to be irrelevant (Slip op, p 6; 2009a). The majority decision also noted that in fact, Trent,

⁷ DCC and DCIC filed an Application for Leave to Appeal from this Opinion and Order on October 11, 2007. AAA filed its own Application for Leave to Appeal on November 15, 2007. Both Applications were denied by the Court of Appeals on January 3, 2008, for failure to persuade the Court of the need for immediate review. The subsequent settlement between Plaintiff and AAA, and stipulated order to dismiss the Third Party Complaint, disposed of all the remaining claims and adjudicated all of the remaining rights and liabilities of the parties. The appeal of right to the Court of Appeals followed.

although not the named insured, was an “insured” under the policy pursuant to its “permissive user” provision (Slip op, p 4; 2007a). The majority emphasized “that Brooks was not driving one of her father’s vehicles that he leased under the DaimlerChrysler Company Car program” (Slip op, p 5, fn 4; 2008a).

The majority rejected Plaintiff’s argument “that the policy should be declared contrary to public policy if Endorsement No. 19 does not apply” (Slip op, p 7; 2010a). Importantly, the majority noted, liability coverage for non-owned vehicles is not mandatory pursuant to the no fault act (*Id.*).

Judge Shapiro’s dissent is premised on various factual errors. For example, Judge Shapiro stated that “this is a private vehicle policy rather than a commercial policy” (Slip op, p 2; 2013a). As noted earlier in this Counter-Statement of Facts, the policy covers a wide variety of vehicles, including promotional vehicles, product evaluation vehicles, and pool vehicles. Judge Shapiro states that DCIC bears no risk (Slip op, p 3; 2014a). In fact, due to the bankruptcy of DaimlerChrysler Corporation, Chrysler Insurance Company is the entity that now bears the entire risk of this policy. Shapiro, J., dissenting, concluded that “the policy’s definition of ‘you’ as the ‘named insured’ when applied in this policy violates the no fault act” (Slip op, p 2; 2013a). Judge Shapiro opined that the Court of Appeals “must reform the definition so that the policy complies with the no fault act” (*Id.*). Judge Shapiro felt that the nature of the policy as a fronting policy in which DCC bore ultimate liability was relevant to its interpretation:

The majority’s conclusion that it can resolve this case by a “plain and ordinary reading” of the policy provision ignores the reality that this policy is anything but “plain and ordinary” and that both the policy and the relationship of the insurer and the insured are highly complex and out of the ordinary.

....

The reality is that DCC is the insurer.

(Slip op, pp 2, 3; 2013-2014a). The dissent concluded that by defining “you” as the “named insured”, the policy “unlawfully shifts the order of priority for insurers for PIP benefits, leaves all lessees in violation of the no-fault act, and renders multiple provisions either meaningless or nugatory” (Slip op, p 3; 2014a). The dissent opined that “[t]his is at best an aberration that should be corrected rather than approved and may, in fact, be a calculated deception”(Slip op, p 4; 2015a) The dissent distinguished the *Pavolich* case on various factual grounds, including that it included township vehicles used for business rather than lease vehicles for personal use, and that in *Pavolich* the insured and insurer “were distinct and wholly separate entities” (Slip op, p 7; 2018a). The dissent concluded that “in this factual context, the policy definition of ‘you’ violates the no-fault act and must be rewritten so as to conform with that act.” The dissent opined that “‘you’ must be defined as ‘DaimlerChrysler Corporation and/or the person to whom DCC leases this vehicle’” (Slip op, p 8; 2019a).

Plaintiff sought leave to appeal to this Honorable Court, which was granted on March 24, 2010. The motion of Allstate and AAA to file an amici curiae brief was also granted. In its order granting leave, this Honorable Court instructed the parties to brief the following issues: “(1) whether the insurance policy issued by DaimlerChrysler Insurance Company is ambiguous, and (2) whether the insurance policy violates any provision of the no-fault act, MCL 500.3101 *et seq.*” (2064a).

ARGUMENT

- I. THE POLICY ISSUED BY APPELLEE IS UNAMBIGUOUS, WHERE IT CLEARLY DEFINES “YOU” WHENEVER USED IN THE POLICY TO MEAN THE NAMED INSURED, THE NAMED INSURED IN THE POLICY IS THE CORPORATE DEFENDANT, AND THE ENDORSEMENT UNDER WHICH PLAINTIFF SEEKS COVERAGE SPECIFICALLY STATES THAT IT ONLY APPLIES “IF YOU ARE AN INDIVIDUAL.”**

Standard of Review

The decision to grant or deny a motion for summary disposition is reviewed *de novo*. *Spiek v Dep’t of Transp’n*, 456 Mich 331, 337; 572 NW2d 201 (1998). Review of a declaratory judgment action is also *de novo*. *Taylor v Blue Cross/Blue Shield of Michigan*, 205 Mich App 644, 649; 517 NW2d 864 (1994). The same standard applies to the question of whether an ambiguity exists in an insurance contract. *Wilkie v Auto-Owners Ins. Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). This Court’s review of questions of law in declaratory judgment actions is also *de novo*. *Green Oak Twp v Munzel*, 255 Mich App 235, 238; 661 NW2d 243 (2003).

Preservation of Issue

This issue was raised and addressed in the trial court (Opinion and order, pp 4-5; 1939a-1940a), and in the Court of Appeals (Slip op, p 5; 2008a).

- 1. There is no patent ambiguity in the contract, which is governed by ordinary principles of contract construction.**

This case is easily resolved by the straightforward application of ordinary principles of contract construction to the insurance contract at issue. Because it is clear and unambiguous – fairly admitting of only one interpretation – it must be enforced as written.

Insurance policies are subject to the same principles of contract construction that apply to any other species of contract. *Rory v Cont’l Ins Co*, 437 Mich 457, 461; 703 NW2d 23 (2005); *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).

“Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy.” *Raska v Farm Bureau Mutual Insurance Company*, 412 Mich 355, 361; 314 NW2d 440 (1982). Where no ambiguity exists, the Court must enforce the contract as written. *Id.*; *Farm Bureau, supra*, 460 Mich at 566. The Court will not look beyond the contract when the words used in the contract are clear and unambiguous. *Sheldon-Seatz v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947); *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc.*, 256 Mich App 646, 650; 671 NW2d 539 (2003), lv den 469 Mich 963; 671 NW2d 884 (2003); *UAW-GM Human Resource Center v KSL Recreation Corporation*, 228 Mich App 486, 491; 579 NW2d 411 (1998), lv den sub nom *UAW-GM Human Resource Center v Carol Mgmt Co*, 459 Mich 945; 590 NW2d 66 (1999). “Just as courts are not to rewrite the express language of statutes, it has long been the law in this state that courts are not to rewrite the express terms of contracts.” *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008).

The Court in *Raska* explained that an ambiguous contract is one that can be reasonably read in two different ways:

A contract may be said to be ambiguous when its words may reasonably be understood in different ways.

If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter and in favor of coverage.

Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear.

Raska, supra, 412 Mich at 361.

At issue in this case is the meaning of the language in Endorsement 19 that reads, “If you are an individual”. (Policy endorsement 19; 63a). The word “if” at the beginning of the phrase indicates that the coverage being provided is contingent upon “*you*” being an “individual.” The “you” referenced in this clause is defined in the policy as referring to the Named Insured shown in the declarations and amendatory endorsement:

Throughout this policy, the words “you” and “your” refer to the Named Insured shown in the Declarations. The words “we”, “us” and “our” refer to the Company providing this insurance.”

(Business Auto Coverage Form, 117a).

Here, the Named Insured shown in the DCIC policy’s Declarations is DaimlerChrysler Corporation and/or Chrysler Corporation and its U.S. Subsidiaries (Declaration sheet; 26a), and by amendatory endorsement, “DaimlerChrysler Corporation, Chrysler Corporation, and its United States Subsidiaries, and its present and future subsidiaries, owned, controlled and managed companies and corporations, any associated or affiliated companies, now or hereafter constituted, or previously existing” (Endorsement No. IL-A; 1277a). No individual is named in the Declarations or in the amendatory endorsement as a Named Insured. In particular, neither James Trent nor Kelly Brooks are Named Insureds under the policy. *Since Mr. Trent was not the named insured shown in the declaration, Endorsement No. 19 does not apply to him.* Because Endorsement 19 does not apply to him, there was no coverage for Kelly Brooks even if it is assumed that she qualified as a “family member.”

Judge Langford Morris agreed with this premise when she observed, “A plain reading of the policy would preclude coverage because under the terms of the policy ‘you’ only refers to the ‘named insured’ and that is DC Corp.” (Opinion and Order, p 4; 1939a). But rather than enforcing the contract according to its plain meaning, Judge Langford Morris ruled that the

language was “patently ambiguous” simply because the policy included the endorsement while listing a business entity as the sole Named Insured. (*Id.*). In reversing the trial court’s ruling, the Court of Appeals correctly observed that “[t]he court was required to apply the policy as written. It erred in creating an ambiguity where none exists and looking outside the policy language in determining its meaning” (Slip op, p 5; 2008a).

There is no confusion regarding the precise terms used by the parties to the contract. Had the parties intended that Endorsement No. 19 apply to any person or entity covered by the policy, they could easily have substituted the word “insured” for “you.” They did not. Rather, they used a precise term that is specifically defined in the policy to describe who was intended to be covered by the endorsement and under what circumstances. Under a plain reading of that endorsement Ms. Brooks is not covered by the DCIC policy for her liability arising out of her use of a non-owned auto.

2. An examination of extrinsic evidence reveals no latent ambiguity.

In examining a contract for latent ambiguity, as in all contract interpretation, the cardinal rule is to ascertain the intention of the parties. See *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 208; 220 NW2d 664 (1974); *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964), cert den 380 US 952; 85 S Ct 1085; 13 L Ed2d 969 (1965). The Appellant’s analysis of “latent ambiguity” is diametrically opposite to the proper objective of such an analysis. Instead of seeking to discern the parties’ intent, Appellant lobs utterly unfounded accusations of conspiracy and deception, which Appellant ultimately relies upon as purported grounds to disregard and rewrite the plain and unambiguous contractual language. In fact, reference to matters outside of the policy only serves to confirm its unambiguous intent.

“A latent ambiguity is one ‘where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among 2 or more possible meanings.’” *McCarty, supra*, 372 Mich at 575, quoting Black’s Law Dictionary (4th Ed), p 105; See also *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 201-202, 208-209; 702 NW2d 106 (2005) (plurality recognizing latent ambiguity analysis but applying varying standards of proof to show ambiguity). Extrinsic evidence may be used “to prove the existence of an ambiguity, as well as to resolve any ambiguity proven to exist.” *McCarty, supra*, 372 Mich at 575.

Appellant has referred the Court to extrinsic evidence that a representative of DCC’s third party administrator (Gallagher Bassett) “admitted that, with respect to many policy provisions, the term ‘you’ is regarded as the individual lessee.” (Appellant Brief, p 43). Appellee surmises that the alleged ambiguity is supposed to arise because “you” is defined in the policy to mean the named insured (DCC), but in practice understood in certain circumstances to mean the vehicle lessee. An examination of other extrinsic evidence, notably the DaimlerChrysler Company Car Program Terms, Instructions and Conditions Manual, reveals that this is no ambiguity at all. Instead, DaimlerChrysler Corporation, the named insured, delegates certain of its contractual responsibilities, in particular the requirement of reporting in the event of an

accident, to the vehicle lessee (DaimlerChrysler Company Car Program Terms Instructions and Conditions Manual, pp 43-44; 551a-552a).⁸

Likewise, many of DCIC's obligations under the policy are transferred to DCC by the indemnification agreement, which provides in pertinent part:

Additional Consideration. As additional consideration for the issuance of the Policy at a reduced premium as set forth above, and CIC's waiver of its right to investigate claims made and to settle or defend the suits, including appeals, brought against DCC and other insureds under the terms of the Policy, DCC agrees to the following:

- A. DCC shall incur all claim investigation, settlement, adjusting and defense expenses, including those expenses identified with the Supplementary Payment provisions of the Policy;
- B. DCC shall report and furnish all documentation of all claim payments to CIC which are in excess of the deductible and which require contribution by CIC;
- C. DCC shall pay all losses in accordance with the Policy and Deductible endorsement;
- D. DCC shall defend, indemnify and hold harmless CIC from all costs and expenses, claims, fees, interest, demands and judgements, and all other liabilities against CIC arising out of the issuance of the Policy and the rights and duties assumed by DCC thereunder, including without limitation Extra-Contractual Obligations, punitive damages and all fines, penalties and sanctions imposed by any competent authority

. . . .

⁸ Appellant refers to a Brief filed by DaimlerChrysler in another lawsuit, entirely separate from this one, in which it was argued that the Company Car Manual was not binding on a separate entity that was not party to the Manual, namely DCIC. This is an unremarkable contention that is in no way inconsistent with Appellee's position in this instant matter. Also, the argument in question referred to a provision in the Manual that is not at issue in the instant case (1782a-1783a).

(Indemnity agreement, pp 1-2; 7b-8b).

No contractual ambiguity is revealed by examination of extrinsic evidence. To the contrary, the parties' plain intent is confirmed. The extrinsic evidence more fully explicates the relationship of the parties, which is governed by a fronted policy of insurance. However, the inference of deception that Appellant persistently attempts to draw from the mere fact of the fronted policy is simply unfounded. That the arrangement is complicated is not surprising given the very broad commercial policy involved, covering an estimated 25,000 vehicles (Geisler dep, p 60; 902a), and the nature of the self insured party, a very large corporation. The mere fact that the contract between two large corporations may be complex given the scope of the risk being assumed does not make it ambiguous.

There is nothing at all unusual about the policy at issue here, where the coverage and the deductible amount are the same, making the insured (DaimlerChrysler Corporation) self insured, and making the insurer (Chrysler Insurance Company) a guarantor up to the amount of that coverage limit with a right of indemnity from the insured. Rather, this is one of four basic types of self insurance. 22-140 Appleman on Insurance § 140.4. “[A] fronting policy arises when the insured agrees to administer all claims and agrees to reimburse the insurer for all settlements and judgments paid. Under this type of policy, *the insurer acts as a surety to the insured’s ability to pay covered premiums.*” *Id.*, citing Douglas R. Richmond, Issues and Problems in “Other Insurance,” Multiple Insurance, and Self-Insurance, 22 Pepp. L. Rev 1373, 1477 (1995) (emphasis added).⁹

⁹ The fact that the former DaimlerChrysler Corporation (now Old Carco) is in bankruptcy further underscores the fact that the policy is not the façade Appellant suggests that it is. Because Old Carco is in bankruptcy, CIC is directly liable under the contract for all liabilities covered by the policy, notwithstanding the deductible or the indemnity agreement. The indemnity agreement, to put it bluntly, is not worth the paper that it is written on.

Other evidence cited by Appellant entirely fails to demonstrate any ambiguity arising in the application or execution of the contract. See *City of Grosse Pointe Park, supra*, 473 Mich at 198, citing Black’s Law Dictionary (7th Ed) (Cavanagh, J.). Appellant attempts to construe discussion by Gallagher Bassett employee Lisa Pape as somehow bearing on the applicability of the DCIC policy endorsement to Mr. Trent. The discussion of potential coverage that Appellant cites (Appellant’s brief, p 42), falls far short of an acknowledgement of policy coverage. Furthermore, statements made by counsel in an unrelated case do not create an ambiguity in the clear policy language. In *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188; 702 NW2d 106 (2005), a plurality of this Court rejected the contention that an insurer’s past payment of claims demonstrated ambiguity in the contract. 473 Mich at 201-202, 221. In examining extrinsic evidence to determine the existence of ambiguity, “a court must never cross the point at which the written contract is *altered* under the guise of contract *interpretation*.” 473 Mich at 218 (Young, J., concurring). “[C]ourts are not permitted to ‘create ambiguity where the terms of the contract are clear.’” *Id.* at 200, quoting *Frankenmuth Ins Co v Masters*, 460 Mich 105, 111; 702 NW2d 106 (1999). Even past payment of claims, for whatever reason, does not alter the meaning of unambiguous contract terms. “The law presumes that the contracting parties’ intent is embodied in the actual words used in the contract itself. A rule to the contrary would reward imprecision in the drafting of contracts. More significant, it would create an incentive for an aggrieved party to enlist the judiciary in an attempt to achieve a benefit that the party itself was unable to secure in negotiating the original contract – a proposition this Court flatly rejected in *Wilkie*.” *City of Grosse Pointe Park, supra*, 473 Mich at 218. Thus, “[t]he party alleging the existence of the latent ambiguity may rebut this

presumption only by proving, through clear and convincing evidence, that such an ambiguity does indeed exist.”¹⁰

Plaintiff’s extrinsic evidence does not rebut the presumption that the contract was intended to mean exactly what it says. Once again, the unambiguous contract must be enforced as written.

3. **The principle that unambiguous contract provisions must be enforced as written was correctly applied in *Pavolich*, which dictates that the contract does not provide non-owned vehicle coverage where such coverage is expressly contingent on the named insured being an individual, and the named insured is not an individual.**

In *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 384; 591 NW2d 325 (1998), the Court of Appeals considered whether a policy of insurance issued by Michigan Township Participating Plan, insuring the Village of Lake Linden, provided underinsurance coverage for an individual employed by the Village as a police officer. The policy in *Pavolich*, *supra*, provided that the Michigan Township Participating Plan would “pay damages which an ‘insured’ is legally entitled to recover from the owner or operator of an ‘underinsured motor vehicle’ because of [‘]bodily injury’ . . .” *Id.* at 381. The officer sustained an injury when he reached into a vehicle during a traffic stop and the driver attempted to drive away, carrying the officer for some distance. *Id.* at 379. The officer sought payment under the policy as an “insured,” which the policy defined as follows:

2. “Insured” as used in this endorsement means:

¹⁰ The clear and convincing standard was not adopted by a majority of the Supreme Court. See *Id.* at 202, n 11, Opinion of Cavanagh, J. (“We disagree with Justice Young’s proposal to adopt a clear and convincing standard with respect to proving the existence of a latent ambiguity.”). However, three Justices did concur with the clear and convincing standard in this three-three decision.

You or any “family member.”

- a. Any other person occupying “your covered auto.”

Id.

As in the instant case, the policy in *Pavolich, supra*, defined “you” as the person identified as the named insured. *Id.* at 382. In *Pavolich* as in this case, the named insured was an entity (Village of Lake Linden) rather than an individual. *Id.* The Court in *Pavolich, supra*, observed that “[i]f defendant [officer] qualifies as the ‘YOU’ in the provision, he may collect underinsured benefits . . .” However, the Court concluded that “[a] plain reading of the policy precludes coverage for Defendant.” *Id.* at 383:

Reading the policy as a whole, and giving ordinary and plain meaning to its terms, the language cannot be reasonably understood to mean village employees and their families. Clearly, the term “you” in the provision refers only to the Village. No mention is made of employees. Therefore, under the policy language, plaintiff is only obligated to pay damages to the village or any of its “family members” that are entitled to “underinsured motor vehicle” coverage.

The Court recognized that a plain reading of the policy would render a portion of the policy meaningless. “Specifically, if a plain interpretation is used, no one is entitled to receive underinsured coverage under the provision because the village cannot sustain bodily injury and cannot have family members who can sustain bodily injury.” *Id.* at 328. However, the Court rejected “the proposition that an ambiguity arises whenever a plain reading of the policy language renders a portion of the policy meaningless.” The Court refused to alter the unambiguous language of the policy either by construction or by outright rewriting. “[W]e will not construe the language or reform the contract to include, as insureds, village employees and members of their families.” *Id.* at 329.

The laundry list of factual distinctions between *Pavolich* and the instant case delineated in Appellant’s brief and by the Court of Appeals’ dissenting opinion does not diminish the relevance of its analysis to this case. For example, it is simply immaterial that the instant case involves a fronted policy.¹¹ These are “very much a custom in the industry” and are customary for large companies such as DCC. 27-169 Appleman on Insurance, Sec. 169.3; *Insurance Company of North America v Pyramid Ins Co*, United States District Court for the Southern District of New York, No 92 Civ 1816; 1994 US Lexis 3001 (1994). In fact, commentators note that “[a]lthough ‘fronting’ has a pejorative connotation in most usages, fronting in insurance is often highly appropriate.” 1-1 New Appleman on Insurance Law Library Edition Sec 1.06.¹² Appellant does not assert that the fronting policy is illegal, nor has Appellant produced any authority to suggest that the policy should be construed in a different manner than any other contract.

Nevertheless, Appellant appears to advocate that the policy is ambiguous merely *because it is a fronted policy*, and draws nefarious intent from various characteristics of the policy that are typical characteristics of fronted policies, such as the assumption of risk by the insured, the deductible equal to the policy limit, and DCC’s “dual role” as insurer and insured. A fronted policy is merely a species of self insurance; and in fact DCC is state certified as a self insurer.

¹¹ The dissent was incorrect in suggesting that the policy involved here is not a “true commercial policy.” (Slip op, p 7; 2018a). It is a very broad policy covering vehicles provided to journalists, promotional vehicles provided to racing groups, pool cars, product evaluation vehicles, as well as lease cars (Collins dep, pp 134-135; 53b) (Omilion dep, pp 29-30; 1954a-1955a) (Pape dep, p 71; 85b).

¹² Commentators also note that such policies may be written for illegal purposes, such as evading state regulation or taxation. 1-1 New Appleman on Insurance Law Library Edition Sec 1.06. That is not the case here. DCC is actually certified as a self insurer under the no fault act pursuant to the certificate filed with the state of Michigan (Application for Self Insurance Status; 7167a).

Published cases reveal that General Motors and Delphi Automotive Systems, L.L.C., employ similar fronting policies. *Redd v National Union Fire Ins Co of Pittsburgh, Pa*, 241 F Supp2d 819, 823 (SD Ohio 2003); *Delphi Automotive Systems, L.L.C. v Slaughter*, 261 F Supp2d 950, 952 (SD Ohio 2003). There is nothing in the least improper about this arrangement. The circumstances from which Appellant seeks to spin a web of ill motive and deceit are simply irrelevant to the straightforward question of policy ambiguity.¹³

4. *Pavolich* represents the majority rule, and the cases that Plaintiff cites are distinguishable.

The holding of the Court of Appeals in *Pavolich* represents the clear majority position taken by courts in other jurisdictions considering whether the use of “family” language in a policy where the sole named insured is an entity or corporation creates a policy ambiguity.

In *Grain Dealers Mutual Ins Co v McKee*, 40 Tex Sup J 483; 943 SW2d 455 (1997), the Texas appellate court held that a business auto policy in which an entity was the sole named insured did not extend coverage to the daughter of the corporation president and sole shareholder. *Id.* at 456. The accident causing injury involved a non-owned vehicle that was not covered under the policy in question. Nevertheless, the plaintiff corporation president sought uninsured motorist and PIP benefits based on “family member” language found in the endorsements relating to those coverages. The PIP endorsement defined an insured as:

1. You or any **family member** while **occupying** or when struck by any **auto**.

¹³ Under a heading “Additional Relevant Facts,” the Court of Appeals dissent remarked that “[t]his lease program and its insurance scheme involve multiple entities and opaque relationships”; and that the policy at issue is a “fronted policy” (Slip op, p 3; 2014a). The dissent appeared to adopt wholesale the Plaintiff’s insinuation that the fronted policy is inherently deceptive and generally sinister. Appellee urges this Court to look at the policy itself, and analyze it according to its unambiguous terms. The fronted nature of the policy is simply not relevant to this analysis.

Id. at 457. As in the policy at issue here, the policy in *Grain Dealers, supra*, defined the words “you” and “your” as referring to the named insured in the declaration page. *Id.* at 457. The Court found the policy did not apply to cover the family member injured in a non-owned auto:

. . . Kelly does not qualify as a “family member” under the endorsements. “Family member” is defined in both endorsements as “a person related to you [Future Investments] by blood, marriage, or adoption who is a resident of your [Future Investments] household, including a ward or foster child. “ Kelly is obviously not related to Future Investments by blood, marriage, or adoption. Of course, she also does not reside in Future Investments’ household. A corporation simply cannot have a “family” as that term is defined in the policy.

Id. at 457. The Court found the policy unambiguous because no reasonable interpretation could construe the individual corporate president “as the ‘you’ to whom the covered family members are linked in the endorsements.” *Id.* at 458. Moreover, the Court noted, “surplusage alone does not make an insurance policy ambiguous.” *Id.* The Court noted that the endorsements in question were standard forms crafted to meet a variety of needs, and elections by the insured could “invoke or render inert various provisions of insurance policy endorsements.”

The same is true in this case. The policy endorsement in question is a standard form, which could easily be invoked by adding the name of any individual as a “named insured” under the DCIC policy. As it stands, the endorsement actually contemplates that the named insured may be an entity and not an individual by specifying that its application is contingent – “*if you are an individual.*” The same language contemplates the possibility that an individual could become a named insured at some time during the term of the policy. Similar policy provisions were considered in *American Economy Insurance Company v Boghdan*, 2004 OK 9; 89 P3d 1051 (2004), where an uninsured motorist endorsement by its terms applied to “You” or “If you

are an individual, any ‘family member.’”¹⁴ The named insured was Hillcrest Pharmacy, a corporation. *Id.* The Plaintiffs, owners of the insured corporation, contended that their son was also an insured pursuant to the endorsement. The Oklahoma Supreme Court disagreed:

[T]he phrase “If you are an individual, any ‘family member’” is not susceptible to two or more interpretations. The term “family member” is qualified or limited by the phrase “If you are an individual.” Since the named insured, Hillcrest Pharmacy, is not an individual, no family members” qualify as Class 1 insureds.

89 P3d at 1055. Identically in the instant case, the phrase that prefaces Endorsement 19 – “If you are an individual” simply is not susceptible to more than one interpretation. The endorsement unambiguously applies only when the named insured is an individual.

The vast majority of states considering this issue have declined to find that the use of “family” language in a commercial policy where the named insured is a corporation renders the policy ambiguous. See cases cited in *Boghdan, supra*, 89 P3d at 1056, and in *Grain Dealers, supra*, 943 SW2d at 459. Various courts have recognized, as the Court of Appeals did in the instant case, that surplusage does not equate to ambiguity. See e.g. *Peterson v Universal Fire and Casualty Ins Co*, 1991 Ind App Lexis 938; 572 NE2d 1309, 1311 (1991) (Plaintiff “is correct that a corporation does not have family members. This does not render the clause ambiguous. The term ‘family member’ is simply a nullity when the standard endorsement is used in a policy insuring a corporation”); *Cutter v Maine Bonding & Casualty Co*, 133 NH 569, 574; 579 A2d 804 (1990) (“The family member section has been construed to be either superfluous or null and void when the named insured is a corporate entity and not an individual”); *Meyer v American*

¹⁴ The endorsement also applied to “Anyone else ‘occupying’ a ‘covered auto’” and “Anyone for damages he or she is entitled to recover because of ‘bodily injury’ sustained by another ‘insured.’” 89 P3d at 1054.

Economy Ins Co, 103 Ore App 160, 163; 796 P2d 1223 (1990), rev den 310 Ore 547; 800 P2d 789 (1990) (“Even if, as plaintiff contends, there is no category one coverage if the policy is read to mean what it unambiguously says, that does not create an ambiguity”); *Seaco Ins Co v Davis-Irish*, 180 F Supp 2d 235, 236 (D Me 2002), aff’d 300 F3d 84 (1st Cir 2002) (“The fact that paragraphs 1 and 2 alone will never result in uninsured motorist coverage in a corporate policy proves nothing.”).

Those cases that Plaintiff relies upon to argue that the policy is ambiguous fail to advance her position. For example, *Home Folks Mobile Homes, Inc. v Meridian Mutual Ins Co*, 744 SW2d 749, 750 (Ky App 1987), turns on the doctrine of “reasonable expectations,” which this Court has firmly rejected as an appropriate means of construing contract language, especially where it is being used to rewrite unambiguous language of the policy. *Raska, supra*, 412 Mich at 361; *Wilkie v Auto Owners Ins Co*, 469 Mich 41, 51, 63; 664 NW2d 776 (2003). In *Kissoondath v Safeco*, 1996 WL 665906; 1996 Minn App Lexis 1304 (Minn App 1996), rev den 1997 Minn App Lexis 89 (1997) (1923a), the named insured, although a corporation, was identified in the policy as an “individual”, thus creating a patent ambiguity. Similarly, *Apgar v Commercial Union Ins Co*, 683 A2d 497 (Me 1996), found the individual named insured endorsement ambiguous because, although the insured was a solely owned corporation, it was designated in the declarations as an “individual” and the declarations described the named insured’s business as “personal use.” In *Greenbaum v The Travelers Ins Co*, 705 F Supp 1138 (ED Va 1989), the named insured included not only the partnership, but also the individual partners. In *Purcell v Allstate Ins Co*, 168 Ga App 863; 310 SE2d 530 (1983), the insured was not a corporation but merely a “trade name” or “assumed name” the undertakings of which are also the obligations of the individual, and against which a judgment would also bind the individual. *Id.* at 865.

5. The enforcement of the unambiguous contract terms does not violate public policy because the coverage at issue – non owned liability coverage – is not mandatory coverage under the Michigan no fault act.

The underlying judgment in the trial court in favor of Plaintiff is for tort liability stemming from Ms. Kelly Brooks' use of a vehicle that was not a Chrysler lease car, and was not owned by Ms. Brooks or any of her family members. The question in this declaratory action is whether the DCIC policy covers Ms. Brooks in these particular circumstances. Thus, this case involves non-owned liability coverage, not personal insurance protection benefits subject to the no fault act.

Under Michigan law, Mr. Trent was not required to maintain liability coverage with respect to his or his family's use of non-owned motor vehicles, and the Appellee was not obligated to provide such insurance. Michigan's no fault act requires only that a policy sold under the act provide residual liability coverage for the use of the vehicle insured – in this instance the vehicle Mr. Trent leased under the Company Car Program. *Citizens Ins. Co. v Federated Mutual Ins Co*, 448 Mich 225, 230; 531 NW2d 38 (1995). This Court has expressly explained that “one who uses another's vehicle generally is not required to provide residual liability coverage for injuries or death arising from use of that other vehicle.” *Id.* at 235-236. See also *Geller v Farmers Ins Exchange*, 253 Mich App 664, 668-669; 659 NW2d 646 (2002) (“We find that *Citizens* and *Husted* [*v Auto Owners Ins Co*, 459 Mich 500; 591 NW2d 642 (1999)] are controlling This is an owner's policy and the insurer is not required under the no fault act to provide blanket portable coverage to the insured when the insured drives another person's insured vehicle.”).

Because residual liability for a non-owned vehicle is optional, the extent of DCIC's liability is governed wholly by the terms of the insurance policy at issue. *Citizens, supra*, 448

Mich App at 236. “Just as courts are not to rewrite the express language of statutes, it has long been the law in this state that courts are not to rewrite the express language of contracts.” *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199; 747 NW2d 811 (2008). The DCIC policy, when applied as unambiguously written, does not provide Ms. Brooks with residual liability insurance in connection with her use of the vehicle owned by Ms. Deborah Jean Lee that Ms. Brooks drove at the time of the accident.

II. THE INSURANCE POLICY ISSUED BY APPELLEE DOES NOT VIOLATE ANY PROVISION OF THE NO-FAULT ACT.

Standard of Review

The decision to grant or deny a motion for summary disposition is reviewed *de novo*. *Spiek v Dep't of Transp'n*, 456 Mich 331, 337; 572 NW2d 201 (1998). Review of a declaratory judgment action is also *de novo*. *Taylor v Blue Cross/Blue Shield of Michigan*, 205 Mich App 644, 649; 517 NW2d 864 (1994). The proper interpretation and application of an insurance contract is reviewed *de novo*, *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001), as are issues of statutory interpretation. *Id.*

- 1. The question whether the policy violates any portion of the no fault act governing PIP benefits is wholly hypothetical because this lawsuit involves third party liability, not PIP benefits, Plaintiff has never attempted to claim PIP benefits under this policy, and Plaintiff could not under the factual scenario presented ever be entitled to PIP benefits under this policy.**

As already noted, the issue of Appellee's potential liability for personal insurance protection benefits under the policy has never been an issue in this case. The underlying action that resulted in a verdict for Plaintiff was based solely on third party liability (Complaint and Jury Demand, 8/16/05; 66a). It is based on allegations that Kelly Brooks was negligent in the operation of a motor vehicle, that Alvin Jerome Taylor was negligent by entrusting the vehicle to Ms. Brooks, and that the vehicle owner, Deborah Jean Lee, was liable pursuant to the owners liability statute, MCL 257.401 (Complaint and Jury demand, 8/16/05, ¶¶ 14-16; 68a-69a).

Furthermore, there is no possible scenario in which Plaintiff could claim PIP benefits under the policy at issue. Pursuant to MCL 500.3114, she would first seek PIP benefits from any policy under which she was a named insured, or the policy of her spouse or resident relative,

MCL 500.3114 (1), then from the insurer of the owner or registrant of the vehicle she occupied, MCL 500.3114(4)(a), and finally, from the insurer of the operator of the vehicle that she occupied. MCL 500.3114(4)(b).

It has long been the rule in Michigan that “courts will not listen to the complaints of persons not injured.” *Richardson v Welch*, 47 Mich 309, 312; 11 NW 172 (1882). This Court has more recently noted:

As part of this endeavor to preserve separation of powers, the judiciary must confine itself to the exercise of the “judicial power” and the “judicial power alone.” “Judicial power” is an undefined phrase in our constitution, but we noted in *Nat’l Wildlife* that “[t]he ‘judicial power’ has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; **the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm;** the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis on proscriptive as opposed to prescriptive decision making.

Mich Citizens for Water Conservation v Nestle Waters N Am, Inc, 479 Mich 280, 293; 237 NW2d 447 (2007), reh den 480 Mich 1203; 739 NW2d 332 (2007), quoting *Nat’l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004). The priority-shifting claim raised by the Appellant is precisely such a hypothetical issue, the adjudication of which would have no effect on the parties to this lawsuit. But, in compliance with this Court’s direction, Appellee turns to the question whether the policy violates any provision of the no fault act.

2. **The policy does not violate any provision of the no fault act.**

The DCIC policy fully complies with all provisions of the no fault act. In compliance with MCL 500.3101, the policy provides personal protection insurance, property protection insurance, and residual liability insurance. The policy equally complies with the mechanism supplied by our Legislature to order the priority of payment for PIP benefits, MCL 500.3114, which contains no restriction on the parties' ability to specify a "named insured." That a "named insured" may be an entity such as a corporation is an unremarkable fact that does not render a policy of insurance violative of the no fault act.

- a. The policy that Mr. Trent maintained by paying premiums bundled with his lease payment fully complies with the statutory requirement that the owner of a vehicle maintain security for payments of benefits for "personal protection insurance, property protection insurance, and residual liability insurance", MCL 500.3101(1), where the policy indisputably provides each of these mandatory coverages.

Pursuant to MCL 500.3101(1), "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under **personal protection insurance, property protection insurance, and residual liability insurance. . . .**"

MCL 500.3101(2) provides the following definition of "owner":

(2) As used in this chapter:

. . . .

(h) "Owner" means any of the following:

- (i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.

- (ii) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle by the lessee for a period that is greater than 30 days.
- (iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.

Mr. Trent is the “owner” of the vehicle that he leased through the Company Car Program. MCL 500.3101(2)(h)(i). Therefore, he was required to maintain security for payment of benefits for personal protection insurance, property protection insurance, and residual liability insurance. This Court observed in *Cohen v Auto Club Insurance Ass’n*, 463 Mich 525, 531; 620 NW2d 840 (2001) that these required coverages are “the bedrock of the no fault system”:

The Legislature requires a Michigan motorist to maintain a no fault policy that includes certain elements mandated by law. Those required coverages are the bedrock of the no fault system and, as we have held on many occasions, are not subject to removal by policy language that conflicts with the statute.

Mr. Trent did maintain such security through the insurance provided by the Company Car Program, for which he paid a monthly premium that was bundled with his lease payment (Collins dep, pp 135-136; 53b) (Trent dep, pp 22-23; 819a). The policy for which Mr. Trent paid premiums, furthermore, provides each of the required coverages specified in MCL 500.3101(1): **“personal protection insurance, property protection insurance, and residual liability insurance. . .”** *Id.* There can be absolutely no dispute that the DCIC policy provides each of

these mandatory coverages in the amount required or greater,¹⁵ and Plaintiff has not contended otherwise. The claim that Mr. Trent was forced to violate the no fault act simply lacks any basis where he indisputably paid premiums for no fault insurance providing all coverage required by law.

While Mr. Trent clearly did maintain a policy in compliance with MCL 500.3101(1), it is nevertheless important to note that the paramount concern is not the identity of the person who provides security for the vehicle, but that security is provided for all vehicles. In *Jasinski v Nat'l Indemnity Ins Co*, 151 Mich App 812, 818-819; 391 NW2d 500 (1986), the Court of Appeals aptly noted:

The basic requirement of the no-fault act is that all vehicles be covered by a policy providing no-fault benefits. Section 3101 of the act requires the owner or registrant of a motor vehicle to maintain security for payment of benefits under personal protection insurance. . . . This does not mean, however, that each owner or registrant must have *a* separate policy covering the vehicle, but only that there be a policy covering the vehicle.

Id. at 818-819. The Court in *Jasinski* concluded that the no-fault act was satisfied where the lessor of a tractor maintained insurance for it. The lessee under a six month lease was not also required to maintain insurance on the tractor. *Id.* at 819.

More recently in *Iqbal v Oakwood Hosp*, 278 Mich App 31; 748 NW2d 574 (2008), the Court of Appeals noted that “the purpose of the Michigan no-fault act ‘is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault.’” *Id.* at 37, quoting *Cole v Auto Owners Ins Co*, 272 Mich App 50, 55; 723 NW2d 922 (2006), lv den 477 Mich 949;

¹⁵ See Endorsement No. 10 (“Michigan Personal Injury Protection”; 51a), Endorsement No. 11 (“Michigan Property Protection Coverage”; 53a) and the Business Auto Declaration (specifying “liability” coverage of \$5,000,000; 26a).

723 NW2d 875 (2006). In the context of MCL 500.3113(b), which precludes recovery of PIP benefits by a person who “was the owner or registrant of a motor vehicle or motorcycle involved in [an] accident with respect to which the security required by section 3101 or 3103 was not in effect,” the Court of Appeals noted that there may be multiple owners of a vehicle for purposes of the no fault act. So long as a vehicle was covered by a no fault policy, the failure of one “owner” to procure a policy in his or her own name did not preclude the recovery of benefits.

The Appellant contends, and the Court of Appeals dissent posits, that “the Car Program, by barring the purchase of any other policy, forces its lessees to violate the No-Fault act in the context of PIP coverage.” (Slip op, p 5; 2016a). In fact, it cannot be disputed that the policy provides all statutorily required coverages, including PIP coverage (See Endorsement No. 10 and Endorsement No 11; 51a, 53a). The policy complies both with the letter of the act and with its essential purpose.

- b. The policy does not conflict with or violate the statutory provision for priority of payment of personal insurance protection benefits.

Plaintiff and the Court of Appeals dissent generally contend that the policy violates PIP priority provisions, without specifying the manner in which any statutory provision is violated. As demonstrated below, the policy does not violate the statutory provision for priority of payment of personal insurance protection benefits.

The no-fault provision governing the priority of payment for personal injury protection benefits, MCL 500.3114, provides as follows:

Sec. 3114. (1) Except as provided in subsections (2), (3), and (5), a personal protection policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person’s spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .

....

(4) Except as provided in subsection (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

- (a) The insurer of the owner or registrant of the vehicle occupied.
- (b) The insurer of the operator of the vehicle occupied.

There is no requirement in MCL 500.3114, in MCL 500.3101, or anywhere in the no fault act, as to the required identity of the “person named in the policy,” or the “named insured.”¹⁶ The “person named in the policy” is wholly a matter of contract. The Court of Appeals has noted in a different context that “there is no requirement that an insured actually own or be the registrant of a motor vehicle in order to have an insurable interest adequate to support PIP coverage.” *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 725; 635 NW2d 52 (2001).¹⁷ It would be quite impracticable for the broad commercial policy involved in this case to specify all persons to whom its benefits could be applicable, including journalists, racing organizations and those individuals who might drive or occupy cars provided to them for promotional purposes, and persons provided with cars for product evaluation purposes, in addition to Chrysler lessees, whose numbers and identities fluctuate virtually daily.

¹⁶ It has consistently been held that the “named insured” and “the person named in the policy” are synonymous terms. *Transamerica Ins Corp v Hastings Mut Ins Co*, 185 Mich App 249, 255; 460 NW2d 291 (1990), lv den 437 Mich 1005, 1010 (1991); *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675; 333 NW2d 322 (1983).

¹⁷ The injured party was in the process of purchasing a car but had not yet purchased it when she was involved in an accident in the car. *Id.* at 717.

The designation of a corporation or other entity as the “named insured” in a commercial policy of no fault automobile insurance is a normal practice, as seen in the factual scenario set forth in *Titan Insurance Co v Cincinnati Ins Co*, unpublished per curiam decision of the Michigan Court of Appeals, issued June 24, 2004 (Docket No. 245940) (10b). In *Titan, supra*, a no fault policy issued by Frankenmuth Mutual Insurance Company identified the “named insured” as Hamilton Electric, a company that employed Mr. Richard Bonk, who was injured while occupying a vehicle insured by another company, Cincinnati Insurance Company. In a priority dispute between the two insurance companies, Cincinnati asserted that the Frankenmuth policy had first priority under MCL 500.3114(1). The Court of Appeals disagreed, noting that Mr. Bonk was not a “named insured” under the policy. He was also not an insured under the policy, which interestingly, contained “family language” that was mere surplusage when applied to the “named insured,” Hamilton Electric.¹⁸ While the *Titan* case is not precedential authority because unpublished, MCR 7.215(C)(1), and in any event not binding on this Supreme Court, it is significant because it demonstrates that the designation of a corporation or other entity as a “named insured” in a business policy is entirely ordinary, and that the practice has been observed

¹⁸ The policy involved in *Titan, supra*, defined “insured” as:

1. You or any “family member.”
2. Anyone else who sustains “bodily injury:”
 - a. While “occupying” a covered “auto,” or,
 - b. As the result of an “accident” involving any other “auto” operated by you or a “family member” if that “auto” is a covered “auto” under the policy’s Liability Coverage, or
 - c. While not “occupying” any “auto” as a result of an “accident” involving a covered “auto”

(11b-12b) (footnote omitted). The policy stated that “you” referred to the Named Insured, i.e., Hamilton Electric. *Id.*, n 1 (12b).

by the Courts of this State without any apparent concern, even in situations in which it may impact the priority of payment. Similar scenarios appear in cases in which the courts of other no-fault states have held that the use of “family” language did not render a no fault policy ambiguous where the sole insured was a corporation or entity. See, e.g., *Buckner v Liberty Mutual Insurance Co*, 66 NY 2d 211, 214; 486 NE2d 210 (1985); *Andrade v Aetna Life & Casualty Co*, 35 Mass App Ct 175; 617 NE2d 1015 (1993).

Contrary to the speculations of amici concerning various factual scenarios that range far into the hypothetical, the policy results in no “coverage chasm” and provides personal insurance protection benefits as contemplated by statute. As the Court of Appeals majority correctly observed, Mr. Trent is insured as a permissive user (Slip op, p 4; 2007a). The majority noted that the trial court appeared troubled because its interpretation of the policy, like that of amici before this Court, would not provide coverage to any individual. However, the Court observed, “the policy defines who is insured, and that definition appears to include Trent himself or persons while using with DaimlerChrysler’s permission a covered auto owned, hired, or borrowed by DCC.” (*Id.*, p 5; 2008a).¹⁹

Amici make the additional argument, again based on a hypothetical factual scenario, that a coverage gap will result when the injured person is a named insured on another policy, but that other policy contains an exclusion of coverage applicable to its named insured, such as for accidents occurring in automobiles not covered under the policy but insured under a different policy. In support of this hypothetical scenario, amici cite an unpublished case, *Frankenmuth Ins Co v Titan Ins Co*, unpublished per curiam decision of the Michigan Court of Appeals, issued

¹⁹ The Business Auto Coverage Form defines “insureds” to include “Anyone else while using with your permission a covered ‘auto’ you own, hire, or borrow . . . “ (Business Auto Coverage Form; 118a).

October 25, 2005 (Docket No. 262345) (13b), where the Court of Appeals noted the rule that this Court clearly set forth in *DAIIE v Home Ins Co*, 428 Mich 43, 4; 405 NW2d 85 (1987), that insurers of equal priority under MCL 500.3114 share liability for PIP benefits. In *DAIIE, supra*, this Court applied the plain mandate of MCL 500.3115(2), which provides for recoupment to an insurer paying benefits when two or more insurers are in the same priority. *Id.* at 48. The Court in *DAIIE* concluded that such a result “is ordained by the clear language of the statute.” *Id.* at 49. Thus, in various hypothetical scenarios, including the one posed by amici, ACIA or Allstate could be of equal priority with another carrier. In that case, they share priority pursuant to *DAIIE, supra*, and they may not alter that priority by policy exclusions. The majority in *Frankenmuth, supra*, noted the potential existence of a policy exclusion such as that cited by amici. While the majority presumed such an exclusion to be valid, this issue is mentioned only in dicta, and was never before the Court.²⁰

The policy exclusions that Amici blandly advise are included in its standard no fault policies “and are not violative of the mandatory requirements of the Michigan No Fault Act” (Amici Brief, p 11), are indeed violative of the act to the extent that they attempt to exclude liability for a named insured. As Amici note, “a policy exclusion that conflicts with mandatory coverage requirements of the no-fault act is void as contrary to public policy.” *Husted v Auto Owners Ins Co*, 459 Mich 500, 512; 591 NW2d 642 (1999). There simply is no coverage gap. Appellant’s and Amici’s rationale for the wholesale rewriting of the parties’ contract is illusory.

The Court of Appeals dissent relied on this Court’s decision in *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co*, 452 Mich 25; 549 NW2d 345 (1996), where the

²⁰ The majority wrote, “While we suspect that an exclusion of this type will ultimately relieve defendant from liability, the issue is not before us.” (14b).

Court held that “car rental companies and their insurers are required to provide primary residual liability coverage for the permissive use of the rental cars . . .”. 452 Mich at 36 (emphasis added). The Court looked to its earlier decision in *Citizens Ins Co v Federated Mutual Ins Co*, 448 Mich 225; 531 NW2d 138 (1995), also a case involving residual, i.e., third party tort liability, and noted that “[i]n *Citizens*, we spoke strongly about the importance of placing the burden of providing primary liability coverage on vehicle owners, as intended by the Legislature.” *State Farm, supra*, 452 Mich at 34 (emphasis added).

The holding of *State Farm, supra*, addressing the question of primary responsibility for residual liability coverage, is simply beside the point in a discussion of PIP liability. While it did not do so for a third party liability situation, *the Michigan Legislature has provided a mechanism for determining which carrier has “priority” in PIP cases*. MCL 500.3114 does not provide that the carrier for the owner of the vehicle is always responsible for PIP. Instead, with certain exceptions, the first priority carrier is the carrier that has the injured party as a named insured. MCL 500.3114(1). It should be plainly obvious to Plaintiff that the Michigan Legislature established priority rules in which the insurance carrier for the owner of the vehicle involved in an accident is very often not the carrier responsible for the payment of PIP benefits.²¹ In a PIP case (which this is not), the straightforward provisions of MCL 500.3114 should be applied as written.

The no fault act is a comprehensive scheme that is wholly legislative in origin. Plaintiff wishes this Court to rewrite not only the contract at issue in this case, but the no-fault act itself.

²¹ For example, the insurer of a motor vehicle is not the first priority for the payment of PIP benefits to a passenger in that motor vehicle. The passenger must first look to any policy in which she is the named insured, MCL 500.3114(1), then to the policy of her spouse or resident relative, and only then to the insurer of the owner or registrant of the vehicle occupied, MCL 500.3114(4)(a).

The act simply contains no requirement that the “named insured” be the owner or registrant of a vehicle.²² If the Legislature had wished to restrict the freedom of parties to designate the named insured as they desired, presumably it would have done so. As this Court has stated, “a court may not do on its own accord what the Legislature has seen fit not to do.” *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993); *Omne Financial, Inc. v Shacks, Inc.*, 226 Mich App 397, 405; 573 NW2d 641 (1997). Equally, if the Plaintiff or insurers such as amici Allstate and AAA are unhappy with the no-fault act as it actually reads, their concern is properly addressed to the Legislature rather than the courts.

²² Nevertheless, a substantial percentage, if not a majority, of the vehicles covered under the policy are owned by DCC. For example, the “pool” vehicles are owned by DaimlerChrysler Corporation (Collins dep, pp 42-43; 30b). The record does not state the ownership of other vehicles such as promotional and product evaluation vehicles that are covered under the policy.

RELIEF REQUESTED

WHEREFORE, Appellee respectfully requests that this Honorable Court affirm the decision of the Court of Appeals.

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