STATE OF MICHIGAN

IN THE SUPREME COURT

GREGORY WELLS, Personal Representative of the Estate of MICHAEL WELLS, deceased

Plaintiff-Appellant,

v

STATE FARM FIRE & CASUALTY,

Defendant-Appellee,

and

JOSEPH NARRA,

Defendant.
_____/

Supreme Court Case No. 161911

Court of Appeals Case No. 348135

Macomb County Circuit Court Case No. 17-003739-NI

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

&

APPENDIX OF EXHIBITS

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JUDGMENT APPEALED FROM AND STATEMENT OF JURISDICTION

On August 27, 2020, Plaintiff-Appellant Gregory Wells timely filed an Application for Leave to Appeal on behalf of his young, deceased son. This case arises from a declaratory judgment action that was summarily dismissed by the trial court pre-answer. The trial court's order of dismissal is included as Exhibit 1 (Appx 1a-4a) and the order granting summary disposition and Register of Actions are included as Exhibits 2 (Appx 5a-7a) and 3 (Appx 8a-24a), respectively.

Plaintiff timely sought review of the trial court's order with the Court of Appeals. On July 16, 2020, the Court issued a 2-1 decision affirming the trial court's pre-answer dismissal of Plaintiff's Complaint. The majority opinion by Judges David H. Sawyer and Patrick M. Meter is included as Exhibit 4 (Appx 25a-37a). The dissenting opinion of the Hon. Elizabeth J. Gleicher is included as Exhibit 5 (Appx 38a-44a). Plaintiff timely filed an Application for Leave to Appeal with this Court.

On March 26, 2021, pursuant to MCR 7.305(H)(1), this Court issued an order granting oral argument on the application, and asked Appellant to file a supplemental brief addressing:

> (1) whether the appellant's underlying complaint in its action against the insureds is a "written instrument" under MCR 2.113(C)(1) (formerly MCR 2.113(F)(1)), a "pertinent part" of a written instrument under MCR 2.113(C)(1), or is otherwise part of "the pleadings" in this case such that the lower courts could properly consider it in the MCR 2.116(C)(8) analysis; (2) whether the Court of Appeals correctly concluded that the appellant's pleadings showed the insureds knowingly provided alcohol to minors and that this knowing act was a proximate cause of the appellant's damages; (3) whether pleading proximate causation is the equivalent of pleading that an act "created a direct risk of harm from which the consequences should reasonably have been expected by the insured,"

Allstate Ins Co v McCarn, 466 Mich 277, 283; 645 NW2d 20 (2002); and (4) whether the Court of Appeals erred in affirming the Macomb Circuit Court's grant of summary disposition to appellee State Farm under MCR 2.116(C)(8). See *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999); *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000); *Allstate, supra*.

Wells v State Farm Fire & Cas Co, 955 NW2d 906 (Mich, 2021).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the appellant's underlying complaint in its action against the insureds is a "written instrument" under MCR 2.113(C)(1) (formerly MCR 2.113(F)(1)), a "pertinent part" of a written instrument under MCR 2.113(C)(1), or is otherwise part of "the pleadings" in this case such that the lower courts could properly consider it in the MCR 2.116(C)(8) analysis?

Plaintiff-Appellant answers:	"No."
Defendant-Appellee answers:	"Yes."
Court of Appeals answered:	"Yes."

II. Whether the Court of Appeals correctly concluded that the appellant's pleadings showed the insureds knowingly provided alcohol to minors and that this knowing act was a proximate cause of the appellant's damages?

Plaintiff-Appellant answers:	"Yes."
Defendant-Appellee answers:	"Yes."
Court of Appeals answered:	"Yes."

III. Whether pleading proximate causation is the equivalent of pleading that an act "created a direct risk of harm from which the consequences should reasonably have been expected by the insured," *Allstate Ins Co v McCarn*, 466 Mich 277, 283, 645 NW2d 20 (2002)?

Plaintiff-Appellant answers:	"No."
Defendant-Appellee answers:	"Yes."
Court of Appeals answered:	"Yes."

IV. Whether the Court of Appeals erred in affirming the Macomb Circuit Court's grant of summary disposition to appellee State Farm under MCR 2.116(C)(8)?

Plaintiff-Appellant answers:	"Yes."
Defendant-Appellee answers:	"No."
Court of Appeals answered:	"No."

INTRODUCTION

This declaratory judgment appeal stems from the trial court's dismissal of Plaintiff's complaint under MCR 2.116(C)(8) in a preanswer motion for summary disposition; it involves the application of three decisions by this Court: *Allstate Ins Co v McCarn*, 466 Mich 277; 645 NW2d 20 (2002); *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999); and *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152; 934 NW2d 665 (2019).

State Farm's preanswer motion for summary disposition requested a judicial determination that there was no coverage under the policy that it issued to the Bobchicks (defendants in a separate but related tort action). As alleged in the Complaint, Michael Wells died in a car crash; the car was being driven by minors who had been provided with alcohol at the Bobchicks' residence. Plaintiff has alleged in this case that the Bobchicks were liable based on social host liability. In the separate tort action, the Estate settled its claims with the Bobchicks and obtained a consent judgment. This case involves getting State Farm to pay that judgment.

State Farm argued that it is not responsible for the judgment because the car crash was not an "occurrence" under the terms of the policy. "Occurrence" is defined only as an "accident." State Farm argued that, if the Bobchicks knowingly provided alcohol to minors, the resulting crash could not be characterized as an "accident."

This analysis is contrary to this Court's decision in *McCarn*, which instructs that whether an "occurrence" exists depends, in part, on a subjective analysis of whether the injury-causing event was an "accident." This Court, in *El-Khalil*, emphasized that a

motion under (C)(8) only tests a claim's legal sufficiency. Here, under *McCarn,* the critical inquiry is whether the Bobchicks *subjectively intended* to cause the car crash. This subjective inquiry cannot be made on the pleadings alone; evidence was necessary.

To get around this, the Court of Appeals majority relied, in part, on allegations made in Plaintiff's complaint against the Bobchicks. That complaint, however, is not a part of the pleadings in this case. It is also not a "written instrument" under MCR 2.113(C)(1), formerly MCR 2.113(F)(1), because the underlying complaint does not set forth any vested rights or obligations, it merely makes allegations. That complaint must be ignored for purposes of assessing the legal sufficiency of the pleadings in this case.

The Court of Appeals majority also erred in holding that Plaintiff's (implicit) allegation of proximate causation is a *de facto* admission that the car crash was not an accident. Pleading proximate causation is not the equivalent of admitting subjective intent. The pleadings do not describe the Bobchicks' intentions or their subjective perceptions. As noted by Judge Elizabeth Gleicher in her dissenting opinion, "'Knowingly' providing or furnishing alcohol is a far cry from intentionally setting in motion a tragic automobile accident. Nothing in the pleadings suggests that the Bobchicks intended the result of their allegedly 'knowing' actions." (*Estate of Estate of Wells by Wells v State Farm Fire & Cas Co*, unpublished opinion of the Court of Appeals, issued July, 16, 2020 (Docket No. 348135),*11 (GLEICHER, J., *dissenting*)).

The Bobchicks' subjective beliefs and understandings are critical to whether the car crash was an "accident," and therefore an "occurrence," under the State Farm Policy. The pleadings do not address the Bobchicks' subjective beliefs, only that State

Farm is liable for the judgment in the underlying case, which was based on social host liability. As recognized by Judge Gleicher's dissenting opinion, Plaintiff sufficiently alleged that an "accident" occurred under the policy and summary disposition was not appropriate under MCR 2.116(C)(8).

The Court of Appeals majority erred by affirming summary disposition in State Farm's favor; this Court should adopt Judge Gleicher's well-reasoned and thorough opinion as its own, reverse the judgment of the Court of Appeals majority and the trial court, and remand this case to the trial court for further proceedings on the merits.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. Plaintiff's Complaint

This appeal stems from a declaratory judgment action brought by Plaintiff Gregory Wells against State Farm. (Plaintiff's Complaint, Appx 45a-69a.) Mr. Wells is pursuing this action as the personal representative of his deceased son Michael Wells. Id. at ¶ 2; Appx 47a. Michael was seventeen years old when he and two friends were killed in a single-vehicle collision that occurred near Stoney Creek Metro Park on May 8, 2015. Id. at ¶ 12, 13, 16; Appx 48a. Michael was a passenger in that vehicle. Id. at ¶ 10; Appx 48a.

Mr. Wells is pursuing this declaratory judgment action following entry of a consent judgment between Michael's Estate and Gregory A. Bobchick and Dawn Bobchick on August 15, 2017. Id. at ¶ 29, 30; Appx 50a-51a. The consent judgment between Plaintiff and the Bobchicks relates to the Estate's allegations that the Bobchicks

provided alcohol to underage minors and that the provision of that alcohol resulted in Michael's death. Such a claim is commonly dubbed "social host liability" in Michigan. Id. at ¶ 19; Appx 49a.

Plaintiff sought a declaration that the homeowners policy applies to Plaintiff's judgment against the Bobchicks such that State Farm was responsible for paying the consent judgment. Id. at ¶ 33, 34; ; Appx 51a. Plaintiff alleged that the Bobchicks timely paid their premiums, timely notified State Farm of Plaintiff's claims, and were entitled to indemnification pursuant to the terms of their homeowners' policy. Id. at ¶ 25, 26; Appx 50a. Plaintiff specifically alleged that "Based upon the policy, defendant State Farm is liable to Plaintiffs for judgment of $475,000 plus interest." *Id.* at ¶ 33; Appx 51a.

B. Procedural history in the trial court.

Following the filing of Plaintiff's Complaint, State Farm filed a pre-answer motion for summary disposition pursuant to MCR 2.116(C)(8). Although the motion was filed under (C)(8), State Farm attached multiple documents in addition to the Complaint to support its analysis.

State Farm argued that Michael's death was not an 'accident' and without being an 'accident', Plaintiff could not meet the policy's requirement of an "occurrence." *Id.* To support its position, State Farm attached to its motion the consent judgment from the underlying action, a certified copy of the policy, and the second amended complaint from the underlying action. *Id.*

State Farm's argument relied primarily on *Allstate Ins Co v JJM*, 254 Mich App 418; 657 NW2d 181 (2002) and an unpublished case. State Farm also cited to this Court's definition of "accident" from *Frankenmuth Mut Ins Co*, 460 Mich at 114. Alternatively, State Farm argued that, even if Michael's death was an "occurrence," coverage was also precluded by a motor-vehicle exclusion in the policy.

Plaintiff responded to both of State Farm's arguments. As to the "occurrence" argument, Plaintiff cited the trial court to this Court's decision in *McCarn*, 466 Mich 277. That decision dealt with a similar definition of "occurrence." In determining whether an "occurrence" was established under that policy, this Court held that a subjective analysis is required to determine whether the insured's conduct is an "accident." Plaintiff also cited to parts of Ms. Bobchicks' testimony from the underlying action that supported his allegations that the Bobchicks' liability for Michael's death would be covered by the policy.

The trial court heard oral argument on the motion for summary disposition on January 22, 2018. After allowing for a brief period of argument, the trial court announced that it was granting State Farm's motion from the bench. (Transcript, p 6; Appx 127a.) The totality of the trial court's analysis was:

> The Court has read your pleading. I'm satisfied applying whatever test – applying both the Supreme Court test and the analysis provided by the Court of Appeals in the light most favorable to the non-moving party that the social host liability on the part of the Defendant herein in providing alcohol to a minor is not an occurrence within the contract language, and the motion for summary disposition is granted. [Appx 127a.]

Which authorities the trial court was referencing by indicating "both the Supreme Court test and the analysis provided by the Court of Appeals" is not entirely clear. The trial court determined that "providing alcohol to a minor is not an occurrence within the contract language" and granted State Farm summary disposition without allowing for discovery and without applying the subjective analysis discussed in *McCarn* to Plaintiff's Complaint.

An order confirming the trial court's decision to grant State Farm's Motion for Summary Disposition was entered on January 22, 2018. (Appx 6a-7a.) Thereafter, an order dismissing the entirety of the action was entered on February 28, 2019. (Appx 2a-4a.) Plaintiff timely filed a claim of appeal with the Michigan Court of Appeals on March 21, 2019.

C. Procedural history in the Court of Appeals.

The Court of Appeals, in a split decision, affirmed the trial court's dismissal of Plaintiff's case. *Estate of Wells by Wells v State Farm Fire & Cas Co*, unpublished opinion of the Court of Appeals, issued July, 16, 2020 (Docket No. 348135). The Court of Appeals majority affirmed relying on MCR 2.116(C)(8). Skirting the subjective analytical methodology set out in *McCarn,* the majority interpreted the record before it such that it concluded that "plaintiff's pleadings show that the automobile crash was the reasonably foreseeable direct result of the insured's intentional act of furnishing alcohol to minors, and therefore, not an 'occurrence' or an 'accident' under Michigan law." (Slip op. at *11.) The majority opinion concluded that "the direct and reasonably to be

expected result of furnishing alcohol to minors, an alcohol-impaired automobile crash, was not an 'accident' or 'occurrence' under defendant's homeowner's policy." *Id.* Since the majority relied on MCR 2.116(C)(8), it reached this conclusion without the benefit of any evidence about what occurred that day or the subjective beliefs of the insureds. The majority went on to claim that amendment would be "futile and unjustified" without providing further analysis. *Id.*

Despite the motion relying on MCR 2.116(C)(8), the majority found it appropriate to also incorporate and apply the following documents to its analysis: the homeowners insurance policy, the consent judgment from the underlying tort action, and the underlying tort complaint. The majority justified their incorporation of these documents by referencing MCR 2.113(C) (formerly MCR 2.113(F)).

The dissenting opinion by Judge Elizabeth Gleicher took a different approach in analysis. Judge Gleicher focused her analysis on *McCarn,* since it "presents our Supreme Court's most recent description of the analytical methodology governing whether an intentional act is an 'accident' for insurance coverage purposes."(Slip Op. at *3, (GLEICHER, J. *dissenting*).) She explained that, under *McCarn*, the operative inquiry is subjective, which necessarily cannot be decided on the pleadings alone. She pointed out three critical takeaways from *McCarn* relevant to this case:

> First, the analysis of whether an event was an "accident" is inherently fact specific because it depends on the insured's beliefs and perceptions as they relate to the *consequences* of the purportedly intended act. This means that summary disposition cannot be granted on the pleadings. Period. Second, the mere fact that an *act* was intentional does not eliminate coverage if the resulting injuries were unintended. And third, courts must evaluate the questions by focusing on the injury-causing event and

> whether *that* event was intended or reasonably expected by the insured. [*Id.* (emphasis in original).]

Applying this framework, Judge Gleicher concluded that the pleadings support Plaintiff's claim that the car crash was an "accident," and dismissal based on (C)(8) was not appropriate. The subjective considerations from *McCarn* required an evidentiary record, which had not been developed for this (C)(8) motion. Ms. Bobchick's subjective intent could not be decided on just the pleadings:

> *McCarn* counsels that the accident in which Michael Wells lost his life is the "occurrence" at issue in this case, and that State Farm's indemnification obligation depends on whether Dawn Bobchick expected or intended the accident to happen. That question may be answered only with evidence. No evidence exists in this record. I would reverse the circuit court's summary disposition ruling and remand for further proceedings. [*Id.*]

Relying heavily on the analysis in Judge Gleicher's dissent, Plaintiff filed a timely Application for Leave to Appeal with this Court. This Court has granted oral argument on the application, and has asked Appellant to file a supplemental brief addressing:

> (1) whether the appellant's underlying complaint in its action against the insureds is a "written instrument" under MCR 2.113(C)(1) (formerly MCR 2.113(F)(1)), a "pertinent part" of a written instrument under MCR 2.113(C)(1), or is otherwise part of "the pleadings" in this case such that the lower courts could properly consider it in the MCR 2.116(C)(8) analysis; (2) whether the Court of Appeals correctly concluded that the appellant's pleadings showed the insureds knowingly provided alcohol to minors and that this knowing act was a proximate cause of the appellant's damages; (3) whether pleading proximate causation is the equivalent of pleading that an act "created a direct risk of harm from which the consequences should reasonably have been expected by the insured," *Allstate Ins. Co. v. McCarn*, 466 Mich. 277, 283, 645 N.W.2d 20 (2002); and (4) whether the Court of Appeals erred in affirming the Macomb Circuit Court's grant of summary disposition to appellee State Farm under MCR 2.116(C)(8). See *Frankenmuth Mut. Ins. Co. v. Masters*, 460 Mich. 105, 595

N.W.2d 832 (1999); *Nabozny v. Burkhardt*, 461 Mich. 471, 606 N.W.2d 639 (2000); *Allstate, supra*.

Wells, 955 NW2d 906.

STANDARD OF REVIEW

An appellate court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil*, 504 Mich at 159. Summary disposition is proper where the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim, *El-Khalil*, 504 Mich at 159, and may not be supported or opposed with affidavits, admissions, or other documentary evidence. MCR 2.116(G)(2); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Rather, the motion must be decided based on the pleadings alone. *Id.*; MCR 2.116(G)(5). When considering a motion under MCR 2.116(C)(8), the trial court must accept all factual allegations in the opposing party's pleadings as true. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *El-Khalil*, 504 Mich at 160.

The proper construction and application of an insurance policy presents a question of law that is reviewed *de novo*. *Cohen v Auto Club Ins Ass'n, 463 Mich 525, 528; 620 NW2d 840 (2001)*. Whether an ambiguity exists is also a question of law that is reviewed *de novo. Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003). "Questions of law relative to declaratory judgment actions are reviewed *de novo*, but the

trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Id.* at 376 (cleaned up).

LEGAL ARGUMENT

I. The Appellant's underlying complaint in its action against the insureds is not a "written instrument" under MCR 2.113(C)(1) (formerly MCR 2.113(F)(1)), is not a "pertinent part" of a written instrument under MCR 2.113(C)(1), and is not otherwise part of "the pleadings" in this case such that the lower courts could properly consider it in the MCR 2.116(C)(8) analysis.

Both the trial court and the Court of Appeals majority erred by considering Plaintiff-Appellant's underlying complaint against the insureds because that complaint is not a "written instrument" on which the claims in this case are based, and, thus, is not considered part of the "pleadings" under MCR 2.113(C)(1). Because the underlying complaint is not a part of the pleadings, it was error to consider the document in a motion for summary disposition under MCR 2.116(C)(8), which considers *only* the sufficiency of the pleadings.

MCR 2.113(C)(1), formerly MCR 2.113(F)(1), provides:

> (1) If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading and labeled according to standards established by the State Court Administrative Office unless the instrument is
>
> (a) a matter of public record in the county in which the action is commenced and its location in the record is stated in the pleading;
>
> (b) in the possession of the adverse party and the pleading so states;
>
> (c) inaccessible to the pleader and the pleading so states, giving the reason; or

> (d) of a nature that attaching the instrument would be unnecessary or impractical and the pleading so states, giving the reason.

Section (2) states that "An attachment or reference to an attachment under subrule (C)(1)(a) or (b) is a part of the pleading for all purposes." In order for the underlying complaint against the insureds to be considered a part of the pleadings in this case, the complaint must fall within the definition of a "written instrument."

Analysis of whether the underlying complaint is a "written instrument" starts with interpretation of the language of the rule. The interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo. *CAM Const v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256, 258 (2002). "When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation." *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753, 755 (2005). This process starts with the language of the Rule itself. *Id.* "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id.* at 706. "When interpreting a court rule or statute, we must be mindful of the surrounding body of law into which the provision must be integrated." *Id.* (cleaned up.)

Here, the plain language of MCR 2.113(C)(1) provides that "written instruments" should be attached to a complaint and incorporated as part of the pleading, but only if the claim is "based on" the instrument. "Written instrument" is not defined in the Michigan Court Rules. "[T]his Court gives undefined terms their plain and ordinary meanings and will often consult dictionary definitions in conferring such meaning." *People v Warren*, 505 Mich 196, 208; 949 NW2d 125, 131 (2020). Consulting a legal

dictionary is appropriate when the term being interpreted is "a legal term of art ... that has acquired a peculiar and appropriate meaning in the law." *Hannay v Dept of Transp*, 497 Mich 45, 68–69; 860 NW2d 67 (2014). "Instrument" is relevantly defined as "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate. — Also termed legal instrument." *Black's Law Dictionary* (11th ed. 2019).

This Court has previously considered the scope of the definition of a "written instrument," albeit in the context of the phase's interpretation within a statute. See *Yaldo v N Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998). Applying the same rules of interpretation, the Court held that an insurance policy is a "written instrument. *Id.* at 345. The Court noted that Michigan Courts have used the phrases "written instrument," "written contract," and insurance contract" interchangeably, and so held that it was "clear and unambiguous" that an insurance policy is a "written contract." *Id*. This holding makes sense given the legal definition of "instrument." A contract's *raison d'etre* is to set forth rights, duties, entitlements and liabilities, and is one of the types of instruments specifically mentioned in the Black's Law Dictionary definition of "instrument."

The underlying tort complaint against the insureds, on the other hand, is not a "written instrument" because it does not define any rights, duties, entitlements, or obligations; it simply sets forth allegations. A "complaint" is defined as "[t]he initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief." *Black's Law Dictionary* (11th ed.

2019). This definition is in keeping with MCR 2.111(B), which requires a complaint to recite a statement of facts on which the pleader relies in stating a cause of action and make a demand for judgment. MCR 2.111(A)(2) advises that it is "not objectionable" for a party to plead facts in the alternative, and that a party can plead multiple claims and defenses, regardless of consistency. MCR 2.111(A)(2)(a) and (b).

Plaintiff did not, and does not, have any vested rights stemming solely from the filing of a complaint. This is true for the underlying complaint, just as it is true for this case. A Complaint merely commences a civil action, nothing more. MCR 2.101(B).

II. For purposes of considering a motion for summary disposition under MCR 2.116(C)(8), the Court of Appeals incorrectly concluded that the appellant's pleadings explicitly alleged that the insureds knowingly provided alcohol to minors and that this knowing act was a "direct" and proximate cause of the appellant's damages. These specific allegations are nowhere in the Complaint. However, to the extent that knowingly providing alcohol and proximate cause is implied in the allegation for "social host liability," it is a part of the pleadings.

The Court of Appeals majority relied on Plaintiff's complaint in the underlying tort action against the insureds to assert that "Plaintiff alleged that the Bobchicks 'knowingly provided or furnished alcohol' to Manolios and Gregory Jr., which was a direct and proximate cause of the crash and plaintiff's damages." *Estate of Wells by Wells v State Farm Fire & Cas Co*, unpublished opinion of the Court of Appeals, issued July, 16, 2020 (Docket No. 348135), p *1. As discussed in the preceding section, the underlying tort complaint is not a "written instrument," and the Court of Appeals erred by relying

on allegations in *that* complaint to test the legal sufficiency of the claims pleaded in *this case*.

Just two years ago, in *El-Khalil*, 504 Mich 152, this Court cautioned that the distinction between motions for summary disposition brought pursuant to MCR 2.116(C)(8) versus (C)(10) is a significant one: the former tests the legal sufficiency of a claim, while the latter tests the claim's factual sufficiency. *Id*. at 159. The Court reiterated the long-standing (though oft unheeded) principle that motions brought under (C)(8) should be evaluated on the pleadings alone:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).
>
> [*El-Khalil*, 504 Mich at 159–60.]

The Court of Appeals majority erred by citing allegations in the underlying complaint to test the legal sufficiency of the claims in this one.

This is not a case where it is "unclear" what standard the trial court evaluated State Farm's motion for summary disposition under: the trial court's January 22, 2018, Order states:

> This matter having come before the Court for hearing on Defendant State Farm Fire & Casualty Company's Motion for Summary Disposition Pursuant to MCR 2.1 16(C)(8), the Court having reviewed the papers filed and heard argument by the parties, and the Court being fully advised:

> NOW, THEREFORE, IT IS HEREBY ORDERED that, for the reasons stated on the record, Defendant State Farm's motion for summary disposition is granted.

The motion was brought pursuant to (C)(8); the trial court evaluated it under (C)(8); there is no justification, on appeal, to apply a (C)(10) scrutiny. To the extent that the Court of Appeals majority advocated this analysis, it should be rejected by this Court.

The relevant allegations in Plaintiff's complaint are ¶¶19, 27, and 29, which state:

> 19. During all relevant times, and including May 8, 2015, a residence located 64500 Coventry Lane, Shelby Township, Michigan 48315 was owned by Gregory Bobchick Sr., and Dawn Bobchick, where alcohol and/or drugs was furnished to minors that caused an auto accident which occurred on Park Drive, at Stoney Creek Metropark, in Shelby Township, Michigan, killing MICHAEL WELLS. Thereafter, Plaintiffs brought a claim for personal injury and wrongful death against Gregory Bobchick Sr., and Dawn Bobchick due to the occurrence.
>
> 27. During all relevant times, the lawsuit and claims by Plaintiffs against Bobchick [sic] were based upon Bobchicks [sic] negligence and social host liability for the property in question.
>
> 29. Bobchicks thereafter entered into a settlement agreement with Plaintiffs. Bobchicks also agreed to a judgment for the covered claims based upon the terms of the settlement agreement.

None of these allegations outright state that the "Bobchicks 'knowingly provided or furnished alcohol' to Manolios and Gregory Jr., which was a direct and proximate cause of the crash and plaintiff's damages." (*Estate of Wells* at p *1.) As such, the Court of Appeals erred by concluding that Plaintiff's complaint explicitly made these allegations.

Plaintiff does, in ¶ 27 of the Complaint, plead that Plaintiff's claims against the Bobchicks in the underlying case were based on "negligence and social host liability." Although not cited in the Complaint, it is generally accepted that social host liability

stems from MCL 436.1701 and MCL 740.141a.[1] See *Longstreth v Gensel*, 423 Mich 675; 377 NW2d 804 (1985); *Traxler v Koposky*, 148 Mich App 514; 384 NW2d 819 (1986). These statutes prohibit "knowingly sell[ing] or furnish[ing] alcoholic liquor to a minor" (§1702), or "knowingly allow[ing] a minor to consume or possess an alcoholic beverage at a social gathering on or within that premises, residence, or other real property" (MCL 750.141a(2)(a)).

In *Longstreth*, this Court recognized that violation of a statute prohibiting furnishing or allowing a minor to consume alcohol can support a claim of negligence against a social host, and explained:

> [The statute] was meant to protect a class of persons, i.e., those under the legal drinking age, and this plaintiff falls within that class. The statute protects a particular interest, i.e., freedom from injury caused by the use of alcohol by persons under twenty-one years of age. We again stress that this interest exists as a result of legislation [] and constitutional provision (Const.1963, art. 4, § 40). [The statute] was meant to protect against the kind of harm which resulted, i.e., injury and death. Finally, the statute was meant to protect against a particular hazard, i.e., the dangerous effects of intoxication of those under twenty-one years of age. Therefore, we hold that the plaintiffs can maintain a cause of action based on violation of [the statute]. [*Longstreth*, 423 Mich at 693.]

Violation of a statute prohibiting knowingly furnishing or allowing a minor to consume alcohol creates a rebuttable presumption of negligence. *Id.*

Based on the allegation in ¶ 27, that "the lawsuit and claims by Plaintiffs against Bobchick [sic] were based upon Bobchicks [sic] negligence and social host liability for the property in question," it can be inferred that Plaintiff pleaded that the Bobchicks

[1] Prior to a 1998 repeal and overhaul of the Michigan Liquor Control Code, the operative statute was formerly MCL 436.33. MCL 750.141a, enacted in 1994, is the penal code making it a criminal offense to knowingly allow a minor to possess or consume alcohol at a social gathering or at the premises.

knowingly provided alcohol to minors and that this knowing act was a proximate cause of the Plaintiff's damages.

Significantly, Plaintiff *did not* allege (explicitly or impliedly) that the Bobchicks' conduct was the "direct" cause of Michael's death; only that it was "a" cause. As will be discussed in the next section, an allegation that the Bobchicks' conduct was a proximate cause of Michael's death is not the equivalent of pleading that the conduct created a direct risk of harm from which the consequences should have been reasonably expected *subjectively by the insured*.

III. Pleading proximate causation is not the equivalent of pleading that an act "created a direct risk of harm from which the consequences should reasonably have been expected by the insured," *McCarn*, 466 Mich at 283.

The Bobchicks' insurance contract with State Farm provides coverage for an "occurrence," which is defined as an "accident." The question here is whether the car crash that killed Michael is an "accident," assuming that the Bobchicks knowingly provided minors with alcohol. This inquiry, under *McCarn*, turns on whether the Bobchicks subjectively intended to cause, or subjectively should have expected, the crash. Based on the allegations in the Complaint, they did not.

Pleading proximate causation is *not* the equivalent of pleading that an act "created a direct risk of harm from which the consequences should reasonably have been expected by the insured," *McCarn*, 466 Mich at 283. *McCarn* held that "negligence. . . is not enough to prevent an incident from being an accident if the consequence of the action [] should not have reasonably been expected by the insured." *Id*. at 287. As will

be explained below, this is a *subjective* inquiry. An allegation of "proximate cause," applicable to negligence, and which involves an *objective* inquiry, is "not enough" to support a finding, as a matter of law, that the crash was not an accident.

A. Overview of the Bobchicks' insurance policy, definition of "occurrence," and overview of precedent regarding subjective, not objective, interpretation of "accident" in the insurance policy.

The liability section of the State Farm policy issued to the Bobchicks states:

> Coverage L – Personal Liability
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:
>
> 1. pay up to our limit of liability for the damages for which an insured is legally liable; and
> 2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the occurrence equals our limit of liability.

(Policy, p. 15; Appx 103a.) The term "occurrence" is defined at the beginning of the policy as:

> 8. "occurrence", when used in Section II of this policy, means an accident, including exposure to conditions, which results in:
>
> a. bodily injury; or
> b. property damage;
>
> during the policy period. Repeated or continuous exposure to the same general conditions is considered one occurrence.

Id. at 2; Appx 90a. The definition of occurrence uses the term "accident." "Accident" is not defined in the policy.

The lack of a definition for "accident" is not unique to State Farm's policy. In many policies the definition of occurrence includes, without defining, the term "accident." In *Frankenmuth Mut Ins Co*, 460 Mich at 114, in the context of interpreting an insurance contract, this Court examined the common meaning of the term and defined "an accident" as an "undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Id.* (cleaned up). The Court further held that "the definition of accident should be framed from the standpoint of the insured, not the injured party." *Id.* Any doubt as to the extent of coverage is to be resolved in the insured's favor. *Id*. at 111. The issue in this case is whether the car crash was an accident, assuming the Bobchicks' intentional conduct.

In *Masters,* this Court addressed whether, and under what circumstances, an event can be characterized as an "accident" when an insured acts intentionally. To address this seeming incongruity, the *Masters* Court adopted the following analysis:

> [A] determination must be made whether the consequences of the insured's intentional act either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions. When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. Similarly, ... when an insured's intentional actions create a direct risk of harm, there can be no liability coverage for any resulting damage or injury, despite the lack of an actual intent to damage or injure." [*Masters,* 460 at 115-116 (cleaned up).]

The operative inquiry, thus, is whether the insured's conduct created a direct risk of harm that was either intended or reasonably should have been expected by the insured.

This is a subjective inquiry—whether a consequence is an "accident must be evaluated from the standpoint of the [insured], not those harmed by their actions." *Masters*, 460 Mich at 114.

Building on *Masters*, this Court in *McCarn* further clarified the contours for interpreting whether an event is an "accident" when it is a consequence of intentional conduct. In *McCarn,* after analyzing *Masters* and other cases, including *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000), the Court held:

> Because "[t]he definition of accident should be framed from the standpoint of the insured …," *Masters* at 114, 595 NW2d 832, and because, where there is doubt, the policy should be construed in favor of the insured, *id.* at 11, 595 NW2d 832, we conclude that a subjective standard should be used here.
>
> *McCarn,* 466 Mich at 284.

Citing to *Masters*, in plain terms the Court explained that "if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured." *Id.* at 282–83. *McCarn* emphasized that, where the policy is silent (as here), whether a consequence is an accident is to be evaluated using a *subjective* standard. *Id*. at 283.

The distinction between a subjective and objective inquiry is critical. As Judge Gleicher explained in her dissent, under *McCarn,* "whether an insured should have reasonably anticipated the consequences of the act does not depend on whether 'a reasonable person' would have done so; 'an objective foreseeability test should not be

used.'" *Wells*, slip op at *2 (GLEICHER, J., *dissenting*) (citing *McCarn,* 466 Mich at 283). "The focus must remain on the insured: whether the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured." *Id*. (citing *McCarn* at 283).

Importantly, "negligence alone is not sufficient to prevent the death from being an accident." *Id.* at 284. A "direct risk of harm intentionally created" requires "a level of culpability only slightly lower than intentionally acting to produce an intended harm," because, in such instances, "the situation is virtually indistinguishable from intentionally causing the harm." *Id*. (cleaned up).

In *McCarn,* the incident at-issue was the shooting death of Kevin LaBelle. *Id.* at 278. There, Robert McCarn (then 16) believed that a gun he was handling was empty. *Id.* at 279. He pointed it at his friend Kevin Labelle and pulled the trigger, thinking he was firing an empty gun. *Id.* He did not intend to hurt anyone; however, a bullet was chambered. *Id.* at 258. It fired and killed Kevin. *Id.* at 279.

Applying the principles discussed above, this Court held that Kevin's death was an accident and covered under the insurance policy. The Court reasoned that there was no genuine issue of material fact that Robert believed the gun was not loaded, given his testimony and the lack of any contradicting evidence.[2] *Id*. at 286. Given that Robert subjectively believed that the gun was unloaded, he did not intend to shoot his friend, and he did not reasonably believe that he would be shooting his friend by pulling the trigger. There was no subjective intent to shoot, even though he intentionally pulled the

[2] Unlike this appeal, *McCarn* was not on appeal on the pleadings alone.

trigger. The inquiry was subjective, not objective. "[T]he negligence of the insured in acting as he did is not enough to prevent an incident from being an accident if the consequence of the action (i.e., shot coming from a gun) should not have reasonably been expected by the insured." *Id.* at 277.

B. A subjective inquiry into whether an act created a direct risk of harm "from which the consequences should reasonably have been expected by the insured" is not the same as an objective allegation of proximate cause.

With the above analysis in mind, an allegation that the Bobchicks' conduct was, from an objective standpoint, a proximate cause of the car crash is not equivalent to stating that the Bobchicks created a direct risk of harm from which they subjectively "should reasonably have expected" the crash.

"[P]roximate cause" is a "legal term of art" and "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366, 371 (2017) (cleaned up). This analysis "requires a determination of whether it was foreseeable that the defendant's conduct could result in harm to the victim." *Id.* "It is not uncommon that more than one proximate cause contributes to an injury." *Id.*

Evaluating proximate cause is an objective standard. As Judge Gleicher explained in her dissent:

> Proximate cause rests on an inherently objective standard. "A result is reasonably foreseeable if there are indications which would lead a reasonably prudent man to know that the particular results could follow from his acts." *Allstate Ins Co v Freeman*, 432 Mich 656, 675; 443 NW2d 734 (1989) (quotation marks and citation omitted). As every law student

> knows, the "reasonably prudent person" standard is objective. In contrast, the Supreme Court has explicitly held that the standard required here is subjective: "an objective foreseeability test should not be used[.]" *McCarn*, 466 Mich. at 283. This means that courts must avoid applying an "objective" standard—whether a reasonable person would have foreseen an injury is irrelevant. [*Wells*, Slip op. at *5 (GLEICHER, J., *dissenting*).]

The allegation that the Bobchicks' conduct proximately caused the crash means, from the objective reasonably prudent person standpoint, it was foreseeable that serving alcohol to minors could lead to a drunk driving accident. The allegation simply asserts that, among the multiple causes, it was foreseeable that their conduct was objectively a foreseeable contributing factor. An allegation that conduct was a proximate cause of injuries is not the equivalent of stating that the conduct was a "direct" cause.

The "direct" language at-issue here is akin to the definition of "the" proximate cause adopted by this Court in *Robinson v City of Detroit*, 462 Mich 439, 446; 613 NW2d 307, 311 (2000), in the context of the Governmental Tort Liability Act. There, the Court defined "the" proximate cause as "the one most immediate, efficient, and ***direct cause*** of the injury." Even in the context of determining "the" proximate, this Court has cautioned against weighing relative factual causes, and advised courts to "consider[] defendant's actions alongside any other potential proximate causes to determine whether defendant's actions were, or could have been, 'the one most immediate, efficient, and direct cause' of the injuries." *Ray*, 501 Mich at 76.

Here, contrary to the Court of Appeals majority statement, Plaintiff *has not* alleged that the Bobchicks' conduct was a "direct" cause of Michael's death, only that it

was a proximate cause of his death. This, in and of itself, makes a determination on the pleadings impossible because of the fact-intensive, subjective nature of the inquiry.

Notably, pleading proximate causation (which is a necessary element in *every* negligence claim) cannot be a *de facto* admission of subjective intent. If it were, then, as Judge Gleicher pointed out in her dissent, the pleading would negate coverage on almost any coverage dispute involving an "accident." Judge Gleicher persuasively explained:

> [I]f the majority were correct and pleading proximate causation definitively establishes an insured's subjective intent to cause all foreseeable consequences of an intentional act, there would be no need for the *McCarn* analysis or any other. Every negligence claim includes an allegation of proximate cause: that the action or inaction of a defendant "must have been a cause of plaintiff's injury, and second, that the plaintiff's injury must have been of a type that is a natural and probable result of the negligent conduct." M. Civ. JI 15.01. Without such an allegation, a tort complaint would be subject to dismissal under MCR 2.116(C)(8). Assuming a properly pleaded negligence claim, the majority's contrived and precedent-lacking "proximate cause" test would mandate an automatic dismissal of every coverage dispute similar to this one. Does the majority truly believe that the underlying complaint in *McCarn* omitted an allegation that the insureds' negligence proximately caused the decedent's wrongful death?
>
> [*Wells*, slip op at *12, (GLEICHER, J., *dissenting*).]

Pleading proximate causation is not an admission that the Bobchicks' conduct created a direct risk of harm "from which the consequences should reasonably have been expected by the insured."

C. The Bobchicks did not create a "direct risk of harm" that the car would crash.

The Bobchicks did not create a "direct risk of harm" that the car would crash by providing the minors with alcohol. The distinguishing factor between whether a consequence was subjectively intended/"reasonably expected," versus an "accident," is that, for an "accident," while the act was intended, the result was not. In cases where this Court has found that an intentional act did not cause an "accident" (i.e. the consequence was intended), the facts showed that, while the magnitude of the resulting harm was not subjectively expected by the insured, the same category of harm certainly was. Thus, for there to be a "direct risk of harm" from which the consequences should reasonably have been *subjectively* expected, the resulting harm must be of the same type and category as originally intended.

For example, *Masters* involved an intentionally set fire; the resulting harm (burned buildings), was of the same type and category as originally intended (a burned building); the only difference was the magnitude of the resulting harm.

In that case, George Masters, Sr. and his son set fire to the family clothing store in Alpena, Michigan, in a bid to collect on a casualty insurance policy. *Masters*, 460 Mich at 108. The fire, which was only intended to burn their own store inventory, grew out of control and burned down other neighboring businesses as well. Some of the businesses impacted sought to hold the Masters accountable. The Masters, in turn, asked their insurer, Frankenmuth Mutual Insurance Company, to defend and indemnify. *Id*. Frankenmuth filed a declaratory judgment action, seeking a determination that it was not responsible for providing a defense or indemnification. *Id*.

This Court ultimately held that the fire damage to the surrounding businesses was not an "accident" because the Masters had the subjective specific intent to start a fire. *Id.* at 116. "[T]here is no question that, in perpetrating the intentional act, the Masters intended to do property damage[,]" i.e. burning their clothing store. *Id*. *McCarn* examined this exact relationship and summed up "when the insured acted by starting a fire, it is irrelevant that the consequence, which was burning property, was different in magnitude from that intended." *McCarn*, 466 Mich at 290. Thus, by starting the fire, the Masters "created a direct risk of harm" that the building would burn. Even though they did not specifically intend the magnitude of the fire, they did intend to start a fire and the harm associated with arson, and therefore, subjectively, the "consequences should reasonably have been expected."

Nabozny, likewise, involved intentional conduct specifically intended to cause bodily injury, therefore creating a "direct risk of harm" for bodily injury; the only dispute was the magnitude of the injury that ultimately resulted. In *Nabozny*, the plaintiff, John Nabozny, was injured in a fight with the defendant, Kevin Burkhardt. Burkhardt approached Nabozny multiple times to try to start an altercation, and Nabozny refused to rise to the bait. *Nabozny*, 461 Mich at 473. Eventually, Burkhardt grabbed Nabozny and tripped him to get him to the ground. *Id*. In this process, Burkhardt fractured Nabozny's ankle. Nabozny sued Burkhardt; Burkhardt's home insurer, Pioneer State Mutual Insurance Company, refused to defend or indemnify on the basis that Nabozny's fractured ankle was not an "accident," and thus not an "occurrence" under the terms of the home-owner's policy. (The definition of

"occurrence" in *Nabozny* is almost identical to the language at-issue in this case, and was simply defined as an "accident.")

After reviewing the testimony (a critical component not existing in the present (C)(8)-based appeal), this Court stated: "it is plain that in tripping someone to the ground in the course of a fight, Mr. Burkhardt reasonably should have expected the consequences of his acts because of the direct risk of harm created. . . . In other words, the injury did not result from an 'accident.'" *Id.* at 480-481. It was undisputed that Burkhardt subjectively intended to cause *some type* of bodily injury when he tripped Nabozny (maybe a mild bruise or cut), just not the magnitude of the injury that resulted (a fractured ankle).

In *Nabozny,* it was the direct relationship between risk created by the intentional act of tripping (bodily injury) and the result (the fractured ankle) that precluded what occurred from being an "accident" within the meaning of the policy. In *Masters,* it was the direct relationship between the risk created by the intentional act of setting a building on fire (a building on fire) and the result (other buildings catching fire) that precluded what occurred from being an "accident" within the meaning of the policy.

Here, there is no such direct relationship alleged. The intentional act at-issue is the Bobchicks providing minors with alcohol. The *direct risk* created by this intentional act is minors getting inebriated. Now, if this case involved alcohol poisoning or other adverse physical effects from imbibing alcohol, there would be an argument that the Bobchicks "created a direct risk of harm from which the consequences should reasonably have been expected." But this case is not about the direct sequela from

ingesting alcohol. Instead, the car crash is one step removed—the drunk minors then had to choose to drive, and then get involved in a car crash. While this sequence of events may be objectively *foreseeable*, and, thus, proximately caused by the Bobchicks, it was not a result of "a direct risk of harm" created by the Bobchicks' conduct. As Judge Gleicher pointed out in her dissent, knowingly furnishing alcohol to minors is a far cry from intentionally setting in motion a tragic automobile collision. (*Wells*, slip op. at *3 (GLEICHER, J., *dissenting*)).

IV. The Court of Appeals majority erred in affirming the Macomb Circuit Court's grant of summary disposition to appellee State Farm under MCR 2.116(C)(8).

This Court, in *El-Khalil*, emphasized that a motion under MCR 2.118(C)(8) only tests a claim's legal sufficiency. Here, under *McCarn,* the critical inquiry is whether the Bobchicks *subjectively intended* to cause the car crash. This subjective inquiry cannot be made on the pleadings alone; evidence was necessary. Plaintiff's Complaint alleged a claim upon which declaratory relief could be granted. Discovery was necessary to apply the facts of the case to the subjective analysis. The facts of each individual case must be considered in light of the subjective test in *McCarn* when the insurer claims that the act does not constitute an "occurrence" under the policy.

As discussed at-length in the prior sections, pleading proximate causation is not the equivalent of admitting subjective intent. The pleadings do not describe the Bobchicks' intentions or their subjective perceptions. As noted by Judge Gleicher, "'Knowingly' providing or furnishing alcohol is a far cry from intentionally setting in

motion a tragic automobile accident. Nothing in the pleadings suggests that the Bobchicks intended the result of their allegedly 'knowing' actions." (*Wells*, slip op. at *11 (GLEICHER, J., *dissenting*)). The Bobchicks' subjective beliefs and understandings are critical to whether the car crash was an "accident," and therefore an "occurrence," under the State Farm Policy. The pleadings do not address the Bobchicks' subjective beliefs, only that State Farm is liable for the judgment in the underlying case, which was based on social host liability. Accordingly, summary disposition was not appropriate under MCR 2.116(C)(8). The Court of Appeals and trial court erred by holding otherwise.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals majority erred by affirming summary disposition in State Farm's favor; this Court should adopt Judge Gleicher's well-reasoned and thorough opinion as its own, reverse the judgment of the Court of Appeals majority and the trial court, and remand this case to the trial court for further proceedings on the merits.

Respectfully submitted,

Fieger, Fieger, Kenney & Harrington, P.C.

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By: /s/ Sima G. Patel

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