STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,	UNPUBLISHED February 14, 2013
v	No. 296791 Oakland Circuit Court
MOSHER DOLAN CATALDO & KELLY, INC., Defendant/Counter-Plaintiff-Appellee/Cross-Appellant,	LC No. 2004-056508-CK
and LISA FEINBLOOM and DAVID FEINBLOOM, Defendants.	

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this insurance coverage dispute, plaintiff Hastings Mutual Insurance Company ("Hastings") appeals as of right from a judgment awarding defendant Mosher Dolan Cataldo & Kelly, Inc. ("MDCK"), $746,048.72, plus pre-judgment and post-judgment interest, on MDCK's counterclaim for breach of contract. MDCK cross appeals, challenging the trial court's pretrial orders in limine restricting MDCK's damages and posttrial orders regarding judgment interest. We affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

MDCK is a general contractor whose business includes custom residential construction. Hastings is MDCK's liability insurer. Hastings issued commercial general liability (CGL) policies to MDCK covering the periods March 30, 2001, to March 30, 2004. In 2001, defendants David Feinbloom and Lisa Feinbloom hired MDCK as the general contractor to construct a custom-built residence in Franklin, Michigan. The Feinblooms' children suffered from respiratory illnesses, so the family wanted an environmentally safe residence with minimal

exposure to mold, bacteria, and toxins. The Feinblooms hired consultants to work with MDCK to ensure that the construction complied with sound environmental standards.

The Feinblooms moved into their new home in February 2003. In December 2003, the Feinblooms initiated arbitration proceedings against MDCK. The Feinblooms alleged that their home was dangerously contaminated with mold, bacteria, and toxins, and that MDCK negligently allowed structural timber to become wet and moldy during construction, and negligently installed a grinder pump that backed up and spread contaminants throughout the house. The Feinblooms sought damages for the cost of demolishing and reconstructing the house, or rescission of their contract with MDCK. MDCK filed a counterclaim against the Feinblooms for the remaining balance of the construction contract, $175,589.97.

MDCK requested that Hastings defend and indemnify it in the arbitration proceeding pursuant to its CGL policy. Hastings questioned whether the Feinblooms' defective construction claims constituted an "occurrence" for which coverage was available under the policies, or whether the Feinblooms' claims were subject to a mold exclusion in the policy. Therefore, it notified MDCK that it was providing a defense under a reservation of rights. Hastings selected an attorney to represent MDCK, but MDCK became dissatisfied with that attorney's representation, so it hired the Clark Hill law firm as substitute counsel to represent it in the Feinblooms' arbitration proceeding. The Clark Hill law firm charged an hourly rate of $300, twice the $150 limit provided by Hastings's liability policy. MDCK agreed to pay the $150 difference.

In November 2004, the arbitrator issued an interim award finding that MDCK committed "material breaches of the technical contractual requirements, contractual express warranties and code requirements," resulting in several defects in the completed residence. The arbitrator determined that remediation of the defects, rather than demolition and reconstruction, was the appropriate remedy. The Feinblooms also sought "recovery of the costs of all of the furniture and furnishings and other contents of the residence that were contaminated by mold spores and toxins," as well as recovery of other direct and consequential damages such as the costs they incurred for temporary relocation, but the arbitrator found that MDCK was not responsible for damage to the Feinblooms' furniture and other household contents. After the interim award was issued, Hastings advised MDCK that Hastings would cease covering MDCK's defense costs, inasmuch as the policy did not provide coverage for the defense of the Feinblooms' ongoing claims because those claims did not arise from an "occurrence" as defined by the CGL policies.

Hastings then filed this action for declaratory relief. Hastings alleged that the CGL policy in effect from March 20, 2003, to March 20, 2004, was the policy in effect relative to the Feinblooms' claims for mold damage. Hastings asserted that the Feinblooms' claims came within the policy's exclusions for pollution damage and fungi damage, and therefore, MDCK was not entitled to coverage for the cost of defending those claims. Hastings also contended that MDCK's claims were barred by business risk exclusions in the CGL policies. Both parties filed cross-motions for summary disposition. The trial court denied Hastings's motion and granted summary disposition in favor of MDCK. In a prior appeal, this Court initially reversed the trial court's decision and remanded for entry of summary disposition in Hastings's favor. *Hastings Mut Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2006 (Docket No. 265621). This Court addressed the threshold

question whether the claimed damage was caused by an "occurrence" within the meaning of the policies, and determined that the construction deficiencies identified by the arbitrator and the visible mold on the sub-flooring material and joists were not accidents within the meaning of the policy. *Id.*, slip op at 2-3. This Court did not address whether any of the policy exclusions or the fungi exclusion endorsement in the 2003-2004 policy applied to MDCK's coverage.

However, this Court subsequently granted MDCK's motion for reconsideration and vacated its original opinion. On reconsideration, this Court remarked that it "must first decide which commercial general liability ("CGL") policies, if any, apply to MDCK's claim in this case," but noted that all three policies included the same relevant language providing that the insurance applied only to bodily injury and property damage if the injury or damage was caused by an occurrence during the policy period. *Hastings Mutual Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 265621), lv den 480 Mich 928 (2007) ("*Hastings I*"), slip op at 2. All three policies defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* The policies did not define "accident," so this Court considered the commonly accepted meaning of that term. *Id.* This Court reiterated its prior conclusion that the visible mold on the sub-flooring material and joists above the basement ceiling, and the other deficiencies enumerated by the arbitrator, were not accidents within the meaning of the policies. *Id.*, slip op at 3-7. After concluding that the trial court erred in granting summary disposition in MDCK's favor with respect to Hastings's duty to indemnify, the Court considered Hastings's duty to defend pursuant to the policy. This Court commented that it is "well settled in Michigan that an insurer's duty to defend is broader than its duty to indemnify." *Id.*, slip op at 7, quoting *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 138; 610 NW2d 272 (2000). This Court then held:

> Where there is doubt concerning whether the complaint "alleges liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Radenbaugh, supra* at 138 (citation omitted). The insurer owes the duty to defend until such time as the insurer has confined the claims against the insured to those theories that the policy would not cover. *American Bumper and Mfg Co v Hartford Fire Ins Co*, 207 Mich App 60, 67; 523 NW2d 841 (1994). "Until that point, the allegations must be regarded as coming arguably within the liability policy, thus resulting in a duty to defend." *Id.*
>
> Because the Feinblooms' complaint in arbitration alleged damages to property other than Mosher's work-product, i.e., household furniture, this damage was arguably covered by the policy; therefore, plaintiff had a duty to defend Mosher. The arbitrator's later determination that Mosher is not liable for those damages does not affect plaintiff's initial duty to defend against the Feinblooms' claims. . . . However, once the Feinblooms' claims are limited to only damages that fall outside the scope of the policy, i.e., Mosher's own work-product, plaintiff's duty to defend ends. *American Bumper, supra.* On remand, it is therefore necessary to determine at what point in time, if any, plaintiff can confine the Feinblooms' claims against Mosher to those theories that the policy would not cover, and to determine the extent of plaintiff's liability for the cost of Mosher's defense until that point. [*Hastings I*, slip op at 8 (citation omitted).]

On remand, both parties again filed cross-motions for summary disposition. The trial court denied Hastings's motion and granted MDCK's motion. The court noted that this Court had held that the CGL policies covered only defective workmanship that caused damage to the property of others, but not damage to MDCK's own work product. In other words, Hastings was liable to indemnify MDCK for liability arising from MDCK's damage to the property of others, but not to indemnify MDCK for liability arising from damage to MDCK's own work product. Although the arbitrator found that MDCK was not responsible for damages to the Feinblooms' property, this Court had held that the duty to defend is broader than the duty to indemnify, and that an insurer has a duty to defend an insured as long as the allegations against the insured involve events within the scope of the policy coverage. Accordingly, the arbitrator's ruling did not affect Hastings's duty to defend the claims.

The trial court turned to the question of when the Feinblooms' claims became limited to damages associated with MDCK's own work product, at which point defense coverage would cease. Hastings contended that this occurred in November 2004, when the arbitrator issued the "Stage One," or interim ruling. The trial court agreed with MDCK that Hastings's duty to defend included the appellate proceedings, unless the policy provided otherwise. The trial court concluded:

> It is undisputed that the policy in this case contains no exclusion for appeals, and that the homeowners appealed the arbitrator's rulings, including the stage one ruling. If so, Plaintiff's duty to defend included all of the appeals taken by the homeowners and, therefore, Defendants are entitled to compensation for these expenses.
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> This is not the end of the analysis, however, as the arbitration included proceedings after the stage 1 ruling and before any appeals were taken. Thus, the Court must determine whether the policy provides coverage for these expenses. The Court finds that it does. Even if the stage 1 ruling absolved Plaintiff of coverage for the underlying liability, it was not a final ruling, or even a final arbitration award. In fact, the ruling carried little legal weight unless and until it was converted to a judgment in the trial court. Thus, at the very least Plaintiff's duty to defend included the duty to ensure that the stage 1 ruling was reduced to judgment. Nor can the Court see any basis for distinguishing these expenses from the other proceedings that followed the stage 1 ruling. Therefore, the Court finds that Plaintiff's duty to defend included the duty to pay for Defendant's representation at all stages of the arbitration process.
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> In light of the foregoing, the Court finds that all of Defendants' expenses in this case are covered under the duty to defend imposed by the policy, and that Defendant is entitled to a judgment for that amount. To this extent, Defendant's Motion if granted, and Plaintiff's motion is denied.

The case proceeded to trial to determine the amount of MDCK's defense expenses.

In the meantime, the Feinblooms were in the process of pursuing their claims in arbitration against MDCK. Ultimately, the arbitrator issued an award requiring the Feinblooms

to pay MDCK $66,988.59, representing the remaining balance owed by the Feinblooms to MDCK, offset by the cost of remediation for the defects. MDCK brought an action in circuit court to confirm the arbitration award and the Feinblooms moved to vacate the arbitration award. The trial court affirmed the majority of the award, but vacated the arbitrator's denial of consequential damages to the Feinblooms. On appeal, this Court reversed the portion of the trial court's decision that had reversed the arbitrator's denial of consequential damages, and remanded for entry of an order affirming the entire arbitration award. *Mosher, Dolan, Cataldo & Kelly, Inc v Feinbloom*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2007 (Docket No. 270579).

After this Court remanded the present case, MDCK filed a counterclaim against Hastings for breach of contract, claiming several categories of damages allegedly caused by Hastings's breach of its duty to defend. In a pretrial motion in limine, Hastings moved to exclude categories of evidence, including: (1) time spent by MDCK employees in the arbitration defense; (2) MDCK's lost profits resulting from the Feinbloom matter; (3) legal fees incurred from Clark Hill's representation while Hastings was defending the action; and (4) legal fees in excess of $150 an hour. MDCK argued in response that Hastings was liable for all consequential damages arising from its breach of the insurance policy. MDCK also argued for the first time that it was entitled to penalty interest under MCL 500.2006 because Hastings had failed to pay any defense costs since it withdrew its defense in 2005. The trial court granted Hastings's motion with respect to attorney fees incurred in excess of $150 an hour and with respect to MDCK's claim for lost profits. The trial court subsequently granted MDCK's motion for reconsideration and permitted MDCK to present its claim that it was entitled to the full amount of attorney fees it had incurred.

The case proceeded to trial and a jury awarded MDCK damages of $244,316.05 for legal fees, $50,431.44 for arbitration costs, $387,517.50 for expert consultation and investigation fees, and $63,739.73 for administrative costs. MDCK requested 12 percent penalty interest pursuant to MCL 500.2006, but the trial court concluded that the statute did not apply because MDCK failed to plead a claim for penalty interest and because MDCK was not a first-party claimant for insurance benefits. The trial court's final judgment awarded MDCK the following damages: (1) $244,360.05 for legal fees; $60,431.44 for arbitration costs; (3) $387,517.50 for expert, consultation and investigation fees; and (4) $63,739.73 for administrative costs. The court also awarded prejudgment and post-judgment interest under MCL 600.6013 "commencing on the date of the filing of the Counter Complaint on August 13, 2008." Hastings's motion for judgment notwithstanding the verdict (JNOV) or a new trial was denied.

II. HASTINGS'S DUTY TO DEFEND

Hastings argues that the trial court erred in denying its motions for summary disposition, a directed verdict, and JNOV with respect to its duty to defend.

We review a trial court's decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Hastings sought summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In evaluating the motion, this Court considers the affidavits, pleadings, depositions, admissions, and

any other documentary evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Id.* at 567-568. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Latham*, 480 Mich at 111.

A trial court's decision on a motion for a directed verdict is also reviewed de novo. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). "When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Id.* (citation and internal quotations omitted.) "A directed verdict is appropriate where reasonable minds could not differ on a factual question." *Id.* This Court also reviews de novo a trial court's decision on a motion for JNOV, viewing the evidence and reasonable inferences arising therefrom in a light most favorable to the nonmoving party to determine if the evidence supports the verdict. *Alfieri v Bertorelli*, 295 Mich App 189, 193; 813 NW2d 772 (2012).

Hastings relies on this Court's prior decision in *Hastings I* and the law of the case doctrine to contend that the trial court was required to revisit the question whether Hastings had a duty to defend any of the Feinblooms' claims. Hastings maintains that a duty to defend never arose because the Feinblooms' defective construction claim did not involve an occurrence under the policies, and the Feinblooms' claims for damage to the contents of the house were excluded by the policies. Hastings relies on the following portion of this Court's prior decision in *Hastings I*:

> Because the Feinblooms' complaint in arbitration alleged damages to property other than Mosher's work-product, i.e., household furniture, this damage was arguably covered by the policy; therefore, plaintiff had a duty to defend Mosher. The arbitrator's later determination that Mosher is not liable for those damages does not affect plaintiff's initial duty to defend against the Feinblooms' claims. *Smorch, supra.* However, once the Feinblooms' claims are limited to only damages that fall outside the scope of the policy, i.e., Mosher's own work-product, plaintiff's duty to defend ends. *American Bumper, supra.* On remand, it is therefore necessary to determine at what point in time, if any, plaintiff can confine the Feinblooms' claims against Mosher to those theories that the policy would not cover, and to determine the extent of plaintiff's liability for the cost of Mosher's defense until that point. [*Id.*, slip op at 8.]

Hastings argues that the last sentence is a two-part directive under which the trial court was first required to address whether Hastings ever had any duty to provide coverage for MDCK's defense of the Feinblooms' claims. All three policies for the 2001-2004 periods provide:

> SECTION I – COVERAGE
>
> COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. *However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply*. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.
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> * * *
>
> No other obligation or liability to pay sums to perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

Hastings contends that the sentence, "We will have no duty to defend the insured against any 'suit' seeking damages . . . to which this insurance does not apply," relieves it of the duty to defend any claims for which it did not also have an obligation to indemnify. Hastings divides the Feinblooms' claims into two categories: (1) claims for defective construction, which does not involve an occurrence under the policy; and (2) claims for damage to contents. Hastings emphasizes that it never had a duty to defend claims for defective construction, which is consistent with this Court's holding in *Hastings I* that such claims do not arise from occurrences within the scope of the policy. MDCK does not dispute that point. Hastings further argues, however, that it also never had any duty to defend the Feinblooms' claims for damage to the contents of the house. Essentially, Hastings interprets the policy language, "we will have no duty to defend the insured against any 'suit' seeking damages . . . to which this insurance does not apply," as meaning that its duty to defend is coterminous with its duty to indemnify, and it requests this Court to analyze fully the question whether it had a duty to indemnify MDCK for the Feinblooms' claims for personal property damage by further addressing whether the claims are precluded by the exclusions and endorsements of the policy.

MDCK argues in response that the expanded analysis urged by Hastings violates the law of the case doctrine because this Court previously concluded that Hastings had a duty to cover MDCK's defense costs for the Feinblooms' personal property claims. The law of the case doctrine "holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The doctrine requires a lower court to follow an appellate court ruling on a particular issue where the facts remain materially the same. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009). "Law of the case applies . . . to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law of the case applies regardless of the correctness of the prior decision. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

This Court held in *Hastings I* that a liability insurance carrier's "duty to defend is broader than its duty to indemnify," and that the duty is imposed even in regard to "groundless, false or fraudulent" claims, "so long as the allegations against the insured even arguably come within the policy coverage." *Id.*, slip op at 7, quoting *Smorch v Auto Club Ins Co*, 179 Mich App 125, 128; 445 NW2d 192 (1989). Applying those principles, this Court held that "[b]ecause the

Feinblooms' complaint in arbitration alleged damages to property other than [MDCK's] work-product, i.e., household furniture, this damage was arguably covered by the policy; *therefore, plaintiff had a duty to defend Mosher*." *Id.*, slip op at 8 (emphasis added). Thus, this Court expressly determined that the duty to defend extended to the claims for damage to the Feinblooms' property, i.e., household furniture. This Court remanded the case to the trial court "to determine the extent of plaintiff's liability for the cost of MDCK's defense until that point." *Id.*

There is no indication in this Court's prior decision that the trial court was required, on remand, to consider whether another basis might be available for avoiding a duty to defend the personal property claims. If the Feinblooms' personal property claims were subject to a policy exclusion, this Court could have affirmed the trial court's order of summary disposition for Hastings on that ground, see *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 74; 817 NW2d 609 (2012) (holding that this Court "will affirm the trial court when it reaches the right result even if it does so for the wrong reason"), thereby avoiding the necessity of any additional proceedings on remand. The interpretation and application of an insurance policy is a question of law, which this Court reviews de novo. *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 252, 253; 819 NW2d 68 (2012). In its prior decision, this Court commented that it was "unnecessary to apply any of the exclusions to any of the CGL policies" once it determined that the damage to MDCK's work product was not an occurrence within the meaning of the policies. *Hastings I*, slip op at 7. Accordingly, this Court was aware of the policy exclusions as a potential alternate basis for avoiding coverage to the insured. By remanding to the trial court to determine the point in time at which the Feinblooms' claims became confined to non-occurrences under the policy, this Court implicitly held that the duty to defend extended to the occurrence-based claims because they did not come within the policy exclusions. The trial court properly denied Hastings's motions for summary disposition, directed verdict, and JNOV on this basis. Therefore, we similarly decline to consider the legal effect of the policy exclusions asserted by Hastings. We are bound by the law of the case to accept this Court's prior implicit determination that they do not apply.

III. DAMAGES FOR DEFENSE PREPARATION TIME OF MDCK EMPLOYEES AND PRINCIPALS

Hastings argues that the trial court erred in allowing MDCK to recover damages of more than $300 an hour for each principal and lesser amounts for other employees for the time they spent preparing for the arbitration defense.

A. EMPLOYEE TIME

The jury awarded MDCK its full requested amount of $63,621.73 for the time that its employees devoted to assisting in the defense of the arbitration proceeding. Hastings argues that because MDCK and its employees were required to assist in its own defense under the terms of the policy and the policy does not provide coverage for the cost of the employees' assistance, this portion of MDCK's damage award was not permissible as a matter of law. Hastings contends that including the employees' defense time as a covered loss effectively converts the liability policy into a business interruption policy, which is not what the contracting parties bargained for. MDCK responds that the loss of its employees' hours for defense preparation is

compensable as an ordinary defense cost, and also as consequential damages for Hastings's breach of the policy. MDCK also argues that Hastings is not entitled to rely on a $250 per day limitation under the policy's supplemental payments section to limit its liability because that provision should not be enforced, inasmuch as Hastings breached the policy.

The policy provides, in ¶ d of the Supplementary Payments section, that Hastings "will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend"

> [a]ll reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to $250 a day because of time off from work.

At least some of the employees hours spent in defense preparation were utilized at Hastings's request to assist in the investigation or defense of the arbitration proceeding. John Kelly testified that the staff performed photocopying and other tasks to assist defense counsel. Some of the hours were spent after Hastings withdrew its defense, but Hastings does not attempt to argue that it is relieved of its obligation to make supplemental payments for the employees' acts of assistance that Hastings did not request because it withdrew from MDCK's defense. The phrase "actual loss of earnings," at first reading, suggests that coverage is not available where the employees were paid their usual wage. However, MDCK lost the value of the employees' earnings by paying them to help with the defense rather than to do their regular jobs. Hastings contends that payments for the employees' defense assistance creates a windfall for MDCK where the employees were merely doing what they were supposed to do. Nonetheless, Hastings's policy clearly and unambiguously provides that it will pay for "expenses incurred by the insured . . . to assist in the investigation or defense." Thus, MDCK was entitled to damages for the lost employee time.

We agree, however, that these expenses are subject to the $250 daily limit under the policy. MDCK relies on *Capitol Reproduction, Inc v Hartford Ins Co*, 800 F2d 617 (CA 6, 1986), to argue that Hastings cannot enforce the policy limits. In *Capitol Reproduction*, 800 F2d 617, the plaintiff insured, Capitol Reproduction, Inc., was a third-party defendant in Linard Building Company's action against Giffels-Webster Engineers, Inc. Capitol Reproduction held a comprehensive general liability policy and an umbrella policy, both issued by Hartford. *Id.* at 619. The umbrella policy required Hartford to defend Capitol Reproduction against lawsuits that were not covered by the general policy, subject to a retained limit of $25,000. *Id.* at 619. When Capitol Reproduction filed a breach of contract action against Hartford, it alleged that Hartford wrongfully denied a defense under the umbrella policy. The trial court entered summary judgment for Capitol Reproduction, holding that Hartford breached its duty under the umbrella policy, and was therefore not entitled to the $25,000 retained liability. *Id.* at 620. The Sixth Circuit Court of Appeals held:

> Under Michigan law, when an insurer fails to fulfill its duty to defend an insured, it becomes liable for the full extent of the judgment against the insured. "If the insurer had an obligation to defend and failed to fulfill that obligation, then, like any other party who fails to perform its contractual obligation, it becomes liable for all foreseeable damages flowing from the breach. . . . An

> insurer's duty to defend is independent of its duty to pay, and damages for breach of that duty are not limited to the face amount of the policy." *Stockdale v Jamison,* 416 Mich 217; 330 NW2d 389, 392 (1982). One basis for this rule seems to lie in the law's reluctance to allow the insurer to benefit from the uncertainty created when it renounces its duty. Thus, an insured is not "required to prove that the amount of the judgment in excess of the policy limits was caused by the failure of the insurer to provide a reasonable defense, since if the insurer *had* provided a reasonable defense as required by its contract, there would be no need for anyone to attempt to offer proofs on that illusive subject." *Maynard v Sauseda,* 121 Mich App 644, 329 NW2d 774, 779 (1982). This general rule applies as well to settlements. *Detroit Edison v Michigan Mut Ins Co.,* 102 Mich App 136, 144; 301 NW2d 832 (1980). The district court, then, correctly ruled that Capitol's right to indemnification is not limited by the $25,000 retained limit of liability specified in the policy. [*Capitol Reproduction,* 800 F2d at 624.]

Capitol Reproduction comes closer to supporting MDCK's position than the other authorities it cites, but it does not support MDCK's position with respect to the $250 daily limitation. The basis for the court's holding was that an insured, denied a defense by its insurer, should not bear the uncertain and illusory burden of proving that a judgment in excess of policy limits would not have arisen but for the insurer's failure to provide a reasonable defense. In this case, the $250 per day limit for defense assistance is not an uncertain occurrence. It is a fixed rate that the parties agreed upon in the insurance contract. Nor is the employee time a consequential damage of Hastings's breach. MDCK does not explain how the number of hours its employees spent assisting in the defense preparation, or the value of those hours to the company, was impacted by Hastings's denial of a defense.

Moreover, the Sixth Circuit recently noted that *Capitol Reproduction* is no longer an accurate statement of Michigan law. In *Stryker Corp v XL Ins America*, 681 F3d 806, 804-815 (CA 6, 2012), the court stated:

> While the *Capitol Reproduction* court may have correctly applied Michigan law at the time of the decision, subsequent Michigan decisions have undermined the rationale and holding of the case. *Capitol Reproduction* holds that, in an insurance context only, all losses are assumed to be consequential losses, without the breached party's having to demonstrate the connection between the loss and the breach. This is an extra-contractual rule of the kind the Michigan Supreme Court rejected in *Frankenmuth* [*Mut Ins Co v Keeley*, 433 Mich 525; 447 NW2d 691 (1989)].

We therefore conclude that the value of the time that MDCK's employees spent assisting the defense is a compensable loss, but that any award of damages is subject to the policy's $250 daily limit for those losses. Accordingly, we remand for adjustment of the judgment in accordance with this limitation.

B. PRINCIPALS' TIME AS EXPERT WITNESSES

Hastings argues that the trial court erred in allowing MDCK to recover compensation for its own principals' contributions to the arbitration defense as if they were expert witnesses. Hastings argues that they were not expert witnesses because the arbitrator did not approve them to testify as experts, they were never listed as experts in any witness lists, and they did not file expert reports. Hastings maintains that the MDCK principals were only fact witnesses, testifying about their personal knowledge as the builders of the Feinblooms' house. MDCK responds that it is immaterial whether its principals' testimony was admitted as expert testimony because their time was recoverable under the policy for assistance with the defense. MDCK contends that the term "expert witness" was just a convenient term used to indicate that the principals performed functions comparable to those of expert witnesses.

MDCK's argument on appeal that the expert witness classification is irrelevant is inconsistent with its position at trial, where MDCK maintained that the partners were de facto expert witnesses and should therefore be regarded as experts for purposes of determining benefits due under the policy. The policy does not make any specific provision with regard to compensating expert witnesses. As discussed previously, the policy limits Hastings's liability for the cost of its insured's defense assistance to $250 a day for lost earnings. The $620,762 that MDCK sought as compensation for its principals' time "assisting in Investigation and/or Serving as Defense Experts" is clearly beyond that limit. MDCK suggests that its principals reduced the defense costs by acting as their own witnesses instead of hiring outside experts with qualifications comparable to the Feinblooms' experts. We find no support in the policy or in the case law to support MDCK's argument that Hastings is liable to compensate MDCK's partners on the same terms as independently retained experts. Indeed, by maintaining on appeal that the expert designation is immaterial because MDCK is entitled to compensation under the supplemental payment provisions, MDCK tacitly concedes that its partners are not entitled to compensation as expert witnesses under the primary coverage of the policy.

As discussed previously, the $250 daily limit for lost earnings is enforceable, notwithstanding Hastings's status as the breaching party. There is no basis in the record or in MDCK's argument for compensating the principals differently for their assistance in the arbitration than the employees subject to the $250 daily limit. Thus, the trial court erred in allowing the jury to award damages to MDCK on the theory that its partners testified as expert witnesses and were entitled to compensation as such.

Accordingly, we vacate the portion of the trial court's judgment awarding damages to MDCK for its principals' and employees' time spent preparing and assisting in the defense in excess of the policy's $250 daily limit and remand for a redetermination of damages in accordance with this limitation.

IV. ADMISSIBILITY OF DAMAGES SUMMARY

Hastings argues that the trial court erred in admitting a summary of the principals' time spent assisting in the defense of the arbitration proceeding. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

Hastings argues that the summary constituted inadmissible hearsay. Hearsay evidence is inadmissible except as provided by the rules of evidence. MRE 802. The trial court determined that the summary was admissible under the hearsay exception for business records. MRE 803(6) provides that the following records of regularly conducted activity are not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

"[A] purported business record may be admitted if it meets the foundational requirements of the rule." *Lopez v Gen Motors Corp*, 224 Mich App 618, 627; 569 NW2d 861 (1997).

Kelly's testimony established an adequate foundation for the admission of the summary as a business record. Kelly stated that although the partners did not keep time cards, they kept calendars, memoranda, and other documentation of the time they spent on various projects, including the Feinbloom arbitration. Kelly stated that he compiled the summary from these records and documents. This testimony was sufficient to establish that MDCK observed the regular practice of counting partners' hours spent on specific projects. The trial court did not abuse its discretion in admitting the summary.

V. JURY INSTRUCTIONS

Hastings argues that the trial court erred by not instructing the jury in accordance with Mich Civ JI 142.31 that an injured party's damages for breach of contract are limited to those naturally arising from the breach and that a party is not entitled to receive a greater amount of damages than the party would be entitled to if the contract had been fully performed. Although the trial court gave such an instruction, it was limited to the existence of an agreement for a $150 a day rate cap for attorney fees. However, the jury's award of only one-half of the expert witness fee compensation sought by MDCK indicates that the jury also applied this rule to that category of damages. Although the jury's full award of the administrative costs sought by MDCK reflects that the jury did not apply the $250 daily limit for those costs, as explained in section III, *supra*, we are remanding this case for a redetermination of those damages in accordance with the $250 daily limit under the terms of Hastings's policy. That relief will remedy any instructional error.

VI. MDCK'S CROSS-APPEAL

A. $150 RATE CAP FOR ATTORNEY FEES

On cross-appeal, MDCK first argues that the $150 hourly rate cap that Hastings imposed on its coverage of attorney fees for MDCK's chosen counsel is unenforceable as a matter of law, and that the existence of the parties' agreement regarding this rate cap should not have been presented to the jury as a question of fact. We review this question of law de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011).

MDCK reiterates its previous argument that Hastings, as the breaching party, is not entitled to rely on the $150 hourly rate cap because a breaching party may not enforce contract provisions advantageous to itself. As explained in section III, *supra*, that argument is without merit.

MDCK also argues that the rate cap is unenforceable because of a conflict of interest. MDCK relies on *Atlanta Int'l Ins Co v Bell*, 438 Mich 512; 475 NW2d 294 (1991). The issue in that case was whether an attorney retained by an insurance company to defend its insured could be liable to the insurer for professional malpractice. *Id.* at 515. The Court examined the unique relationship among the insurer, the insured, and the retained counsel in a liability insurance context, and concluded that public policy would best be served by allowing the insurer to recover for the retained counsel's malpractice through an equitable subrogation theory. The Court stated:

> To hold that an attorney-client relationship exists between insurer and defense counsel could indeed work mischief, yet to hold that a mere commercial relationship exists would work obfuscation and injustice. The gap is best bridged by resort to the doctrine of equitable subrogation to allow recovery by the insurer. Equitable subrogation best vindicates the attorney-client relationship and the interests of the insured, properly imposing the social costs of malpractice where they belong. Allowing the insurer to stand in the shoes of the insured under the doctrine of equitable subrogation best serves the public policy underlying the attorney-client relationship. [*Id.* at 521.]

The Court remarked that "the tripartite relationship between insured, insurer, and defense counsel contains rife possibility of conflict." *Id.* at 519. In a footnote, the Court observed:

> See Mallen & Levit, Legal Malpractice, § 263, p 356, recognizing that "[t]here is great temptation [for defense counsel] to favor [the insurance company] who pays the bills and will send further business, and where long-standing personal relations may exist. . . . " Keeton & Widiss, *supra* at 829–830: "An attorney employed by an insurer to represent an insured may be confronted with serious conflicts of interest issues almost from the very outset of the relationship." [*Id.* at 519 n 6.]

Although the Court discussed the possibility of retained counsel's conflict of interest in the context of the insurer-insured-attorney relationship, its statements relate to the analysis of the malpractice issue, and are only tangentially relevant to the enforceability of the rate-cap agreement in this case.

MDCK also cites *Northern Ins Co v Allied Mut Ins Co*, 955 F2d 1353, 1359 (CA 9, 1992). In that case, the defendant insurer retained counsel for the insured under a reservation of

rights. The insured initially objected to the insurer's choice of counsel, but eventually agreed to allow the insurer's choice of counsel to participate in the defense with the insured's choice of counsel. *Id.* at 1356. The issue presented was whether the defendant fulfilled its duty to provide a defense when it hired its own choice of a law firm. The court noted that the resolution of this issue entailed a conflict-of-laws question because the defendant fulfilled its duty under Washington law, but not under California law. The court remarked that "California protects insureds by requiring insurers to pay the reasonable costs of independent counsel when a conflict of interest exists between the insured and insurer. Conflicts arise when, as here, the insurer reserves its rights on an issue over which defense counsel exerts some degree of control." *Id.* at 1358-1359. The court resolved the conflict-of-law issue in favor of California law. *Id.* at 1360.

MDCK also cites *Aetna Cas & Surety Co v Dow Chem Co*, 44 F Supp 2d 847, 863 (ED Mich, 1997), in which the court held that the insured party, Dow Chemical, was not entitled to summary judgment with respect to its claim that its liability insurer deprived Dow of its contractual right to a defense by reserving its rights and contesting its duty to defend and indemnify Dow in environmental lawsuits. The court concluded:

> Dow's claim that it is entitled to these costs [legal fees] is factually dependent upon its claim that Primary Insurers created a conflict-of-interest situation giving it an absolute right to control its own defense in the underlying suits. Questions of fact exist on this issue as to each of the underlying claims, including: (1) when if at all, Primary Insurers were made aware of an underlying claim and Dow's need for a defense; (2) when and what defense to coverage were asserted by Primary Insurers; and (3) whether any Primary Insurers were aware of the fact that Dow was defending an underlying suit yet took no affirmative step to try and assert its right to control the defense of that underlying suit. [*Id.* at 861.]

Here, Hastings's reservation of rights letter did not create a conflict of interest that voided the $150 hourly rate cap. MDCK contends that by reserving its rights, Hastings revealed an intention not to indemnify MDCK if the arbitrator found that MDCK was liable to the Feinblooms. MDCK asserts that because Hastings had no intention of indemnifying MDCK, it had no incentive to provide MDCK with effective representation. We disagree. Hastings had no assurances that it would prevail in its denial of coverage. The question of Hastings's duty to defend and duty to indemnify involved a complex question of law, resulting in an unsuccessful summary disposition motion by Hastings, an appellate decision originally ordering summary disposition in Hastings's favor, and a subsequent appellate decision on reconsideration that relieved Hastings of its duty to defend some of the Feinblooms' claims. In view of the complexities of the case, leaving MDCK to inadequate counsel on the assumption that it would be free of any obligation to indemnify MDCK would have been highly risky. Moreover, MDCK's belief that it needed the best defense that money could buy in order to match the perceived overpowering tactics of the Feinblooms' counsel proved unfounded when the arbitrator denied the Feinblooms' claim for a complete tear-down and rebuild, and instead ordered that a finite list of repairs be completed. Under these circumstances, there was no conflict of interest invalidating Hastings's decision to compensate MDCK's selected legal counsel at a rate no higher than $150 an hour.

MDCK has also failed to establish its implied claim that the agreement was void because Hastings forced MDCK, under duress, to accept the $150 an hour limitation. In order to prevail on a claim of duress, the defendants to a breach of contract action must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes. "Fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully." *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 61-682; 591 NW2d 348 (1998). MDCK failed to establish that Hastings acted unlawfully. Hastings appointed a counsel at no charge to MDCK. When MDCK became dissatisfied with Hastings's selection of counsel, Hastings agreed that MDCK could choose its attorney, on the condition that it agree to pay any fees above $150 an hour. MDCK apparently decided that Clark Hill's representation was worth the additional out-of-pocket expense. MDCK's alleged fear that the arbitration would result in a crippling award for the Feinblooms is not sufficient to nullify the agreement on grounds of duress.

B. LOST PROFITS

MDCK argues that the trial court erred in granting Hastings's motion in limine with respect to MDCK's claim for damages for lost profits. The question whether MDCK's lost profits were recoverable as an element of damages is a question of law, which we review de novo. *Klooster*, 488 Mich at 295.

MDCK characterizes liability insurance as "litigation insurance" that compensates the insured for all losses arising from litigation. MDCK's reliance on a footnote in a concurring opinion in *Allstate Ins Co v Freeman*, 432 Mich 656, 703; 443 NW2d 734 (1989), is misplaced. The footnote cites one commentator, *Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured*, 31 ALR4th 957, 976, for the statement that a liability insurance policy "is 'litigation insurance' as well, protecting the insured from the expense of defending suits brought against him." *Id.* at 704 n 3 ((BOYLE, J., concurring). Nothing in any of the opinions in *Freeman* supports MDCK's position that lost profits are compensable for breach of a duty to defend a liability insurance contract.

MDCK argues that breach of the duty to defend can result in an award of consequential damages, including lost profits. However, MDCK has not established that Hastings's breach of its duty to defend caused MDCK's alleged lost profits. MDCK emphasizes that the time its principals spent preparing a defense and testifying at the arbitration proceeding took them away from profitable construction projects. But MDCK's principals and employees would have had to assist in the defense of the arbitration irrespective of whether Hastings was paying for the defense. MDCK's principals and employees were the individuals with personal knowledge of the construction project and with access to MDCK's records. Whoever represented MDCK would have had to rely on MDCK for assistance in defending the Feinblooms' claims.

The cases MDCK cites are distinguishable from this case. In *Lawrence v Will Darrah & Assoc's, Inc*, 445 Mich 1; 516 NW2d 43 (1994), the Supreme Court held that an insurance policy obtained by the plaintiff from the defendant for a commercial tractor-trailer covered lost profits resulting from the theft of the commercial vehicle. *Id.* at 3-6. The Court held that the plaintiff presented sufficient evidence that the parties knew or had reason to know that lost profits would

be a consequential damage if the vehicle were lost. *Id.* at 14-16. Similarly, in *Wendt v Auto Owners Ins Co*, 156 Mich App 19; 401 NW2d 375 (1986), the plaintiff insured brought negligence and breach of contract claims against the defendant insurer, alleging in part that the defendant's negligent handling of his motor vehicle insurance claim and breach of the insurance policy resulted in lost profits from the lost use of the vehicle for its commercial purpose. This Court reversed the trial court's dismissal of these claims, finding that "questions of what damages might be reasonably anticipated is a question better left to the fact finder." *Id.* at 26, 28-29.

In sum, MDCK has not identified any policy provision entitling it to compensation for lost profits caused by defense of a claim, and the case law cited by MDCK does not support its position that Hastings is liable for lost profits, either pursuant to a term of the policy, or as a consequential loss caused by Hastings's breach of the policy. The trial court properly granted Hastings's motion in limine with respect to lost profits.

C. PENALTY INTEREST

MDCK argues that it was entitled to penalty interest under § 2006 of the Unfair Trade Practices Act ("UTPA"), MCL 500.2006, which provides, in pertinent part:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
>
> * * *
>
> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law.

The trial court determined that MDCK was not entitled to penalty interest for two reasons: (1) it was not a first-party claimant for insurance benefits; and (2) it failed to plead a claim for penalty interest under the statute.

Hastings contends that penalty interest is not payable under MCL 500.2006 where the claim for insurance benefits was reasonably disputed. Hastings relies on *Auto-Owners Ins Co v*

Ferwerda Enterprises, Inc, 287 Mich App 248; 797 NW2d 168 (2010), vacated in part on other grounds 488 Mich 917 (2010), which involved a liability insurance carrier's duty to defend and indemnify its insured, a hotel, in an action by hotel guests allegedly injured on the hotel's property. The guests were injured by a chemical gas release from heating equipment while using the hotel pool. The injured guests sued the hotel, which was insured by Auto-Owners Insurance Company. *Id.* at 250-251. The insurer initially paid the injured individuals, but declined to defend and indemnify the hotel pursuant to the policy's pollution exclusion. *Id.* at 252. In the ensuing litigation between the hotel and its insurer, the trial court determined that the insurer had a duty to defend and indemnify the hotel because the family's claim came within the heating equipment exception to the pollution exclusion. On appeal, this Court addressed the hotel's claim for penalty interest, and held:

> Defendants argue that because their award comes from a breach of contract claim, they are entitled to penalty interest. We disagree with defendants' characterization. In this case, the breach of contract claim is specifically tied to the underlying third-party tort claim. Indeed, the trial court was exceptionally clear that the amount of the breach of contract claim exactly matched that of the judgment in the underlying tort claim. The trial court only granted a breach of contract claim award to Holiday Inn because plaintiff had not yet paid the judgment in the underlying tort claim.
>
> This is a wholly different situation than that found in the cases where penalty interest was awarded. *Griswold* [*Properties, LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007) (special panel)] involved three consolidated claims, all of which involved an insurance company's failure to pay for the direct losses of the insured, as opposed to the nonpayment of a third-party claim found in this case. *Griswold*, *supra* at 559–561, 741 NW2d 549. This case involves an issue of first impression to Michigan's jurisprudence. The claim, as shown by our prior opinions in these cases, was "reasonably in dispute" and therefore the nonpayment of the claim was not an unfair trade practice. Moreover, the Bronkemas are not entitled to collect on the underlying judgment because that judgment was reversed on appeal. [*Ferwerda Enterprises*, 287 Mich App at 259-260.]

The Sixth Circuit Court of Appeals recently analyzed this Court's decision in *Ferwerda Enterprises*. In *Stryker Corp*, 681 F3d 806, the insured, "Stryker," claimed penalty interest under MCL 500.2006 from the insurer, "XL," on damages that Stryker received for XL's failure to defend and failure to indemnify Stryker in a product liability action that was resolved by settlement. The district court reviewed *Ferwerda Enterprises* and concluded that Stryker was the first-party claimant for purposes of defense cost benefits, but the injured plaintiffs in the underlying tort action were third-party claimants. The district court concluded that under *Ferwerda Enterprises*, once Stryker paid the settlement amounts to the tort plaintiffs, Stryker's claim was no longer "tied" to the plaintiffs' third-party claims, and Stryker became the first-party claimant for purposes of obtaining penalty interest. The Sixth Circuit Court of Appeals affirmed the district court's judgment, holding as follows:

Michigan case law has reinforced this distinction [between third-party and first-party claimants] and emphasized that first party insurance claimants need not demonstrate that the claim was "not reasonably in dispute" in order to recover the 12% interest. *Griswold Properties, LLC v Lexington Ins Co,* 276 Mich App 551; 741 NW2d 549, 557 (2007) (special panel).

Relying on *Griswold,* the district court initially held that the entirety of the *Stryker I* judgment was subject to the 12% pre-judgment interest because Stryker was an "insured," and thus entitled to pre-judgment interest from the tender of the claim to XL, regardless of whether the matter was in dispute. The district court reconsidered this award in light of the intervening Michigan Court of Appeals decision in *Auto–Owners Insurance Co v Ferwerda Enterprises, Inc (Ferwerda I),* 287 Mich App 248; 797 NW2d 168, 175 (2010), where the Michigan Court of Appeals held that a breach of the insurance contract that was "specifically tied to the underlying third-party tort claim," was subject to the "reasonable dispute" rule in § 500.2006(4). In analyzing *Ferwerda I,* the district court concluded that a claim is "tied" to the third-party tort claim up until the point where the insured pays the claim, at which point it is converted into a first-party claim. First Interest Opinion, 726 F Supp 2d at 767. Therefore, the district court modified the pre-judgment interest award with regard to the settlements, holding that the interest accrues from the date that Stryker settled the claim. *Id.* However, with regard to defense costs, the district court held that they were always "first party" claims, since they are a benefit due directly to Stryker. Therefore, pre-judgment interest on those claims began to run when Stryker tendered the claim to XL. *Id.* at 768.

XL argues that all pre-judgment interest in this case is subject to the "reasonable dispute" rule, per *Ferwerda I,* because the *Stryker I* judgment stems ultimately from third-party tort claims against Stryker. Stryker, by contrast, argues that the Michigan Supreme Court vacated *Ferwerda I* via its subsequent decision in *Ferwerda II,* 784 NW2d 44 (Mich 2010) (*Ferwerda II*). Thus, Stryker argues that we should not consider *Ferwerda I* at all, and instead reinstate the district court's original pre-judgment interest calculation.

Stryker's argument goes too far, because the Michigan Supreme Court reversed *Ferwerda II* on other grounds, and at no point does the court say it is vacating the penalty interest analysis. At most, the Michigan Supreme Court's corrections turn the penalty interest analysis in *Ferwerda I* into dicta. In the absence of a clear pronouncement from the Michigan Supreme Court, a federal court sitting in diversity "must predict how the court would rule by looking to all the available data." *Allstate Ins Co v Thrifty Rent–A–Car Sys, Inc.,* 249 F 3d 450, 454 (6th Cir.2001). Even if *Ferwerda I* is in fact dicta, it was not improper for the district court to consider *Ferwerda I* to predict how Michigan courts would handle penalty interest. Nevertheless, the uncertain status of *Ferwerda I* does significantly undercut XL's argument that all claims stemming ultimately from third party tort actions are always subject to the "reasonable dispute" rule. This is particularly true because the plain language of the statute focuses on the identity of the claimant who is seeking benefits from the insurer, not the underlying source

> of the claim. Here, it is undisputed that Stryker is the claimant, because Stryker already paid off the third-party tort claims. The district court's rule is therefore a logical one and one that is consistent with the statutory language—as long as the "claimant" is a third-party, the "reasonable dispute" rule applies; the moment the "claimant" becomes the insured, it ceases to apply. [*Stryker*, 681 F3d at 816-818.]

Applying *Ferwerda Enterprises*, as interpreted in *Stryker*, 681 F3d 806, to the instant case, the trial court erred in classifying MDCK as a third-party claimant and in denying penalty interest on that basis. We also disagree with Hastings's argument that penalty interest is not warranted because MDCK's claim was reasonably disputed. With respect to defense costs, MDCK is a first-party claimant. The Feinblooms did not prevail in any claim that triggered Hastings's obligations to indemnify, so there is no issue whether or when MDCK should be considered a third-party claimant with respect to indemnification coverage.

The trial court also denied penalty interest on the ground that MDCK failed to plead a claim under MCL 500.2006. This Court has held several times that there is no private cause of action for damages under MCL 500.2006, although a private person may recover penalty interest for a violation of this statute. See *Isagholian v Transamerica Ins Corp,* 208 Mich App 9, 17; 527 NW2d 13, 17 (1994); *Young v Mich Mut Ins Co*, 139 Mich App 600, 604-606; 362 NW2d 844 (1984). Penalty interest is properly considered a penalty against the recalcitrant insurer rather than compensation for the plaintiff. See *Angott v Chubb Group Ins*, 270 Mich App 465, 479; 717 NW2d 341 (2006); *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 589-590; 321 NW2d 653, 662 (1982); *Board of Trustees of Mich State Univ v Continental Cas Co*, 730 F Supp 1408, 1417 (WD Mich 1990).

In *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998), this Court affirmed an award of prejudgment interest under MCL 600.6013. The Supreme Court stated:

> We find that defendant misreads the Uniform Trade Practices Act. Clearly, plaintiff could have filed a claim under MCL § 500.2006(4); MSA § 24.12006(4). With respect to collection of twelve percent interest, reasonable dispute is applicable only when the claimant is a third-party tort claimant. Here, plaintiff is not such a claimant. Rather, he is seeking reimbursement for the loss of his business due to a fire. Therefore, plaintiff could have recovered interest at the rate of twelve percent per annum under the Uniform Trade Practices Act. [*Yaldo*, 457 Mich at 349.]

Because the issue in *Yaldo* was prejudgment interest, and not penalty interest under MCL 500.2006, the Court's statement is dicta. Hastings relies on this excerpt, specifically the phrase, "plaintiff could have filed a claim under MCL 500.2006," as authority for the proposition that a claimant cannot receive penalty interest without pleading a claim for it, but this argument takes the statement out of context. Additionally, in *Society of St Vincent De Paul in Archdiocese of Detroit v Mt Hawsley Ins Co*, 49 F Supp 2d 1011 (1999), the court noted that the purpose of the 12 percent penalty interest statute is not to compensate insureds for the delay in payment, but to penalize insurers "who procrastinate or are dilatory in paying meritorious claims in bad faith." *Id.* at 1020 (citation omitted). The court stated that "[p]roof that Defendant has violated the

UTPA will entitle Plaintiff to a 12% interest penalty and no more." The omission of a requirement for the claimant to specially plead entitlement to the penalty is consistent with the general principles that there is no private cause of action under MCL 500.6002, and the purpose of the statute is to penalize dilatory insurers rather than to compensate claimants.

Hastings also argues that penalty interest under MCL 500.2006 applies only until the date the complaint is filed, at which point only statutory prejudgment interest is available as provided in MCL 600.6013. The Supreme Court in *Wood*, 413 Mich at 590, stated that the Court "[did] not consider these statutes to be mutually exclusive," and affirmed a trial court order awarding the claimant both the six percent prejudgment interest and the 12 percent penalty interest. Accordingly, when penalty interest is warranted under the UTPA, the trial court may award the claimant interest under both statutes.

Hastings argues that penalty interest cannot be accurately calculated because questions remain regarding when MDCK filed an adequate notice of loss. This argument overlooks that MDCK duly notified Hastings of the Feinblooms' claim, and that Hastings withdrew coverage.

In light of the foregoing, we conclude that the trial court erred in denying MDCK penalty interest under MCL 500.2006. Hastings ceased paying MDCK's claimed benefits in 2004 and continued to withhold benefits throughout these protracted proceedings. The statute clearly provides for penalty interest in this context, and Hastings's arguments to the contrary are unavailing. Accordingly, we remand for a determination of penalty interest under MCL 500.2006.

D. PREJUDGMENT INTEREST

MDCK argues that the trial court erred in awarding prejudgment interest commencing with the date that MDCK filed its counterclaim, rather than the date that Hastings filed its original complaint. The date on which prejudgment interest commences is an issue of law, which we review de novo. *Neville v Neville*, 295 Mich App 460, 466; 812 NW2d 816 (2012).

MCL 600.6013(7) provides:

> For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

MDCK asserts that this statute provides for interest commencing on "the date of filing to the complaint," and contends that it is therefore entitled to prejudgment interest from the date that Hastings filed its complaint for a declaratory judgment. Although MDCK's position is supported by *Amerisure Ins Co v Graff Chevrolet, Inc*, 257 Mich App 585, 600-601; 669 NW2d 304 (2003), our Supreme Court reversed this Court's decision in that case, holding:

> Prejudgment interest accrues from the date that the complaint is filed against the party upon whom prejudgment interest is being taxed. *Rittenhouse v Erhart*, 424 Mich 166, 217-218; 380 NW2d 440 (1985). Defendant did not timely file a counterclaim. Although defendant was given permission by the circuit court on November 15, 2001 to do so, it did not file a counterclaim until November 26, after judgment had been entered. Defendant is therefore not entitled to prejudgment interest. [*Amerisure Ins Co v Graff Chevrolet, Inc*, 469 Mich 1003; 674 NW2d 379 (2004).]

The Supreme Court's statement clearly defeats MDCK's argument that it is entitled to prejudgment interest from the date that Hastings filed its original complaint. Prejudgment interest was taxed against Hastings on the basis of the judgment that MDCK received on its counterclaim. Accordingly, the trial court properly awarded prejudgment interest from the date the counterclaim was filed.

Affirmed in part, reversed in part, and remanded for recalculation of MDCK's damages in accordance with the $250 daily limitation under the supplemental payments provision and for an award of 12 percent penalty interest in favor of MDCK under the UTPA. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly

Saad, P. J., not participating.