

STATE OF MICHIGAN
COURT OF APPEALS

GM SIGN, INC.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 11, 2012

No. 301742
Wayne Circuit Court
LC No. 10-000455-CK

Before: GLEICHER, P.J., and M.J. KELLY and BOONSTRA, JJ.

BOONSTRA, J. (*concurring in the result*).

I concur in the result reached by the majority. I write separately because I believe that the trial court should not have reached the merits of plaintiff's claims, but rather should have dismissed them based on plaintiff's lack of standing to assert them in the circumstances presented. I therefore would vacate the trial court's ruling, and affirm its grant of summary disposition to defendant, pursuant to MCR 2.116(C)(8), based on plaintiff's lack of standing.

I. INTRODUCTION

In this declaratory judgment action, plaintiff sought a declaration that defendant insurance company was required to defend and indemnify its insured, 400 Freight Services, Inc. ("400 Freight") in a lawsuit that plaintiff had filed against 400 Freight in Illinois (the "Illinois action"). The trial court in this Michigan action granted summary disposition to defendant pursuant to MCR 2.116(C)(8), finding that a policy exclusion barred coverage. Plaintiff appealed.

Following oral argument, during which this Court and counsel in part discussed issues relating to standing, this Court issued an order directing the parties to file supplemental briefs addressing the following issues:

I. Which state's law applies to whether plaintiff GM Sign has standing to bring this declaratory judgment action?

II. Does plaintiff GM Sign have standing to bring a declaratory judgment action seeking a determination that defendant Auto-Owners Insurance Company owes 400 Freight a duty to both defend and indemnify 400 Freight? In answering this question, the parties are directed to reference *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349 (2010); *Allstate Ins*

Co v Hayes, 442 Mich 56 (1993), and *Auto-Owners Ins Co v Keizer-Morris Inc*, 284 Mich App 610 (2009).

III. Is standing waivable and, if so, has defendant Auto-Owners waived any challenge to standing?

Having received and considered the parties' supplemental briefs, I would vacate the trial court's holding, but affirm its grant of summary disposition to defendant, on the ground that plaintiff lacked standing, under the circumstances of this case, to bring this action for declaratory relief.

II. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff, an Illinois corporation, filed the Illinois action, a nationwide class action, in an Illinois court, against 400 Freight, for sending unsolicited fax advertisements – known as “blast faxes” – to plaintiff and other class members. Plaintiff alleged that Illinois jurisdiction was proper in the Illinois action because 400 Freight was located in Illinois, had transacted business in Illinois, had violated Illinois as well as federal law, and had committed tortious acts in Illinois. Plaintiff alleged violation of the Telephone Consumer Protection Act (TCPA), 47 USC § 227; common law conversion; and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (CFA), 815 ICLS 505/2.

Defendant insured 400 Freight, under a commercial general liability policy, at the time of the alleged conduct by 400 Freight. It is undisputed that defendant has provided a defense to 400 Freight in the Illinois action. It has done so, however, under a reservation of rights, based upon a policy exclusion for “violation of statutes that govern emails, fax, phone calls, or other methods of sending material or information.”

Notwithstanding defendant's provision of a defense to 400 Freight in the Illinois action, plaintiff filed this action in Wayne County (Michigan) Circuit Court for declaratory relief, seeking a determination that defendant owed 400 Freight a duty to both defend and indemnify 400 Freight under the policy.¹ At that time, neither defendant nor 400 Freight had sought a declaration, in any court, of defendant's rights and responsibilities under the policy. Defendant

¹ The majority characterizes this declaratory judgment action as having been brought “to continue defending 400 Freight and to indemnify 400 Freight in the event the class action yields a damages award.” In fact, however, GM Sign sought a declaration of a duty “to *defend* and indemnify” 400 Freight (emphasis added), notwithstanding defendant's provision of a defense to 400 Freight in the class action. There has never been any suggestion that defendant might discontinue that defense, nor did plaintiff allege (or argue that there was) any need for a declaratory order to “continue” the on-going defense. Plaintiff instead alleged (and argued for) a duty to “defend” and indemnify. While seemingly unnecessary and illogical to seek a declaration of something that was already being provided, plaintiff presumably did so because while it lacks standing at this juncture to seek a declaration of a duty to *indemnify*, it would have standing at this juncture to seek a declaration of a duty to *defend*.

responded by moving for summary disposition pursuant to MCR 2.116(C)(8), arguing that, under both Michigan and Illinois law, an exclusion to the policy barred coverage for liability incurred by 400 Freight as a result of its sending of the faxes, that notice of the exclusion was properly given to 400 Freight and, additionally, that Illinois law, if applicable, would bar plaintiff's claim as premature. Plaintiff responded that, under Illinois law (which it argued applied to this action), there were genuine issues of material fact as to whether defendant had given proper notice of the exclusion to 400 Freight, and whether defendant had properly reserved its rights when it furnished a defense in the Illinois action without informing 400 Freight of potential conflicts of interest. Plaintiff also argued that, under either Illinois or Michigan law, the exclusion at issue did not bar conversion claims.

In granting summary disposition to defendant, the trial court held that the policy exclusion at issue was clear and unambiguous, that the claims against 400 Freight in the Illinois action arose out of the actions of 400 Freight in sending unsolicited faxes, and that coverage was therefore barred by the policy exclusion regardless of the label placed on plaintiff's claims. The trial court also held that notice of the exclusion was properly given. The trial court therefore granted defendant's motion pursuant to MCR 2.116(C)(8) in a written order stating that defendant's requested relief should be granted "for reasons stated on the record." From that order, plaintiff now appeals. The majority affirms.

III. STANDARD OF REVIEW

This Court reviews de novo the trial court's grant or denial of summary disposition based upon a failure to state a claim. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). "Whether a party has legal standing to assert a claim [is] a question of law that we review de novo." *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001).

IV. PRELIMINARY MATTERS

On appeal, plaintiff contends that the trial court did not appropriately decide which state's law applies to this action, improperly considered materials beyond the pleadings in ruling on defendant's motion, wrongly determined that no genuine issues of material fact existed, and erred in concluding that the exclusion at issue barred all of plaintiff's claims.

Under the circumstances before us, I conclude that the trial court should not have reached the merits of plaintiff's claims, and thus should not have addressed either the applicability of the policy exclusion to the claims brought against 400 Freight in the Illinois action, or the adequacy of notice. It also need not have determined (as it apparently did not) whether Illinois or Michigan law applied to any assessment of the policy exclusion and notice issues. Rather, I believe that plaintiff lacked standing to bring this action for declaratory relief, under the circumstances presented. This Court does not generally address issues not raised by the parties on appeal. See *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 4 n 3; 704 NW2d 69 (2005). "However, this Court possesses the discretion to review a legal issue not raised by the parties." *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004).

V. STANDING

While our Supreme Court recently has altered its view of standing from one deriving from the Michigan Constitution to a more “limited, prudential approach,” the Court reiterated that:

The purpose of the standing doctrine is to assess whether a litigant’s interest in the issue is sufficient to “ensure sincere and vigorous advocacy.” Thus, the standing inquiry focuses on whether a litigant “is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable.” [*Lansing Schools Educ Ass’n*, 487 Mich at 355 (citations omitted).]

A prospective plaintiff lacks standing if it is not a real party in interest, because the “standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy.” *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997), citing *Michigan Nat’l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). A real party in interest is the one who is vested with the right of action on a given claim. *Id.*, citing *Hoffman v Auto Club Ins Ass’n*, 211 Mich App 55, 96; 535 NW2d 529 (1995).

“Standing does not address the ultimate merits of the substantive claims of the parties.” *Id.* at 357, quoting *Detroit Fire Fights Ass’n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). Historically in Michigan, standing has been treated as “an inquiry that was distinct from whether the plaintiff’s requested remedy was available.” *Id.* at 357-358, citing *Eide v Kelsey-Hayes Co*, 431 Mich 26, 50 n 16; 427 NW2d 488 (1988) (Griffin, J.).

A. Michigan Law of Standing Applies.

As a threshold matter, I conclude that it is the standing doctrine of Michigan, rather than of Illinois, that applies to this action. Michigan conflict of laws analysis focuses on whether the court should apply the *substantive* law of another state; procedural matters in Michigan courts remain governed by the law of Michigan, including its court rules. See *Nat’l Equipment Rental, Ltd v Miller*, 73 Mich App 421, 425; 251 NW2d 611 (1977).

A declaratory judgment is a *procedural remedy* that constitutes a binding and conclusive adjudication of the rights and status of the litigants. *Associated Builders and Contractors v Director of Dep’t of Consumer & Industry Services*, 472 Mich 117, 124; 693 NW2d 374 (2005), overruled in part on other grounds by *Lansing Schools Educ Ass’n*, 487 Mich at 372 n 18 (emphasis added). Matters relating purely to the remedy requested are governed by the laws of the state where the action is instituted. *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 397; 509 NW2d 829 (1993), citing *Yount v Nat’l Bank of Jackson*, 327 Mich 342, 346; 42 NW2d 110 (1950). Because the doctrine of standing does not reach the substantive claims of the parties, and in this case involves application of the court rule governing the court’s power to

enter the procedural remedy of a declaratory judgment, I conclude that Michigan law governs the standing analysis.²

² Plaintiff argues that “standing” is a “substantive question,” but acknowledges that it is to “be answered by the domestic law selected by the courts of the . . . states.” (Citation omitted). Plaintiff also cites to *Int’l Primate Protection League v Admin’rs of Tulane Educ Fund*, 500 US 72, 77 (1991), for the proposition that “standing should be seen as a question of substantive law.” (Quoting Fletcher, *The Structure of Standing*, 98 Yale L J 221, 229 (1988)). In referencing that quote, however, plaintiff omits the following important qualifying language: “answerable by reference to the statutory and constitutional provision whose protection is invoked.” In this case, that provision is MCR 2.605. Finally, plaintiff contends (although the record suggests otherwise) that there is “no dispute” that Illinois substantive law governs this action, and argues therefrom that “it stands to reason” that Illinois law should determine the issue of standing. I disagree. Although plaintiff is an Illinois resident seeking to apply Illinois law, it has invoked the Michigan rules of procedure by electing to pursue this claim in the Michigan courts (for reasons that it appears may not yet have been candidly explained).

In my view, Judge Gleicher’s separate concurrence extends the error of plaintiff’s conflicts analysis by attempting to analogize to applications of tort and contract law, even while noting that in this declaratory judgment context, “Michigan’s Court Rules dictate how this lawsuit must be litigated.” While Judge Gleicher’s concurrence implicitly recognizes that, by electing to bring this case in Michigan, GM Sign consented to follow the Michigan Court Rules, it errantly ignores those rules as if they did not impact whether GM Sign has standing to sue. In fact, Judge Gleicher’s concurrence argues elsewhere that MCR 2.605 “incorporates the doctrines of standing, ripeness, and mootness.” (Citation omitted). MCR 2.605 (including its requirements for standing) governs here.

Judge Gleicher’s concurrence also seeks to “buttress” its conclusion that Illinois law applies to the determination of standing by referencing two sections of the Restatement (Second) of Conflict of Laws. Although as stated, *either* state’s law would deny plaintiff standing, I do not read those sections as broadly as does the concurrence. Although Restatement Conflict of Laws, 2d, § 122, cmt b, does caution against “unthinking adherence” to procedural/substantive classifications, I do not find my determination to apply Michigan law to the standing issue “unthinking.” Moreover, Comment a to that same section notes that important factors that may influence a court to apply the law of the forum include “whether the precedents have tended consistently to classify the issue as ‘procedural’ or ‘substantive’ for choice-of-law purposes” and “whether an effort to apply the rules of the judicial administration of another state would impose an undue burden upon the forum.” *Id.*, cmt a. Further, “[t]he forum has compelling reasons for applying its own rules to decide such issues [as to the “rules for conducting lawsuits and administering the court’s processes”] even if the case has foreign contacts and even if many issues in the case will be decided by reference to the local law of another state.” *Id.* I conclude that Michigan’s concern for the administration of its declaratory judgment procedure is such a compelling reason.

B. Plaintiff Lacks Standing Under Michigan Law.

A plaintiff's standing to bring a declaratory judgment action is determined by the court rule governing declaratory judgments. MCR 2.605; see also *Lansing Schools Educ Ass'n*, 427 Mich at 372. In the declaratory judgment context, therefore, a litigant has standing when it "meets the criteria of MCR 2.605." *Lansing Schools Educ Ass'n*, 487 Mich at 372.³

MCR 2.605 provides in relevant part:

(A) Power to Enter Declaratory Judgment.

(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

Further, Restatement Conflicts of Laws, 2d, § 125 cmt a, is not applicable to the instant case. Although the comment does state that "the local law of the forum will not be applied to determine whether a direct action can be maintained against an insurance company without the need of first obtaining a judgment against the insured," it in doing so refers the reader to Restatement Conflict of Laws, 2d, § 162. Comment b to that section discusses "whether an action may be maintained against the liability insurer of the tortfeasor without first having obtained judgment against the latter," but it does so only in connection with the application of "direct action statutes" to "no action clauses" in insurance contracts entered into in other states. *Id.*, cmt b. Neither Michigan nor Illinois has such a statute, nor is such a contractual provision at issue here. More generally, Comment a reflects that the section relates to whether a "mandatory condition of liability" must be satisfied before a plaintiff can recover. *Id.*, cmt a. The instant case involves a request to declare the rights of plaintiff under defendant's insurance policy with its insured; it does not present any question relating to plaintiff's right of recovery against the alleged tortfeasor insured, or any "mandatory condition of liability." I thus find this section to be inapplicable to the matter before this Court.

³ Judge Gleicher's concurrence suggests that my conclusions are contrary to the holding in *Lansing Schools Educ Ass'n*. To the contrary, *Lansing Schools Educ Ass'n* reflects that standing in declaratory judgment actions in Michigan is determined under MCR 2.605. The conclusion that plaintiff lacks standing, at this juncture, under the circumstances presented, does not derive, as Judge Gleicher's concurrence suggests, from the application of any "far more rigorous federal case or controversy doctrine," but rather from the requirements of MCR 2.605 itself, including that of an "actual controversy within [the court's] jurisdiction." Judge Gleicher's concurrence finds an "actual controversy" in the question of "whether the Auto-Owners policy affords coverage for the blast faxes." However, for the reasons stated herein, plaintiff is not a proper party, at this juncture and under the circumstances presented, to raise that ultimate question of a duty to indemnify under the policy. And there also is no "actual controversy" over whether defendant has a duty to defend, because defendant is providing, and at all times has provided, a defense to its insured in the Illinois action.

(2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

The language of this court rule thus raises the preliminary questions of (a) whether there currently exists an “actual controversy”; (b) whether plaintiff is an “interested party”; and (c) whether the trial court would have jurisdiction over the claim presented if the relief sought were other than for a declaratory judgment.⁴ I am unable to answer those questions in the affirmative, on the facts presented. This is particularly true since, notwithstanding plaintiff’s request for a declaration that defendant owes its insured a duty to both defend and indemnify, defendant has in fact provided a defense to its insured in the Illinois case and, prior to the filing of this action, had not denied coverage or sought a declaration of its rights under the insurance policy.

No published authority exists in Michigan that is squarely on point with this case. However, I note initially that an “actual controversy” exists under Michigan law when “a declaratory judgment is necessary to guide a plaintiff’s future conduct in order to preserve the plaintiff’s legal rights.” *Citizens for Common Sense in Gov’t v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000); *Genesis Ctr, PLC v Comm’r of Financial & Ins Services*, 246 Mich App 531, 544; 633 NW2d 834 (2001). “Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist.” *Citizens for Common Sense*, 243 Mich App at 55. Where “there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment.” *Id.*, 243 Mich App at 56; *Genesis*, 246 Mich App at 544. Thus, our Supreme Court reiterated in *Lansing Schools Educ Ass’n*, 427 Mich at 372 n 20, that “[t]he essential requirement of the term ‘actual controversy’ under the [declaratory judgment] rule is that plaintiffs ‘plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.’” *Id.*, quoting *Associated Builders*, 472 Mich at 126, quoting *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978).

Particularly where, as here, the insurer defendant has at all times provided, and in fact continues to provide, a defense to its insured in the Illinois action, plaintiff has not shown that a declaratory judgment is “necessary to guide [its] future conduct in order to preserve [its] legal rights,” or that at this juncture it has “an adverse interest necessitating the sharpening of the issues raised.” Accordingly, there is not currently an “actual controversy” under MCR 2.605, and the trial court “lack[ed] jurisdiction to issue a declaratory judgment.” It accordingly should not have reached the merits of plaintiff’s claims.⁵

⁴ Plaintiff incorrectly asserts that “MCR 2.605 merely requires Plaintiff to be an ‘interested party.’” Plaintiff cites only to the court rule itself as authority for this proposition, and ignores the other requirements of the court rule.

⁵ Judge Gleicher’s reliance, in her separate concurring opinion, on *UAW v Central Mich Univ Trustees*, 295 Mich App 486; 815 NW2d 132 (2012) is in my view misplaced. In that case, a union challenged a university’s policies and procedures restricting university employees’ candidacies for public office. This Court held that there was an “actual controversy” between the parties “because the CMU officials promulgated a policy that is allegedly at odds with a *state*

Judge Gleicher’s separate concurring opinion would find that an “actual controversy” derives from the mere fact that plaintiff has an interest in knowing “whether insurance coverage would be available if it prevailed in the Illinois class-action suit.” It speculates that, absent insurance coverage, “GM Sign perhaps will elect to terminate the class action.” Relatedly, Judge Gleicher’s concurrence relies on the supposed and unsubstantiated fact that 400 Freight is “out of business and therefore unable to independently satisfy any judgment.” I respectfully disagree. In my view, this sort of logic places the incentives in all the wrong places. It would mean that the litigation of plaintiff’s underlying claims in the Illinois action should rise and fall *not* on their merits, but instead on whether there is insurance coverage, i.e., a pot of gold at the end of the rainbow. I believe, to the contrary, that plaintiff’s claims should rise or fall on their merits. The question of insurance coverage should be litigated only if and when the underlying claims are determined to have merit; otherwise, parties may forever be litigating coverage disputes that may or may not ever need to be litigated.

Our Supreme Court also has concluded that injured parties (such as plaintiff) are not third-party beneficiaries to contracts of insurance. *Allstate Ins Co v Hayes*, 442 Mich 56, 63; 499 NW2d 743 (1993). An injured party may have standing to *continue* an action for a declaration of insurance coverage, where both the insured and the injured party have been named by the insurer as defendants in a declaratory judgment action, and where a default judgment has entered against the insured. *Id* at 67.⁶ Also, this Court has found that an injured party has standing to *intervene*

statute.” *UAW*, 295 Mich App at 496 (emphasis added). Standing derived from the fact that “the university employees have a special and substantial interest in ensuring that the CMU officials’ policies do not violate their *statutory rights* under the Act, and that interest is different from any rights or interests of the public at large.” *Id.*, at 497 (emphasis added). No such conflict with statutory rights exists here, and no “actual controversy” yet exists under MCR 2.605.

⁶ In my view, Judge Gleicher’s concurrence distorts *Hayes* to suggest that the Supreme Court had there determined that declaratory relief is appropriate even where a plaintiff lacks a “vested” interest. To the contrary, *Hayes* characterized a “vested” interest as that which “would *permit* the institution by the injured party of an action for declaratory relief.” *Hayes*, 442 Mich at 63 (emphasis added). The Supreme Court merely found that a party’s right to “continue” a declaratory action did not depend on the party having “third-party beneficiary status.” *Id.* But that finding in no way obviates the need to establish standing where, as here, there exists no ongoing declaratory action. Judge Gleicher’s concurrence further would re-write *Hayes* to replace the words “continue the action” with “bring an action,” and thus joins plaintiff in over-reading that decision of our Supreme Court. *Hayes*, 442 Mich at 63.

Judge Gleicher’s concurrence additionally misconstrues this Court’s decision in *Cloud v Vance*, 97 Mich App 446; 296 NW2d 68 (1980), as “specifically recogniz[ing] a tort plaintiff’s entitlement to declaratory relief under similar circumstances.” To the contrary, the tort plaintiff in *Cloud*, unlike here, had already obtained a judgment against the insured. *Cloud*, 97 Mich App at 449-50. The Court recognized that it was only *then* that the plaintiff came to possess standing relative to the insurer. *Id.* (“[w]hen plaintiff obtained judgment against [the insured], plaintiff succeeded to [the insured’s] right against [the insurer]). The circumstances here could hardly be less “similar.” Moreover, the insurer in *Cloud*, unlike here, had already obtained by default a declaratory judgment of no coverage against its insured. The issue in *Cloud* was simply whether,

in an insurer's declaratory action, where the defendant insured has failed to oppose (or even appear in connection with) the insurer's motion for summary disposition. *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 615; 773 NW2d 267 (2009).

However, the Supreme Court in *Hayes* specifically declined to reach the issue of whether an injured party has a "vested" interest, from the time of the injury, that would permit the injured party to bring its own action for declaratory relief. *Hayes*, 442 Mich at 63 ("We do not reach the issue whether an injured party has a 'vested' interest from the time of the injury, which would permit the institution by the injured party of an action for declaratory relief").⁷

The parties also call the Court's attention to an unpublished (and therefore unprecedential) opinion of this Court in *Michigan Educational Employees Mutual Ins Co v Executive Risk Indemnity, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2004 (Docket No. 242967). In *Michigan Educational*, an insurance company ("MEEMIC"), had brought suit against the agent of its wholly owned subsidiary, MEEMIC Insurance Services, to recoup money that MEEMIC had paid on a homeowner's insurance policy that the agent of the subsidiary had negligently executed on behalf of the subsidiary. MEEMIC had issued that policy through its subsidiary, MEEMIC Insurance Services. The subsidiary maintained an errors and omissions ("E&O") insurance policy through the defendant insurer, Executive Risk Indemnity, Inc. Based on that E&O policy maintained by MEEMIC Insurance Services, MEEMIC also brought a declaratory action against the defendant, Executive Risk, the insurer of its subsidiary. MEEMIC sought a declaration of coverage under the E&O policy. In that factual scenario, a panel of this Court rejected the defendant insurer's argument that MEEMIC lacked standing to seek a declaration of rights under the E&O policy that had been issued to its subsidiary, and held that "plaintiff has standing to seek a declaration regarding whether an independent insurance agent is an insured and whether defendant must indemnify the agent under the policy." *Michigan Educational*, unpub op at 3 (emphasis added).

Even if *Michigan Educational* were precedential (which it is not), I do not find its unique facts comparable to those before us. *Michigan Educational* held only that the parent company of

under those circumstances (which do not exist here), the plaintiff was precluded by the doctrine of res judicata from litigating the coverage issue, even though the insurer had not provided the plaintiff with notice of its declaratory judgment action against the insured. *Id.* at 449.

⁷ Plaintiff suggests that the Supreme Court in *Hayes* made "clear" that a third party has standing to bring a declaratory judgment action "concerning a question of coverage under an insurance policy as long as the declaratory judgment might affect the party's rights." (Emphasis added). I find this to be an overly broad reading of *Hayes*.

I also respectfully disagree with the assertion of Judge Gleicher's concurrence that "*Lansing Schools* resolves the question left unanswered in [*Hayes*]." To the contrary, *Lansing Schools Educ Ass'n* did not present the issue that is raised here, in this insurance context. Moreover, it did not even decide the issue of standing with respect to the declaratory judgment claim that was before the Court in that case; rather, it remanded the case to the Court of Appeals "to decide whether plaintiffs meet the requirements of MCR 2.605." *Lansing Schools Educ Ass'n*, 487 Mich at 373.

an insured could seek a declaration as to whether the insured's independent agent also was an insured under the policy. I do not find those facts, or the reasoning of that case, persuasive of plaintiff's position that *Michigan Educational* "definitively establish[es]" that unrelated third parties (such as plaintiff) have standing to seek declaratory relief as to coverage under an insurance policy that was issued (unlike in *Michigan Educational*) to an unrelated insured.⁸

In my view, the case law in Michigan thus does not currently afford an injured party a "vested" right to bring a direct claim for declaratory relief, and it is not for this Court, in the circumstances presented, to extend the law in Michigan to create such a "vested" interest.⁹ Consequently, I would find that plaintiff lacked standing to bring this action.¹⁰

C. Illinois Law Also Would Not Afford Standing to Plaintiff Under These Circumstances.

While Michigan law governs the standing analysis, my conclusion is buttressed by my review of the law in Illinois (and other jurisdictions).¹¹ As plaintiff notes, Illinois law actually goes farther than Michigan law in providing that an injured party may bring a declaratory action against an alleged tortfeasor's insurer in certain situations. See *Reagor v Travelers Ins Co*, 92 Ill App 3d 99, 102-103; 415 NE2d 512 (1980).¹² Unlike in Michigan, the court in *Reagor* found

⁸ In addition, *Michigan Educational* rested on its application of a concept (of "independent and separable claims") that it found addressed in certain Maryland cases, a concept that I do not find to have been otherwise adopted or applied in Michigan. Further, the Maryland case on which *Michigan Educational* relied, *Howard v Montgomery Mut Ins Co*, 145 Md App 549; 805 A2d 1167 (2002), addressed a situation where, unlike here, the defendant insurer had denied coverage and had refused to defend its insured. The other Maryland case cited by *Michigan Educational* as providing "examples" of claims that are "independent and separable" was brought by an insurer, not a third party. *Allstate Ins Co v Arwood*, 319 Md 247; 572 A2d 154 (1990). For these additional reasons, I do not find *Michigan Educational* persuasive here.

⁹ Nor am I prepared to accept defendant's characterization -- made in arguing that a Michigan court should not grant standing "to an Illinois plaintiff to seek a determination of coverage under Illinois law, where Illinois law itself denies standing to raise the issue (emphasis in original) -- that the "logic" of *Michigan Educational*, "along with [Hayes] and [Keizer-Morris] suggests that Michigan courts "would probably, and eventually, grant standing to an injured plaintiff asking a Michigan court to determine coverage under Michigan law." (Emphasis added and in original).

¹⁰ My analysis of the case law is unaffected by the majority's observation that plaintiff named 400 Freight as an additional named defendant in this action. That fact is inconsequential under the existing case law.

¹¹ I recognize that law from other jurisdictions is not binding, but it may constitute persuasive authority. *People v Jamieson*, 436 Mich 61, 86-87, 461 NW2d 884 (1990).

¹² Judge Gleicher's concurring opinion notes that our Supreme Court in *Hayes*, 442 Mich at 63 n 7, "explicit[ly] acknowledge[d]" that the Illinois court in *Reagor* had found, for "public policy" reasons, that "members of the public in general are beneficiaries of a liability insurance policy." . Of course, that acknowledgement was made in comparison with a similar acknowledgment of a

that injured parties are beneficiaries of liability insurance policies with rights under the policy, vested at the time of the accident. *Id.*, 92 Ill App 3d at 103. As such, “an injured person has rights under the policy which vest at the time of the occurrence giving rise to his injuries.” *Id.*

The court in *Reagor* did not, however, articulate *what* rights an injured person has (as of the time of the occurrence), or the conditions under which those rights could (or could not) be asserted. It merely rejected the insurer’s argument that the plaintiffs could not maintain their declaratory judgment action “because there is no legal relationship between the parties.” *Id.*

Such an articulation came in *Dial Corp v Marine Office of America*, 318 Ill App 3d 1056, 1063; 743 NE2d 621 (2001), which found that the test for allowing a declaratory judgment action by an injured party in Illinois is whether (a) an injured party has filed suit against an injured tortfeasor; (b) the insurer has denied a defense to the insured, and (c) neither the insured nor the insurer has filed a declaratory judgment action to determine the scope of the insurer’s policy. *Id.* Subsequently, in *Record-A-Hit, Inc v National Fire Ins Co of Hartford*, 377 Ill App 3d 642; 880 NE2d 205 (2007), the Illinois appellate court rejected the third element of this test, holding that “a tort-claimant need not allege that neither the insured-tortfeasor nor the insurance carrier has filed a declaratory judgment action in order to adequately plead a declaratory judgment action to determine the scope of coverage afforded to the tortfeasor under a policy of insurance.” *Id.* at 648. However, it did not disturb the other elements of the applicable test, as articulated in *Dial Corp*, including the requirement that the insurer have “denied a defense to the insured.” *Id.*, quoting *Dial Corp*, 318 Ill App 3d at 1063. Plaintiff thus over-reads *Record-A-Hit* in citing it for the broad proposition that injured parties “have the same rights to bring insurance coverage declaratory actions as insureds and their insurers.”¹³

contrary holding in a Georgia case, as was also noted in *Hayes*. See 442 Mich at 63 n 7, citing *Googe v Florida Int’l Co*, 262 Ga 546; 422 SE 2d 552 (1992). In any event, our Supreme Court’s “acknowledgment” of Illinois public policy as recognized in *Reagor* stands in stark contrast to its finding in *Hayes*, i.e., that members of the public in general are *not* third-party beneficiaries of insurance contracts under Michigan law.

¹³ Plaintiff also cites to other Illinois cases that are equally unpersuasive. See *American Service Ins Co v City of Chicago*, 404 Ill App 3d 769; 935 NE2d 715 (2010) (holding that insurer has standing to file declaratory judgment action against insured and injured party); *State Farm Fire & Cas Co v Perez*, 387 Ill App 3d 549; 899 NE2d 1231 (2008) (holding, in insurer-brought declaratory action contesting duty to defend, that policy exclusion barred coverage); *Skidmore v Throgmorton*, 323 Ill App 3d 417; 751 NE2d 637 (2001) (on which Judge Gleicher’s concurrence also heavily relies for its characterization of prior Illinois case law) (agreement between insured and insurer limiting amount of coverage does not divest injured person of right to seek post-judgment resolution of policy ambiguities as to coverage); *Society of Mount Carmel v National Ben Franklin Ins Co of Illinois*, 268 Ill App 3d 655; 643 NE2d 1280 (1994) (holding that injured person was necessary party to declaratory judgment action brought by insured against insurer refusing to defend); *Pratt v Protective Ins Co*, 250 Ill App 3d 612; 621 NE2d 187 (1993) (injured person had standing to bring declaratory judgment action, where insurer had withdrawn defense, insurer had dismissed its own declaratory judgment action, a default judgment had entered against the injured person in the underlying action, and the insured and

Thus, while I would hold that Michigan law of standing applies and therefore do not find Illinois law applicable or persuasive, the articulation of the Illinois test by the court in *Dial*, as modified in *Record-A-Hit*, demonstrates that, even under Illinois law, plaintiff would not have standing to bring this action, since defendant in this case has not denied a defense to its insured. See *Dial Corp*, 318 Ill App 3d at 1063 (limiting right to bring declaratory judgment action “to those cases where . . . the insurer of the tortfeasor has not provided a defense to its insured”). Further, Plaintiff’s suit would be premature. See *John Crane Inc v Admiral Ins Co*, 391 Ill App 3d 693, 702; 910 NE2d 1168 (2009) (preliminarily enjoining injured person’s additional declaratory judgment actions in foreign jurisdictions, and “find[ing] further persuasive” the insurers’ argument that the injured person’s “efforts to obtain a declaration on the duty to indemnify before findings of liability are entered in the foreign underlying cases is manifestly premature, both in Illinois as well as in the foreign jurisdictions”); *Weber v St Paul Fire & Marine Ins Co*, 251 Ill App 3d 371, 373-374; 622 NE2d 66 (1993) (characterizing *Reagor* as a “duty to defend case,” and finding injured person’s “declaratory judgment action brought to determine an insurer’s duty to indemnify its insured, brought prior to a determination of the insured’s liability, is premature since the question to be determined is not ripe before adjudication in the underlying action”).

Consequently, the law of Illinois also would not afford plaintiff standing under the circumstances presented, and would not sanction the premature filing of plaintiff’s claim for declaratory relief as to defendant’s duty to indemnify.¹⁴

D. Other State Law Also Counsels Against Affording Standing to Plaintiff.

Even if Illinois law broadly conferred standing to injured persons as plaintiff suggests (which I find it does not), the law of other states also counsels against affording standing to plaintiff under the circumstances presented. Minnesota law, for example, is more closely analogous (than is Illinois law) to that of Michigan. In *Anderson v St Paul Fire & Marine Ins Co*, 414 NW2d 575 (Minn App 1987), the plaintiff sought a declaration of the insurer’s liability to its insured, and did so after the insurer had denied coverage but prior to an establishment of the insured’s liability. *Id.* at 576. The Minnesota Court of Appeals affirmed the dismissal of the suit on the grounds that the plaintiff had failed to state a claim on relief which could be granted, because Minnesota law did not allow an injured party to seek a declaration of coverage from an insurer prior to a determination of the insured’s liability. *Id.* at 577. The Minnesota court declined the plaintiff’s invitation to adopt the rationale of *Reagor* (which, as noted, would not apply to this case in any event) for two reasons. First, the plaintiff had “at least one and possibly two avenues of protecting her interest in the insurance contract[:]” (1) to litigate the question of insurer had agreed that the policy did not cover the injured person); *Ins Co of North America v Cape Industries, Ltd*, 138 Ill App 3d 720; 486 NE2d 287 (1985) (insurer may not use judgment obtained in insurer-brought declaratory judgment action against insured to collaterally estop injured person in subsequent declaratory judgment action).

¹⁴ As noted, defendant continues to provide a defense to its insured in the underlying Illinois action. Accordingly, there also is no basis for plaintiff’s request for declaratory relief as to defendant’s duty to defend or, as the majority characterizes it, defendant’s duty to *continue* to defend.

insurer liability *after* the insured’s liability had been established, and (2) if the insured contested the insurer’s denial of coverage, the plaintiff could have joined in that suit prior to determination of liability on the merits. *Id.* Second, the Minnesota Supreme Court had “explicitly rejected the idea of third-party privity.” *Id.*; citing *Morris v American Family Mut Ins Co*, 386 NW2d 233, 237 (Minn 1986).

The Michigan Supreme Court similarly has concluded that injured parties are not third-party beneficiaries to a contract of insurance. *Hayes*, 442 Mich at 63 (“the Court of Appeals correctly concluded that [the injured party] was not a third-party beneficiary . . .”). This Court has held that injured parties in Michigan may be allowed to intervene in declaratory actions between an insured and its insurer over coverage. *Keizer-Morris*, 284 Mich App at 615. Plaintiff also may litigate the insurer’s liability if and when the insured’s liability is established. Plaintiff thus possesses appropriate means of protecting its interests, at an appropriate time, in appropriate circumstances that do not yet exist. That is particularly true where, as here (unlike even in *Anderson*, 414 NW2d at 576) the insurer has not denied coverage. *Id.* Here, the defendant insurer has provided a defense to its insured, the insured’s liability has not been established, and neither the insured nor the insurer has sought a declaration regarding coverage. Consequently, plaintiff is not entitled to seek declaratory relief at this juncture.

E. Standing is Properly Raised.

Although plaintiff argues that defendant has waived a challenge to standing, plaintiff relies in part on authority that conflates “standing” with “legal capacity to sue.” See *Lansing Schools Educ Ass’n*, 487 Mich at 555 (standing inquiry addresses whether a litigant has an interest in an issue such that he is a proper party to pursue it), and *Leite v Dow Chem Co*, 439 Mich 920; 478 NW2d 892 (1992) (discussing legal capacity-to-sue defense). Moreover, whether presented as part of a “standing” analysis, or of the closely related concept of “ripeness,” it is undeniable that defendant premised its motion for summary disposition on plaintiff’s claim being “premature.” I accordingly would find no waiver. Regardless, however, and as plaintiff acknowledges, the Court “may raise the issue of standing on its own accord.” See *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 177-78; 702 NW2d 588 (2005), rev’d on other grounds 476 Mich 131 (2006). This is because, where “there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment.” *Citizens for Common Sense*, 243 Mich App at 56; *Genesis*, 246 Mich App at 544. Because standing impacts subject matter jurisdiction, it is properly this Court’s first inquiry. And under the circumstances presented, that inquiry is dispositive of plaintiff’s claim.¹⁵

¹⁵ In advocating that insurance coverage issues be litigated before a determination of an insured’s liability in the underlying dispute, Judge Gleicher’s concurrence expresses concern that plaintiff might otherwise “squander” resources in litigating the class action to what potentially might be a “valueless judgment.” Of course, that is a risk that every plaintiff takes in any litigation, and a factor that every plaintiff takes into account in deciding whether to pursue litigation. It is not for the courts to eliminate all such risks by granting all plaintiffs the right to first bring insurance coverage actions, regardless of standing or ripeness. To do so not only puts the cart before the

VI. CONCLUSION

I would hold, as a matter of law, that under the circumstances presented, plaintiff lacks standing to bring suit for a declaration of defendant's obligation to provide insurance coverage to its insured. The requirements of MCR 2.605 are not met. Michigan law affords plaintiff no vested right, under these circumstances, to file a declaratory judgment action against defendant. Further, and particularly in light of the fact that defendant has not denied coverage or failed to provide a defense, an "actual controversy" does not exist, and plaintiff is not, at this juncture, an "interested party." Finally, plaintiff at this time would have no claim against defendant for relief other than declaratory relief, since the insured's liability has not been established and the insurer has not denied coverage.

Dismissal under MCR 2.116(C)(8) is appropriate when a plaintiff lacks standing. See, e.g., *Leite*, 439 Mich at 920 (where plaintiff is not a real party in interest, dismissal is appropriate under MCR 2.116(C)(8) or MCR 2.116(C)(10)); *Gyarmati v Bielfield*, 245 Mich App 602, 606; 629 NW2d 93 (2001) ("This language clearly demonstrates that there was no 'actual controversy' between plaintiffs and the township. . . . As such, plaintiff's complaint for declaratory judgment failed to state a claim on which relief could be granted and summary disposition was proper").

I would therefore vacate the trial court's holding on the merits, but affirm the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8), on the ground that plaintiff lacked standing to bring suit for declaratory relief against defendant. See *Simpson v Borbolla Const & Concrete Supply, Inc*, 480 Mich 964 (2007) (vacating opinion and affirming result); *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578, 591 (2011), citing *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989) ("an appellate court may uphold a lower tribunal's decision that reached the correct result, even if for an incorrect reason."). Because I would determine that plaintiff lacked standing, I would not reach plaintiff's other arguments, and would express no opinion as to the applicability or effect of the policy exclusion at issue.

/s/ Mark T. Boonstra

horse, but undoubtedly would cause the squandering of substantial resources in litigating insurance coverage issues that might never need to be litigated.