

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN INSURANCE COMPANY,
a Michigan Insurance Company,

Plaintiff-Appellant/Cross-Appellee,

-vs-

NATIONAL LIABILITY & FIRE INSURANCE
COMPANY, a foreign corporation, licensed to
do business in the State of Michigan,

Defendant-Appellee/Cross-Appellant.

Supreme Court No. 144771
Court of Appeals No. 301980
Lower Court No. 09-104725-NF

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**PLAINTIFF-APPELLANT/CROSS-APPELLEE, MICHIGAN INSURANCE COMPANY'S REPLY
TO DEFENDANT-APPELLEE/CROSS-APPELLANT, NATIONAL LIABILITY & FIRE
INSURANCE COMPANY'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL**

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MICHIGAN SUPREME COURT

144771
reply

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Plaintiff-Appellant/Cross-Appellee, Michigan Insurance Company ("Plaintiff-Appellant/Cross-Appellee") relies on the facts and statement of proceedings presented in its application for leave to appeal to this Court.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED PARTIAL SUMMARY DISPOSITION IN FAVOR OF PLAINTIFF-APPELLANT/CROSS-APPELLEE BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER LAWRENCE STUBBE WAS AN INSURED FAMILY MEMBER (AS A WARD) UNDER THE INSURANCE POLICY ISSUED TO QUALITY AFC HOME, INC. BY DEFENDANT-APPELLEE/CROSS-APPELLANT.

In this case, both parties filed motions for summary disposition pursuant to MCR 2.116(C)(10).¹ A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim and is reviewed de novo. *Spiek v. Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In *Smith v. Globe Life Insurance Company*, 460 Mich 446; 597 NW2d 28 (1999), this Court restated and clarified the standard for summary under MCR 2.116(C)(10):

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v. Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exist. *McCart v. J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to presents documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v. Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993). *Smith*, 460 Mich at 455.

Defendant-Appellee/Cross-Appellant, National Liability & Fire Insurance Company ("Defendant-Appellee/Cross-Appellant") contends that there may be an issue of fact as to whether Lawrence Stubbe ("Stubbe") was a ward under the insured family member provision of the insurance policy issued to an adult foster care home, known as Quality AFC Home, Inc.. "The interpretation of an insurance contract is a question of law that we review de novo." *Twichel v. MIC*

¹ See *Appendix 1* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

Gen. Ins. Corp., 469 Mich 524, 533; 676 NW2d 616 (2004).

In the insurance policy issued by Defendant-Appellee/Cross-Appellant, the named insured was "Quality AFC Home Corp."² The nature of the insured's business was identified: "NAMED INSURED'S BUSINESS: ADULT FOSTER CARE."³ The term "Family member" was defined as follows:

F. Additional Definitions

As used in this endorsement:

2. "Family member" 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

It was undisputed in the trial court and in the Court of Appeals that the term "ward" was not defined in the policy issued by Defendant-Appellee/Cross-Appellant. In the case of *United States Fidelity & Guaranty Company v. Citizens Insurance Company*, 241 Mich App 83; 613 NW2d 740 (2000), "ward" was defined as "a person ... under the protection or tutelage of a person." *United States Fidelity & Guaranty Company*, 241 Mich App at 87, quoting *Hartman v. Ins. Co. of North America*, 106 Mich App 731, 738; 308 NW2d 625 (1981), and *Webster's Third New International Dictionary (1965)*, p. 2575. In addition, Plaintiff-Appellant/Cross-Appellee cited a more recent definition of ward, which provided as follows: "a person under another's protection or care."⁵ After "[v]iewing the evidence in light the most favorable" to Defendant-Appellee/Cross-Appellant, the trial court determined that Stubbe was a ward of Quality AFC Home at the time of the accident.⁶

In this case, the trial court correctly concluded that no genuine issue of *material* fact existed.⁷ Defendant's-Appellee's/Cross-Appellant's reliance upon the deposition testimony of

² See *Exhibit L* Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

³ See *Exhibit L* Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

⁴ See *Exhibit K* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

⁵ See *Exhibit V* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

⁶ See *Appendix 1* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

⁷ See *Appendix 1* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

employees from the adult foster care home is misplaced. The issue for the trial court was not the quality of care given to Stubbe, but rather, that as a resident of the adult foster care home, Stubbe was under the protection and care of the adult foster care home. The trial court's ruling that Stubbe "is a ward of Quality AFC Home because he was under its protection and care" was based on certain undisputed material facts, which is why that decision was sound and correct.⁸

The uncontested material facts presented to the trial court included:

- Stubbe was a resident of Quality AFC Home on the date of the accident.⁹
- Quality AFC Home was licensed and regulated by the State of Michigan to provide adult foster care to its residents, which included Stubbe, on the date of the accident.¹⁰
- Quality AFC Home agreed "to provide personal care, supervision and protection in addition to room and board for 24 hours a day" to Stubbe.¹¹
- Quality AFC Home agreed to supervise Stubbe's taking of medication.¹²
- Quality AFC Home agreed to provide Stubbe "with a 30-day written notice before discharging him" from the home.¹³
- Stubbe was obligated to live under the "House Rules" imposed by Quality AFC Home, and was disciplined when violating those rules.¹⁴
- Quality AFC Home agreed to provide transportation services to Stubbe.¹⁵
- Quality AFC Home owned a Dodge van on the date of the accident.¹⁶
- The van was insured by Defendant-Appellee/Cross-Appellant on the date of the accident.¹⁷

⁸ This point highlights the main problem with the analysis from the Court of Appeals. The Court of Appeals basically determined that summary disposition was improperly granted because the trial court "was determining facts or assessing credibility." [See p. 3 of Judgment from the Court of Appeals; Appendix 3 to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.] This was clear error by the Court of Appeals. The trial court did not "determine facts," but rather, based its opinion and order on the consequential facts that were uncontested.

⁹ See *Exhibit C* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹⁰ See *Exhibit C* and *Exhibit D* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹¹ See *Exhibit F* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹² See *Exhibit F* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹³ See *Exhibit F* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹⁴ See *Exhibits F and U* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹⁵ See *Exhibit F* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹⁶ See *Exhibit C* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

¹⁷ See *Exhibit K* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

- Defendant-Appellee/Cross-Appellant knew Quality AFC Home was an adult foster care home when the policy was issued.¹⁸
- The insurance policy issued by Defendant-Appellee/Cross-Appellant agreed to insure “[y]ou or any family member.”¹⁹
- The insurance policy definition of “family member” was defined a “a person related to you by blood, marriage, or adoption who is a resident of your household, including a ward or foster child.”²⁰

None of the above material facts were disputed. The trial court was not “deciding facts” when it considered what was uncontested. Further, the following undisputed facts were also presented to the trial court:

- Stubbe had experienced “about eight to nine inpatient psychiatric hospitalizations” over the past five years.²¹
- Stubbe reported “hearing his parents’, brothers’, and uncles’ voices for the past five years.”²²
- Stubbe’s issues with depression “started at age 13, characterized by sad mood, lack of motivation, low energy, suicidal ideations and hopelessness, panic, and [a] 13-year history of hearing voices of his deceased mother.”²³
- Diagnostic impressions of Dr. Geetha Mohan dated March 26, 2008 (which is before the accident in question): mood disorder, differential diagnostic consideration of bipolar disorder, and personality disorder.²⁴
- Diagnosed as “Bipolar” by Dr. Faiz Mansour on September 10, 2008 (which is before the accident in question).²⁵

None of the above listed material facts were disputed. These uncontested material facts formed the basis of the trial court’s opinion and order.²⁶ The Court of Appeals clearly erred when it ruled that the trial court was “determining facts and assessing credibility.” To the contrary, the relevant facts, for purposes of the motion for partial summary disposition, were undisputed. As a result, the judgment of the Court of Appeals should be reversed.

¹⁸ See *Exhibit L* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.
¹⁹ See *Exhibit K* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.
²⁰ See *Exhibit K* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.
²¹ See *Exhibit W* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.
²² See *Exhibit W* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.
²³ See *Exhibit W* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal. [Emphasis supplied.]
²⁴ See *Exhibit W* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.
²⁵ See *Exhibit W* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.
²⁶ See *Appendix 1* to Plaintiff’s-Appellant’s/Cross-Appellee’s application for leave to appeal.

Moreover, the State of Michigan has defined the purpose and definition of Adult Foster Care as follows:

Definition of Adult Foster Care

- Adult foster care is a specific type of assisted living, as outlined in PA 218 and the administrative rules.
- Adult foster care facility means a governmental or nongovernmental establishment that provides foster care to adults.
- Foster care means the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation.

- Personal care means personal assistance provided by a licensee or an agent or employee of a licensee to a resident who requires assistance with dressing, personal hygiene, grooming, maintenance of a medication schedule as directed and supervised by the resident's physician, *or the development of those personal and social skills required to live in the least restrictive environment.*
- Protection means the continual responsibility of the licensee to take reasonable action to insure the health, safety, and well-being of a resident, including protection from physical harm, humiliation, intimidation, and social, moral, financial, and personal exploitation while on the premise, while under the supervision of the licensee or an agent or employee of the licensee, or when the resident's assessment plan states the resident needs continuous supervision.

Purpose of Adult Foster Care

- To provide needed care for the aged, developmentally disabled, mentally ill and physically handicapped persons.
- To assure privacy, and protection from moral, social and financial exploitation.
- To treat people with dignity while meeting personal needs and assuring safety.

What Adult Foster Care is Not

- It is not a nursing home as the residents do not require continuous nursing care, unless a hospice patient.
- It is not a room & board situation as 24-hour supervision is provided.²⁷

²⁷

Exhibit A, Purpose and Definition of Adult Foster Care provided by State of Michigan. [Emphasis supplied.]

In this case, it is undisputed that Stubbe was the resident of an adult foster care home that was licensed and regulated by the State of Michigan.²⁸ It is also undisputed that the adult foster care home in question, Quality AFC Home, was insured by Defendant-Appellee/Cross-Appellant.²⁹ Based on the undisputed material facts, and the definition of adult foster care provided by the State of Michigan, the trial court correctly concluded that Stubbe was under the protection and care of Quality AFC Home, and thus a ward of the adult foster care home.

Defendant-Appellee/Cross-Appellant seems to argue to this Court (although it should be noted that such a position was not advanced to the trial court or the Court of Appeals) that a question of material fact exists because Quality AFC Home may have done an inadequate or less than thorough job of providing care, supervision, and protection to Stubbe. Clearly, there may be many adult foster care homes in Michigan that provide better care than Stubbe received. However, the relevant legal issue is not the level or quality of care from Quality AFC Home, but that Stubbe was under the care and protection of the home as a resident of that adult foster care home.

The essence of Defendant's-Appellee's/Cross-Appellant's argument is gravely flawed. The issue is not whether Stubbe was allegedly "high functioning" or "independent," but rather, that Stubbe was a resident in an adult foster care home that was licensed and regulated by the State of Michigan. As a resident of a adult foster care home in Michigan, Stubbe was entitled to care and protection from Quality AFC Home, and should therefore be presumed a "ward," pursuant to that term's common dictionary definition. *United States Fidelity & Guaranty Company*, 241 Mich App at 87. Receipt by Stubbe of quality care, protection, and supervision by Quality AFC Home was irrelevant to deciding summary disposition. After all, a patient in a hospital is still a patient whether or not decent quality medical care is provided. The trial court correctly ruled that Stubbe was a ward of the adult foster care home based on the uncontested facts.

²⁸ See Exhibits C, D, E, F, G, and H to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

²⁹ See Exhibits K and L to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

Moreover, Defendant's-Appellee's/Cross-Appellant's characterizations of Stubbe's alleged independence overlooks one critical point: adult foster care is a type of assisted living; it is not a prison.³⁰ Stubbe's movement and alleged actions outside the home did not make him any less a ward of the adult foster care home. Quality AFC Home could not have restricted Stubbe from his resident rights even if it desired to do so.³¹

Trial courts must grant summary disposition motions when presented with undisputed material facts. This is exactly what the trial court did in this case, and that decision was proper and just and should be reinstated.

³⁰

Exhibit A.

³¹

See *Exhibit BB* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

CONCLUSION

To avoid summary disposition, a nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing a genuine issue of material fact exists. *Aho v. Dep't of Corrections*, 263 Mich App 281, 288; 688 NW2d 104 (2004). Conclusory statements are insufficient to create a genuine issue of fact. *Rose v. Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 453 (2002).

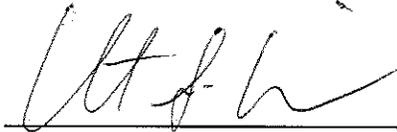
After viewing all evidence in the light most favorable to Defendant-Appellee/Cross-Appellant, the uncontested material facts demonstrate that no genuine issue existed and that Plaintiff-Appellant/Cross-Appellee was entitled to summary disposition. Because reasonable minds could not differ on the undisputed material facts, the trial court's ruling was correct, and its opinion and order should be restored.

RELIEF REQUESTED

Plaintiff-Appellant/Cross-Appellee respectfully requests that this Honorable Court grant its application for leave to appeal, or, in the alternative, peremptorily reverse the judgment of the Court of Appeals and enter an order reinstating the opinion and order and judgment of the trial court.

Respectfully submitted,

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Dated: April 2, 2012

"EXHIBIT A"

- Determine / get acquainted with potential placement sources: community mental health system, Department of Human Services, veteran's hospital, etc.

The following web site may be helpful: www.michigan.gov/businessstartup.

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PURPOSE AND DEFINITION OF ADULT FOSTER CARE

The purpose of this section is to provide the purpose and definition of adult foster care and how adult foster care differs from other types of residential programs.

Definition of Adult Foster Care

- Adult foster care is a specific type of assisted living, as outlined in PA 218 and the administrative rules.
- Adult foster care facility means a governmental or nongovernmental establishment that provides foster care to adults.
- Foster care means the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation.
- Supervision means guidance of a resident in the activities of daily living, including all of the following:
 - (a) Reminding a resident to maintain his or her medication schedule, as directed by the resident's physician.
 - (b) Reminding a resident of important activities to be carried out.
 - (c) Assisting a resident in keeping appointments.
 - (d) Being aware of a resident's general whereabouts even though the resident may travel independently about the community.
- Personal care means personal assistance provided by a licensee or an agent or employee of a licensee to a resident who requires assistance with dressing, personal hygiene, grooming, maintenance of a medication schedule as directed and supervised by the resident's physician, or the development of those personal and social skills required to live in the least restrictive environment.
- Protection means the continual responsibility of the licensee to take reasonable action to insure the health, safety, and well-being of a resident, including protection from physical harm, humiliation, intimidation, and social, moral, financial, and personal exploitation while on the premises, while under the supervision of the licensee or an agent or employee of the licensee, or when the resident's assessment plan states that the resident needs continuous supervision.

Purpose of Adult Foster Care

- To provide needed care for aged, developmentally disabled, mentally ill and physically handicapped persons.
- To assure privacy, and protection from moral, social and financial exploitation.
- To treat people with dignity while meeting personal needs and assuring safety.

What Adult Foster Care is Not

- It is not a nursing home as the residents do not require continuous nursing care, unless a hospice patient.
- It is not a room & board situation as 24-hour supervision is provided.
- It is not specialized care provided in an individual's home as the individual receiving care typically does not own or control the real estate.
- It excludes facilities licensed under other laws such as:
 - Homes for the Aged
 - Hospitals
 - Facilities operated by the Department of Community Health
 - Children's facilities.

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