

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ST. PAUL FIRE & MARINE INSURANCE  
COMPANY and HANDICAPPERS  
INFORMATION COUNSEL/PATIENT  
EQUIPMENT LOCKER, INC.,

UNPUBLISHED  
January 21, 2003

Plaintiffs-Appellees/Cross-  
Appellants,

v

MICHIGAN MUTUAL INSURANCE  
COMPANY,

No. 231269  
Gratiot Circuit Court  
LC No. 98-005122-NZ

Defendant-Appellant/Cross-  
Appellee.

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Before: O’Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant appeals as of right the trial court’s May 3, 1999, grant of summary disposition to plaintiff St. Paul Fire & Marine Insurance Company (St. Paul) and plaintiff Handicappers Information Counsel/Patient Equipment Locker, Inc. (HIC/PEL) under MCR 2.116(C)(10). Plaintiffs cross appeal as of right the trial court’s October 2, 2000, order applying former MCL 600.6013(6) instead of former MCL 600.6013(5) in determining the interest defendant owed plaintiffs on the judgment. We affirm.

This subrogation case arises out of a fatal car accident caused by a HIC/PEL driver operating a city bus. The accident led to a wrongful death settlement between the city and the estate, in which defendant, HIC/PEL’s car insurance carrier, refused to cooperate. When the city sued HIC/PEL for contribution, defendant denied coverage. St. Paul, HIC/PEL’s general insurer, settled the city’s suit and then brought this action for reimbursement as HIC/PEL’s subrogee.

The trial court granted St. Paul’s summary disposition motion because it found that defendant breached its duty to defend and indemnify HIC/PEL. It also ruled that the parties should compute prejudgment interest according to former MCL 600.6013(6) instead of former MCL 600.6013(5). On November 13, 2000, the trial court ordered defendant to pay St. Paul \$169,625.06 for defending and settling the city’s suit against HIC/PEL, and then awarded St. Paul \$28,610.23 in interest under the former MCL 600.6013(6).

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). What interest rate applies is a question requiring statutory interpretation that we also review de novo. *In re MCI Telecommunications Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999).

## I

Defendant first argues that the trial court erred when it determined that the insurance policy covered the city's bus. We disagree.

It is well settled that "if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." *Royce v Citizens Ins Co*, 219 Mich App 537, 543; 557 NW2d 144 (1996), citing with approval *American Bumper & Mfg Co v Hartford Fire Ins Co*, 207 Mich App 60, 67; 523 NW2d 841 (1994), aff'd 452 Mich 440; 550 NW2d 475 (1996). Further,

[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *Dochod v Central Mutual Ins Co*, 81 Mich App 63; 264 NW2d 122 (1978). [*Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980).]

In this case, the policy expressly covered "automobiles not owned by [HIC/PEL] but used in connection with [HIC/PEL's] business." HIC/PEL offered equipment and services, including busing, to elderly and handicapped individuals. In the spring of 1992, HIC/PEL arranged to provide drivers to the city of Alma during the Alma Highland Festival. According to the arrangement, the drivers would operate the city's buses, but HIC/PEL would pay the drivers and later receive reimbursement from the city.

On May 23, 1992, a driver that HIC/PEL provided drove a city-owned bus through a stop sign, killing a motorist, Richard Chartier, and injuring his wife and young child. The record does not contain any evidence to refute St. Paul's assertion that the HIC/PEL employee who caused the accident drove the bus "in connection with" HIC/PEL's business. Therefore, the trial court did not err when it granted plaintiff's motion for summary disposition.

Defendant also argues that St. Paul and HIC/PEL violated a policy provision that required them to obtain defendant's consent before settling the city's suit. When an insurer breaches its duty to defend, however, it also releases its insured from any obligation to obtain the insurer's consent before settling. *Elliott v Casualty Ass'n of America*, 254 Mich 282, 287; 236 NW 782 (1931). Because defendant wrongfully refused to defend HIC/PEL against the city's claims, the policy provision does not apply. *Id.*

## II

Plaintiff argues that the trial court erred when it calculated prejudgment interest according to former MCL 600.6013(6) instead of applying the twelve percent rate found in the former MCL 600.6013(5). However, as of March 22, 2002, MCL 600.6013(6) states:

For a complaint filed on or after January 1, 1987 but before July 1, 2001, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2001, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).

Plaintiff filed its suit on April 22, 1998. It has yet to receive a “nonappealable” judgment. Also, the insurance policy does not contain any specified interest rate. Therefore, this subsection applies and plaintiff is limited to the interest rate in subsection (8). MCL 600.6013(6). The interest rate in the new subsection (8) mirrors the former subsection (6), which the trial court applied to the judgment. Therefore, the trial court applied the correct interest rate.

Affirmed.

/s/ Peter D. O’Connell  
/s/ Richard Allen Griffin  
/s/ Jane E. Markey