

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. 144792
Court of Appeals No. 301980
Lower Court No. 09-104725-NF

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

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144792

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(All exhibits and the appendix referenced below, but not attached to this brief, are part of the Court record as attached to Plaintiff's-Appellant's/Cross-Appellee's brief filed in the Court of Appeals).

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ORDERS AND OPINIONS

Trial Court's Opinion and Order APPENDIX 1

JUDGMENT OR ORDER BEING APPEALED AND RELIEF SOUGHT

Plaintiff-Appellant/Cross-Appellee, Michigan Insurance Company acknowledges that Defendant-Appellee/Cross-Appellant, National Liability & Fire Insurance Company is seeking leave to appeal regarding a judgment of the Court of Appeals issued on February 14, 2012, pursuant to MCR 7.302. Plaintiff-Appellee/Cross-Appellee, Michigan Insurance requests that the application for leave to appeal submitted by Defendant-Appellee/Cross-Appellant, National Liability & Fire Insurance Company be denied, and that the trial court's order in favor of Plaintiff-Appellant/Cross-Appellee, Michigan Insurance Company be reinstated.

COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellant/Cross-Appellee, Michigan Insurance Company ("Plaintiff-Appellant/Cross-Appellee") acknowledges that MCR 7.302 controls applications for leave to appeal to this Honorable Court. Plaintiff-Appellant/Cross-Appellee asserts, however, that the application for leave to appeal filed by Defendant-Appellee/Cross-Appellant, National Liability & Fire Insurance Company ("Defendant-Appellee/Cross-Appellant") should be denied because adequate grounds are not demonstrated, as required by MCR 7.302(B). Further, the position advanced by Defendant-Appellee/Cross-Appellant would promote injustice.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DOES CLAIMANT, LAWRENCE STUBBE QUALIFY AS AN INSURED FAMILY MEMBER BASED ON THE BROAD LANGUAGE OF THE INSURANCE POLICY DEFENDANT-APPELLEE/CROSS-APPELLANT ISSUED TO QUALITY AFC HOME?

PLAINTIFF-APPELLANT/CROSS-APPELLEE,
MICHIGAN INSURANCE COMPANY ANSWERS: "YES"

DEFENDANT-APPELLEE/CROSS-APPELLANT,
NATIONAL LIABILITY & FIRE INSURANCE
ANSWERS: "NO"

TRIAL COURT ANSWERED: "YES"

COURT OF APPEALS ANSWERED: Did not answer.

- II. DID THE COURT OF APPEALS ERR BY FAILING TO CONSIDER DEFENDANT'S-APPELLEE'S/CROSS-APPELLANT'S FLAWED ARGUMENT THAT A CORPORATION CANNOT HAVE A WARD, EVEN THOUGH SUCH A POSITION IS INCONSISTENT WITH THE INSURANCE POLICY AT ISSUE AND WOULD PROMOTE INJUSTICE?

PLAINTIFF-APPELLANT/CROSS-APPELLEE,
MICHIGAN INSURANCE COMPANY ANSWERS: "NO"

DEFENDANT-APPELLEE/CROSS-APPELLANT,
NATIONAL LIABILITY & FIRE INSURANCE
ANSWERS: "YES"

TRIAL COURT ANSWERED: "NO"

COURT OF APPEALS ANSWERED: Did not answer.

COUNTER-STATEMENT OF REVIEW

Plaintiff-Appellant/Cross-Appellee relies upon the standard of review stated in its application for leave to appeal.

COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Plaintiff-Appellant/Cross-Appellee relies upon the statement of material proceedings and facts submitted in its application for leave to appeal.

ARGUMENT

I. CLAIMANT, LAWRENCE STUBBE QUALIFIES AS AN INSURED FAMILY MEMBER UNDER THE BROADLY DEFINED INSURANCE POLICY DEFENDANT-APPELLEE/CROSS-APPELLANT ISSUED TO QUALITY AFC HOME.

The argument that Claimant, Lawrence Stubbe ("Stubbe") was not "the person named in [NATIONAL LIABILITY] policy, the person's spouse, [or] a relative of either" simply misinterprets Defendant's-Appellee's/Cross-Appellant's own insurance policy and Michigan law.¹ As the trial court correctly determined, Stubbe qualified as an insured family member based on the policy issued by Defendant-Appellee/Cross-Appellant to Quality AFC Home, Inc.. The general rule regarding priority issues is that insurance policies cover persons, not motor vehicles. *DAIE v. Home Ins. Co.*, 428 Mich 43; 405 NW2d 85 (1987); *Madar v. League Gen. Ins. Co.*, 152 Mich App 734; 394 NW2d 90 (1986).

The basic priority scheme is laid out in MCL 500.3114, which provides in relevant part:

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

MCL 500.3115(1) also provides in relevant part:

- (1) Except as provided in subsection (1) of section 3114, a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

¹ It should be noted that Defendant-Appellee/Cross-Appellant conceded that this argument was not presented in the trial court. Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the trial court or administrative tribunal. See *Town & Country Dodge v. Dep't of Treasury*, 420 Mich 226, 228 n. 1; 362 NW2d 618 (1984); *Brown v. Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004); *Alford v. Pollution Control Industries of America*, 222 Mich App 693, 699; 565 NW2d 9 (1997). This Court need not address issues first raised on appeal. *Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Higgins Lake Prop. Owners Ass'n v. Gerrish Twp.*, 255 Mich App 83, 117; 662 NW2d 387 (2003). This Court may disregard, however, the issue preservation requirements and review may be granted in failure to consider the issue would result in manifest injustice. *Herald Co., Inc. v. Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). In this case, Plaintiff-Appellant/Cross-Appellee respectfully asserts that manifest injustice would not result by declining to address this argument.

- (a) Insurers of owners or registrants of motor vehicles involved in the accident.
- (b) Insurers of operators of motor vehicles involved in the accident.

MCL 500.3115(1) cannot be read without referencing MCL 500.3114(1). When no insurance carrier is available in a nonoccupant's household (in other words, when the claimant, the claimant's spouse, and any resident relatives of the claimant, do not own a motor vehicle with insurance coverage), then MCL 500.3115(1) controls.

Although MCL 500.3114(1) states that a personal protection insurance policy described in MCL 500.3101(1) applies to the "person named in the policy, the person's spouse, and a relative of either domiciled in the same household," Defendant-Appellee/Cross-Appellant overlooks that nothing prevents an insurance carrier from extending PIP benefits to a broader range of persons. See *Amerisure Insurance Company v. Coleman*, 274 Mich App 432; 733 NW2d 93 (2007).²

In this case, there is also no dispute that the definition of "An Insured" in Defendant's-Appellee's/Cross-Appellant's insurance policy was as follows:

B. Who is An Insured

- 1. You or any "family member".

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.³

² The Court of Appeals in *Amerisure Insurance Company* stated further: "We disagree with Titan's argument that under *Rednour v. Hastings Mut. Ins. Co.*, 468 Mich 241; 661 NW2d 562 (2003), the provisions of the insurance contract are irrelevant in determining whether Titan is liable to pay no-fault benefits under the statute for a number of reasons. First, Titan's argument rests on its conclusion that a no-fault policy cannot provide coverage broader than that required by the no-fault act, but that question was specifically 'left open' by *Rednour*, *supra* at 249, 661 NW2d 562."

³ See Exhibit K to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal. [Emphasis supplied.]

Falling for Defendant's-Appellee's/Cross-Appellant's corporation/ward argument would only provide a parachute to disregard contractual obligations. This Court should not permit Defendant-Appellee/Cross-Appellant to re-write its insurance policy on appeal. There is no dispute that Defendant-Appellee/Cross-Appellant could have defined "Insured" in a different manner. Indeed, Defendant-Appellee/Cross-Appellant could have defined "Insured" to mean "only the person named in the policy," but it did not do so. There is no dispute that Defendant-Appellee/Cross-Appellant could have defined "Family member" in a different manner, or simply omitted the phrase altogether. Defendant-Appellee/Cross-Appellant should be required to honor its obligations.

Defendant-Appellee/Cross-Appellant freely decided to issue a PIP policy to an adult foster care home that provided transportation to residents. The insurance risk was obvious or at least should have been, but Defendant-Appellee/Cross-Appellant gladly accepted the premium anyway. Only after a claim was made and a lawsuit was fully litigated did Defendant-Appellee/Cross-Appellant seek to re-draft its policy. Defendant's-Appellee's/Cross-Appellant's position should be rejected, and the wise decision of the trial court should be affirmed.

Defendant's-Appellee's/Cross-Appellant's position is an attempt to avoid application of *Hartman v. Insurance Company of North America*, 106 Mich App 731; 308 NW2d 625 (1981), and *United States Fidelity & Guaranty Company v. Citizens Insurance Company*, 241 Mich App 83; 613 NW2d 740 (2000). Plaintiff-Appellant/Cross-Appellee respectfully submits that both cases dealt with facts very similar to those presented in this case. The trial court properly applied both cases in reaching its wise opinion and order, which should be reinstated.⁴

⁴ See *Appendix 1* to Plaintiff's-Appellant's/Cross-Appellee's application for leave to appeal.

II. THE COURT OF APPEALS DID NOT ERR BY FAILING TO CONSIDER DEFENDANT'S-APPELLEE'S/CROSS-APPELLANT'S FLAWED ARGUMENT THAT A CORPORATION CANNOT HAVE A WARD, ESPECIALLY SINCE SUCH A POSITION IS INCONSISTENT WITH THE INSURANCE POLICY AT ISSUE AND WOULD PROMOTE INJUSTICE.

Defendant's-Appellee's/Cross-Appellant's asserts that the case of *United States Fidelity & Guaranty Company, supra*, should be overruled. Such a request should be swiftly rejected by this Court.

Justice Felix Frankfurter opined that stare decisis should be abandoned only "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119; 60 S.Ct. 444; 84 L.Ed. 604 (1940). Justice Antonin Scalia has stated that precedent should be abandoned where the rule is "wrong in principle," "unstable in application," and undermined by various exceptions and contradictions. *United States v. Dixon*, 509 U.S. 688, 709-711; 113 S.Ct. 2849; 125 L.Ed. 556 (1993).

In *U of M Regents v. Titan Ins.*, 487 Mich 289; 791 NW2d 897 (2010), this Court stated:

In determining whether a compelling justification exists to overturn precedent, the Court may consider numerous evaluative criteria, none of which, standing alone, is dispositive. Historically, courts have considered (1) whether the precedent has proved to be intolerable because it defies practical workability, (2) whether reliance on it is such that overruling it would cause a special hardship and inequity, (3) whether related principles of law have so far developed since the precedent was pronounced that no more than a remnant of it has survived, (4) whether facts and circumstances have so changed, or come to be seen so differently as to have robbed the precedent of significant application or justification, (5) whether other jurisdictions have decided similar issues in a different manner, (6) whether upholding the precedent is likely to result in serious detriment prejudicial to public interests, and (7) whether the prior decision was an abrupt and largely unexplained departure from then existing precedent.

U of M Regents, 487 Mich at 303-304.

Applying the above factors to this case, there is no reason to overrule *United States Fidelity & Guaranty Company*. That decision has not been proven intolerable because it defies practical

workability. Reliance on that decision would not and does not cause a special hardship or inequity. Upholding the case is unlikely to result in serious detriment to public interests. The case of *United States Fidelity & Guaranty Company* was not an abrupt and largely unexplained departure to existing precedent. Moreover, the Court of Appeals got it right in *United States Fidelity & Guaranty*, and that decision should be preserved and the trial court's opinion and order in this case should be reinstated. None of the factors from *U of M Regents* support overruling *United States Fidelity & Guaranty Company*.

The case of *United States Fidelity & Guaranty Company* was correctly decided. Defendant-Appellee/Cross-Appellant maintains that a corporation cannot have a ward. However, it is fundamental that "[a] corporation is a person in the eyes of the law and as such carries on its activities, be they lawful or unlawful." *Jones v. Martz and Meek Construction Co. Inc.*, 362 Mich 451, 455; 107 NW2d 802 (1961). If a corporation is indeed a person, it can certainly have family members, including a ward. This was the essence of the trial judge's sound reasoning in *United States Fidelity & Guaranty Company*.

More important, "[a]n insurance policy is enforced in accordance with its terms." *Twichel v. MIC Gen. Ins. Corp.*, 469 Mich 524, 534; 676 NW2d 616 (2004), citing *Allstate Ins. Co. v. McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002). Insurance policies are subject to the same rules of interpretation that apply to the interpretation of contracts. *Rory v. Cont'l Ins. Co.*, 473 Mich 457; 703 NW2d 23, 26 (2005). "A contract must be interpreted according to its plain and ordinary meaning." *Holmes v. Holmes*, 281 Mich App 575; 760 NW2d 300, 311 (2008) (citation omitted).

The real heart of Defendant's-Appellee's/Cross-Appellant's argument is that it should be able to avoid a risk it freely agreed to undertake. Defendant-Appellee/Cross-Appellant knew it was selling an auto insurance policy to an adult foster care home. As the Court of Appeals recently observed: "Courts avoid interpreting insurance policies in such a way that insured's coverage is

never triggered and the insurer bears no risk." *Ile v. Foremost Insurance Company*, 293 Mich App 309, 315-316; — NW2d — (2011); app for leave to appeal granted 490 Mich 1004; 807 NW2d 710 (2012). The *Ile* Court further pointed out that "courts are to enforce ... agreement[s] as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Ile*, 293 Mich App at 319, quoting *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich 41, 51 and 63; 664 NW2d 776 (2003).

Defendant-Appellee/Cross-Appellant really wants this Court to interpret its policy in such a way that coverage is not triggered and a known risk is ignored. Defendant-Appellee/Cross-Appellant ignores the policy definition of "family member" because it is inconvenient. Doing so, however, would make part of Defendant's-Appellee's/Cross-Appellant's policy a nullity. Plaintiff-Appellant/Cross-Appellee respectfully asserts that an insurance policy should not be interpreted so as to render any part of it superfluous. As other courts have noted, "[i]f it is reasonably possible to do so, every provision of an insurance policy must be given operative effect." *Kelly v. Figueiredo*, 223 Conn. 31, 36; 610 A2d 1296 (1992), quoting *Streitweiser v. Middlesex Mutual Assurance Co.*, *supra*, 219 Conn at 376; 593 A.2d 498; "because parties ordinarily do not insert meaningless provisions in their agreements." *Connecticut Co. v. Division 425*, 147 Conn. 608, 617, 164 A2d 413 (1960); *A.M. Larson Co. v. Lawlor Ins. Agency, Inc.*, 153 Conn. 618, 622; 220 A.2d 32 (1966).

Defendant's-Appellee's/Cross-Appellant's reliance upon *Michigan Township Participating Plan v. Pavolich*, 232 Mich App 378; 591 NW2d 325 (1999) is seriously misplaced. *Michigan Township* was not a PIP case. Instead, it was a dec action dealing with underinsured motorist (UIM) coverage. As this Court knows well, underinsured motorist benefits are not statutorily mandated in Michigan. *Ile, supra*. By contrast, the purpose of the no-fault statute was to broadly provide coverage for those injured in motor vehicle accidents without regard to fault. See *Cole*

Auto Owners Insurance Company, 272 Mich App 50; 723 NW2d 922 (2006); app for leave denied 477 Mich 949; 723 NW2d 875 (2006).

Defendant-Appellee/Cross-Appellant's reference to selective jurisdictions overlooks the sound reasoning from courts not quoted in its brief. For example, in *Ceci v. National Indemnity Company*, 225 Conn. 165; 622 A2d 545 (1993), the Supreme Court of Connecticut pointed out:

The language relating to "family members" in a policy insuring a corporation was not required. The defendant could have omitted section D.1. of the uninsured motorists endorsement of this corporate auto policy.

The reasoning from *Ceci* is helpful. Defendant-Appellee/Cross-Appellant knew it was selling an insurance policy to a corporation that operated an adult foster care home.⁵ Defendant-Appellee/Cross-Appellant knew the nature of their insured's business was to provide "ADULT FOSTER CARE."⁶ Defendant-Appellee/Cross-Appellant knew the insurance policy covered a 2000 Dodge van.⁷ The insurable risk to Defendant-Appellee/Cross-Appellant was readily apparent and ignored.

In *Progressive Casualty Insurance Company*, 166 N. J. 260; 765 A2d 195, the Supreme Court of New Jersey dealt with a declaratory judgment regarding uninsured motorist (UM) coverage for a business automobile insurance policy issued to a corporation. The issue was whether uninsured motorist coverage could extend to one of the officers of the corporation. The definition of "family member" was "a person related to you by blood, marriage or adoption who is [a] resident of your household, including a ward or foster child." In finding that business insurance policies cover family members, the Court in *Progressive Casualty Insurance Company* noted that the insurance carrier "could have omitted the 'family member' language in section D.1. of the UM endorsement of the auto policy to avoid any ambiguity." 765 A.2d at 204, citing *Ceci, supra*, 622

⁵ See *Exhibit L* to Plaintiff's-Appellant's/Cross-Appellee's appeal brief filed in the Court of Appeals.

⁶ See *Exhibit L* to Plaintiff's-Appellant's/Cross-Appellee's appeal brief filed in the Court of Appeals.

⁷ See *Exhibit K* to Plaintiff's-Appellant's/Cross-Appellee's appeal brief filed in Court of Appeals.

A2d at 545-546.

In this case, Defendant-Appellee/Cross-Appellant sold an insurance policy to an adult foster care home. After a claim was presented for benefits, Defendant-Appellee/Cross-Appellant essentially wants a court to let it off the hook so it does not have to honor its statutory and contractual duties. This Court should not permit Defendant-Appellee/Cross-Appellant to run from obligations gladly agreed to with premium dollars.

Another problem with the position advocated by Defendant-Appellee/Cross-Appellant is that would promote serious injustice for the residents of adult foster care homes. In this day and age, most adult foster care homes are likely operated as either corporations or limited liability companies. The days of running an adult foster care home without a corporate or other legal form as in *Hartman* are long gone. Since adult foster care homes presumably have motor vehicles to transport residents to and from medical appointments and workshops, etc., accepting Defendant's-Appellee's/Cross-Appellant's position could result in long term harm for residents of adult foster care homes. For example, in this case, what if the driver that struck Stubbe fled the scene and was never found? Defendant-Appellee/Cross-Appellant may have simply taken the position that the resident would have no PIP coverage because a corporation cannot have a ward. As a result, the injured person would be left to seek benefits from the assigned claims facility. MCL 500.3172. Under such a scenario, one insurance carrier would benefit to the detriment of all others. This would certainly be poor public policy.

Another illustration of the weakness Defendant's-Appellee's/Cross-Appellant's position is the assertion that it may only be liable for 50% of the total benefits paid on behalf of Stubbe's care and treatment. Defendant-Appellee/Cross-Appellant suggests that if it is determined that Stubbe is a ward of the adult foster care home, that Defendant-Appellee/Cross-Appellant "would be liable only for one-half of Mr. Stubbe's benefits." Defendant-Appellee/Cross-Appellant offers no legal

support for such a position. It has always been the position of Plaintiff-Appellant/Cross-Appellee that Defendant-Appellee/Cross-Appellant is in the highest order of priority, pursuant to MCL 500.3114. The trial court agreed with Plaintiff-Appellant/Cross-Appellee, and its wise order partial summary disposition should be restored.

Defendant's-Appellee's/Cross-Appellant's discussion about the premium amount charged is simply another request for a bailout. It is well understood that "the very purpose of insurance is to protect against the risk of unknown, but not unexpected loss." *H & R Block, Inc. v. American Intern. Speciality Lines Co.*, 546 F.3d 937 C.A.8 (Mo.) 2008. As one panel of the Federal Court of Appeals noted:

The premium charged enrollees is essential to insurers' goal of profitable outcomes from their insurance bargains. Insurers are making a conscious gamble with profitability: will the premiums they receive be sufficient to cover the risks they have assumed?

The premiums charged may or may not be sufficient to cover the claims the insurers pay; when the claims exceed the insurers' projections, they bear the loss. When, however, the premiums received exceed the value of the claims paid by the insurers, the enrollees bear the loss because the insurers keep the remaining premium proceeds. Thus, in sum the insurance contract represents a conscious bargain in which both sides hope to, at least, come out even – but know they might not.

Ironworkers Local Union 68 v. Astrazeneca Pharmaceuticals, LP, 634 F.3d 1352, 1364-1365 (2011).

In short, Defendant-Appellee/Cross-Appellant should honor the bargain.

CONCLUSION

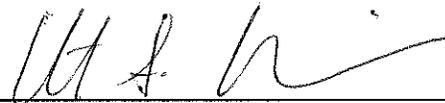
Defendant's-Appellee's/Cross-Appellant's application does not provide suitable grounds for granting leave to appeal. The trial court correctly applied established Michigan law to the uncontested material facts presented. The trial court's well articulated opinion and order should be reinstated.

RELIEF REQUESTED

Plaintiff-Appellant/Cross-Appellee respectfully requests that this Honorable Court deny Defendant's-Appellee's/Cross-Appellant's application for leave to appeal.

Respectfully submitted,

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Dated: April 2, 2012