

132179

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**FARMERS INSURANCE
EXCHANGE,**

Plaintiff/Appellee,

v

**FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,**

Defendant/Appellant.

Supreme Court File No. 132179

Court of Appeals File No. 259763

Lower Court File No. 03-21922-CK

**SUPPLEMENTAL BRIEF IN SUPPORT OF
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

Respectfully submitted,

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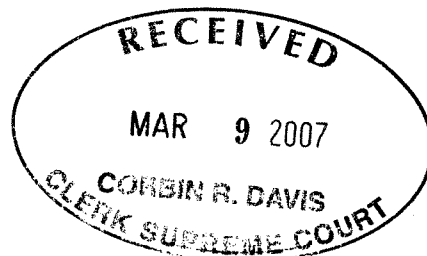


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SUPPLEMENTAL ARGUMENT

On January 19, 2007, this Court issued an order directing that this case be scheduled for oral argument on whether to grant the application for leave to appeal or take other peremptory action. Exhibit A, January 19, 2007 order¹. Also in that order, this Court requested supplemental briefs on the issue of “whether an injured motorcyclist may recover personal protection insurance benefits from the no-fault insurer of an owner of the vehicle involved in the accident but not listed in the owner’s policy, pursuant to MCL 500.3114(5)(a) and whether such a recovery is proper when the owner’s no-fault policy does not in terms afford such coverage or purports to exclude it.” In addition to the arguments already made in its application for leave to appeal, Defendant/ Appellant Farm Bureau General Insurance Company of Michigan submits these supplemental arguments.

I. THE CONTRACTUAL TERMS OF INSURANCE POLICY DETERMINE WHETHER OR NOT AN INSURER IS AN INSURER OF AN “OWNER” OR “OPERATOR” OF A MOTOR VEHICLE INVOLVED IN THE ACCIDENT.

This Court’s January 19, 2007 order raises the issue whether the contract of insurance determines if insurer-insured status is present in considering whether the priority provision of MCL 500.3114(5) applies when it says that an insurer of an owner of a motor vehicle involved in an accident has priority responsibility. This is important because there is no definition of “insurer” in the No-Fault Act definitions in MCL 500.3101. A similar issue of whether there was an “insurer” was recently addressed by the Court of Appeals in *Amerisure Ins Co v Coleman*, ___ Mich App ___; ___ NW2d ___; 2007 Mich App LEXIS

¹ This order was amended on January 23, 2007 to correct a clerical error. Exhibit B, January 23, 2007 order.

470 (2007)². In *Coleman*, the Court of Appeals made absolutely no reference to the within case, even though having two panel members in common, but took an entirely different approach altogether than was taken in the instant case. The Court correctly looked solely to whether the contract of insurance conferred insured status. The Court had to determine if the operator of an uninsured vehicle was “insured” for purposes of establishing priority for the claim of an injured passenger³ and thus considered the issue before this Court of insurer-insured status.

In determining priority under MCL 500.3114(4)(b)⁴, the Court of Appeals ruled in *Coleman* that the contract controlled for whether insured status was present:

MCL 500.3114(4)(b) provides that, when there are no insurers with a higher priority, a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim PIP benefits from “[t]he insurer of the operator of the vehicle occupied.” The term “insurer” is not defined in the no-fault act. Black’s Law Dictionary defines “insurer” as “[o]ne who agrees, by contract, to assume the risk of another’s

² For the Court’s convenience, a copy of the opinion is attached as Exhibit C.

³ In *Coleman*, Barnard Coleman, Tonya Coleman, and Reginald Coleman were all occupants in an uninsured motor vehicle owned by Agnes Fleming, Tonya Coleman’s mother. Tonya Coleman was insured under a no-fault policy issued by Titan Insurance Company for a vehicle not involved in the accident. Bernard Coleman was Tonya Coleman’s resident spouse while Reginald Coleman was a non-resident nephew of Barnard Coleman. As a result of the accident, Reginald Coleman file a PIP benefit claim with the Michigan Assigned Claims Facility (assigned to Amerisure Insurance Company), which in turn sought reimbursement from Titan Insurance Company.

⁴ MCL 500.3114(4)(b) provides:

Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

* * *

(b) The insurer of the operator of the vehicle occupied.

loss and to compensate for that loss.” Black’s Law Dictionary (7th ed). **Accordingly, we must determine whether, under the terms of the Titan insurance contract, it was the insurer of Bernard, who was the operator of the vehicle at the time of the accident.** [*Coleman*, slip opinion p 2 (emphasis added)]

In making this ruling, the Court of Appeals in footnote 1 of the opinion specifically rejected Titan’s argument that its policy was irrelevant in determining whether it “insured” the operator of the vehicle. Instead, it ruled that “...whether an insurance company is an ‘insurer’ of the operator of the vehicle necessarily depends on the language of the relevant insurance policy.” *Coleman*, slip opinion, p 3 fn 1. Then, in reviewing the terms of Titan’s policy regarding no-fault coverage, the Court of Appeals determined that the operator of the motor vehicle was an insured by virtue of the contract of Titan. Since Titan contracted to make Bernard an insured under its policy, then Titan was the “insurer” of the “operator” of the motor vehicle and, thus, the priority insurer.

However by contrast in the Farm Bureau’s policy in this case, Mr. Petiprin was not insured for this accident under the terms of Farm Bureau’s policy regarding no-fault benefits⁵. As a result, Farm Bureau is not the insurer of the owner under MCL 500.3114(5)(a).

⁵ Questions of insurance coverage are properly decided as a matter of law. See *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480, *reh den*, 447 Mich 1202; 525 NW2d 450 (1994). Further, in *Upjohn v New Hampshire Ins Co*, 438 Mich 197, 206-207; 476 NW2d 392 (1991), this Court set forth the controlling rules of interpretation regarding insurance contracts by stating that courts should not create an ambiguity where none exists, and “reject the temptation to rewrite the plain and unambiguous meaning of the policy under the guise of interpretation. Rather, we enforce the terms of the contract as written.” Therefore, an insurance policy must be enforced in accordance with its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62-63; 664 NW2d 776 (2004); *Rory v Continental Ins Co*, 473 Mich 457, 469-470; 703 NW2d 23 (2005). Further, each term in the contract is to be given meaning. *Reurink Bros v Maryland Cas Co*, 131 Mich App 139, 146-47; 345 NW2d 659 (1983).

This issue returns the Court to its decision in *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999). The rationale and ruling there also answers the argument of Appellee Farmers in its Supplemental Brief. There this Court repudiated a prior plurality opinion that had reached the result that there always had to be either owned or non-owned status to an automobile, and so if these definitions left another category of vehicles for which there was no coverage, the policy was ambiguous and the result was coverage. This Court held to the contrary in applying Farm Bureau's definition of "non-owned automobile", and ruled that coverage could be inapplicable where a regularly furnished vehicle was not a "non-owned automobile," even though it was also not an "owned automobile" either.

Important to this case, *Nikkel* construed the same language, which links person insured status to those same categories of owned and non-owned automobiles. It is thus controlling since it allows for a lack of insured status where an involved vehicle is neither owned nor non-owned by definition. Farm Bureau's policy still does not contractually confer insured status on a policyholder for an owned but uninsured vehicle.

1. There is no liability coverage for Mr. Petiprin for the uninsured van.

The fundamental coverage prescribed by the contract of insurance is liability coverage, also specified in not only the No-Fault Act in MCL 500.3131 and, MCL 500.3009(1), but also in the Financial Responsibility Act in MCL 257.520. However, while the latter statute prescribes owners and operator's policies, the definitions of the No-Fault Act do not define an insurer. Please see MCL 500.3101. The contract of insurance issued by Farm Bureau, however, does specify "Persons Insured" under Part I for liability

coverages.⁶ It does so separately with respect to owned automobiles, and, with respect to non-owned automobiles. (Exhibit D, form page 1). Insured status is directly linked to those two categories, absent which a person is not an insured.

A. Mr. Petiprin is not a person insured with respect to an owned automobile for this accident.

Importantly, an “owned automobile” is a defined term, linked to “persons insured”, that rules out insured status of John Petiprin (the named insured in the Farm Bureau policy who was also the co-owner of the uninsured vehicle involved in the collision with the injured motorcyclist whose claim is at issue). The reason is that being an “owned automobile” requires being within one of 4 sub-categories, none of which apply⁷.

⁶ Farm Bureau’s policy provides coverage for bodily injury liability and property damage liability as follows:

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called “bodily injury,” sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called “property damage”;

arising out of the ownership, maintenance or use of the **owned automobile** or any **non-owned automobile**.... (Exhibit D, Part I- Liability, Coverage A (emphasis added).)

⁷ An “owned automobile” is defined as:

(a) a private passenger, farm or utility **automobile described in this policy** for which a specific premium charge indicates that coverage is afforded,

(b) a trailer owned by the named insured,

(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided

(1) it replaces an owned automobile as defined in (a) above, or the company insures all private passenger, farm and utility automobiles owned by the named

The most salient omission is that the uninsured vehicle here is not an “owned automobile” triggering “person insured” status because it is not “a private passenger ... automobile described in this policy for which a specific premium charge indicates that coverage is afforded.” None of the other 3 categories apply, either (trailer, newly acquired vehicle replacing an insured vehicle, nor a temporary substitute auto).

As a result, Mr. Petiprin is contractually not a “person insured” “with respect to the owned automobile” for this accident because there is no defined “owned automobile” to make him a person insured. Thus, he is not an insured nor is Farm Bureau his insurer for the accident at issue notwithstanding his ownership interest in the uninsured involved vehicle.

B. Mr. Petiprin presents no “non-owned automobile” triggering person insured status.

Nor is Mr. Petiprin contractually a “person insured” with respect to a non-owned automobile because that is also a defined term, meaning “any automobile ... not owned by the named insured.” The accident van was co-owned by Mr. Petiprin.

Thus, Mr. Petiprin cannot be a person insured, nor is Farm Bureau his insurer, with respect to the owned but uninsured van involved in this accident, for the same reasons this Court applied in *Nikkel, supra*. There can be vehicles for which “person insured” status is

insured on the date of such acquisition and (2) the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or

(d) a temporary substitute automobile;

(Exhibit D, Part I- Liability, Definitions, “owned automobile” (Emphasis added).)

contractually ruled out by the definitions of owned and non-owned automobiles.

2. Mr. Petiprin is not an insured for Part II, Part III or Part IV coverages.

While these parts of the policy provide for optional and not statutorily mandated coverages, all are theoretical coverages applicable to other accidents, and other vehicles, and most apply to the same owned and non-owned automobiles whose definitions rule out liability coverage also. Irrespective, none apply to this accident. While they could be applied to Mr. Petiprin in other circumstances, that begs the question whether hypothetical coverage that is inapplicable is what is meant by an “insurer.” The contract clearly provides no applicable coverage to Mr. Petiprin for this accident and so Farm Bureau submits that it is not an “insurer” notwithstanding the theoretical possibility that Parts II, III, and IV could apply in other circumstances.

3. Person insured status is not contractually expanded for PIP coverages so as to confer “insured” status on a policyholder owning an uninsured vehicle.

It is circular reasoning to look to benefit entitlement for PIP as defining insurer status, since there is a distinction between being entitled to benefits and being an insured. As the Court of Appeals has twice recently recognized: “Under MCL 500.3114 and MCL 500.3115 an insurer may become liable for payment of PIP benefits to someone other than an insured.” *Budget Rent-A-Car System, Inc v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued February 1, 2007 (Docket No. 271703); *Mager v Lloyd-Lee*, unpublished per curiam opinion of the Court of Appeals, issued November 2, 2006 (Docket No. 264796)⁸.

Farm Bureau’s PIP coverages are consistent with this, defining benefits in terms of

⁸ A copy each is attached as Exhibit E.

eligible persons, not insureds, in its Michigan No-Fault Endorsement. Importantly, however, the PIP coverage here does not, by contract, extend any other contractual insured status either to Mr. Petiprin nor to provide coverage in this case to the injured claimant, Mr. Osentoski. Examined closely, the defined “insured motor vehicle” in the PIP coverages is not present where vehicles are not insured for liability coverages and thus there is no contractual extension of coverage to the uninsured accident vehicle:

The Company will pay, in accordance with Chapter 31 of Michigan’s Insurance Code, to or on behalf of each **eligible injured person** or his dependent survivors, personal protection benefits....

* * *

Section III: Definitions

* * *

“eligible injured person” means:

- A. the Named Insured or any relative who sustains bodily injury in an accident involving a motor vehicle;
- B. **any other person who sustains bodily injury;**
 - 1. while occupying the insured motor vehicle; or
 - 2. while not occupying any motor vehicle as a result of an accident **involving the insured motor vehicle;** or
 - 3. as the result of an accident **involving any other motor vehicle;**
 - a. **which is being operated by the Named Insured or a relative** and
 - b. to which the bodily injury liability insurance of the policy applies;

“insured motor vehicle” means a motor vehicle with respect to which:

- A. **the bodily injury and property damage liability insurance of the policy applies and for which a specific premium is charged and**

- B. the Named Insured is required to maintain security under Chapter 31 of Michigan's Insurance Code:

* * *

"Named Insured" means the person or organization named in the Declarations. (Exhibit D, emphasis added).

It is undisputed that the uninsured van was not listed as an "insured motor vehicle" on Mr. Petiprin's Farm Bureau policy, and neither Ms. Smith nor Mr. Osentoski were listed as a "named insured" on the policy. In addition, neither Ms. Smith nor Mr. Osentoski were a relative of Mr. Petiprin. It is further undisputed that Farm Bureau never received a premium from Mr. Petiprin to insure the van and that Mr. Petiprin was not operating the uninsured motor vehicle at the time of the motor vehicle accident. Pursuant to the terms of Farm Bureau's no-fault endorsement and the undisputed facts of this case, Farm Bureau did not contract to provide no-fault coverage and; therefore, under the holding in *Coleman*, contractually would not be the insurer of the "owner" of the motor vehicle.

II. THERE IS NEVER AN "INSURER" OF AN OWNER UNDER THE NO-FAULT ACT WHEN THE VEHICLE ITSELF IS NOT LISTED UNDER A POLICY SINCE THE OWNER IS NEVER ENTITLED TO NO-FAULT BENEFITS.

Even if this Court looks solely to the No-Fault Act to determine if an insurer is an "insurer" of an owner of a motor vehicle involved in an accident, there would necessarily be no "insurer" of an owner when the motor vehicle is not listed as an insured vehicle under a policy. This is seen in two provisions, one dealing with owner disqualification, and the other applicable to recovery against uninsured owners.

1. Uninsured owners are never insureds for PIP benefits.

MCL 500.3113(b) provides that "a person is not entitled to personal protection

insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:... (b) the person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.”

Under the provisions of MCL 500.3113(b), an owner of a vehicle not insured as required by MCL 500.3101 would never receive PIP benefits if the owner is injured in an accident involving that vehicle. MCL 500.3113(b) applies irrespectively of whether the owner has insurance required by MCL 500.3101 on any other of the owner’s vehicles.

Therefore, with respect to an uninsured motor vehicle, there is no “insurer” of the owner of that uninsured motor vehicle, since there is no insurance company that would ever be responsible for payment of no-fault benefits to that owner for any injuries suffered from an accident involving that vehicle⁹.

2. Uninsured vehicle recovery would be meaningless if another insured vehicle’s coverage is applicable to the accident vehicle.

The point that there is no “insurer” of an owner of an uninsured motor vehicle under the Act is also supported by other provisions of the No-Fault Act. MCL 500.3177(1) provides, in relevant part:

An insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the **owner or registrant of the uninsured motor vehicle** or from his or her estate. (...) **An uninsured motor vehicle for the purpose of this section is a motor vehicle with respect to which security required by sections 3101 and 3102 is not in effect at the time of the accident.** (Emphasis added.)

⁹ The Assigned Claims Facility would also not be an “insurer” under the provisions of MCL 500.3173.

Under MCL 500.3177(1), the Michigan legislature makes clear that under the No-Fault Act, motor vehicles must be specifically listed under a policy for there to be an insurer of the owner, (just like the Financial Responsibility Act does in MCL 257.520(b)). Otherwise, if an uninsured motor vehicle involved in the accident were treated as having coverage applicable under the rationale of the Court of Appeals in this case, (because the owner has other non-accident vehicles insured under a policy), then the definition of “uninsured motor vehicle” in MCL 500.3177(1) would make no sense. In that case, the motor vehicle would seemingly be “uninsured” yet have security applicable as required by sections 3101 and 3102 and in effect at the time of the accident.

Moreover, this scenario where insurers with no policy insuring the accident vehicle are exacted to pay benefits creates an incentive to have uninsured vehicles. The uninsured owner can't be said to be liable under Section 3177 if there was indeed the intent to have a policy on other vehicles apply to the accident vehicle under the priorities of Sections 3114 and 3115. Section 3177 clearly requires coverage on vehicles and, absent that, liability for benefits, which is inconsistent with saying that there is an insurer of the owner present where the vehicle is uninsured.

The Michigan Legislature's intent to have owners specifically list owned vehicles in their policies, is also supported by MCL 500.3135, dealing with tort liability. MCL 500.3135(3) provides, in relevant part, that “notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a **motor vehicle with respect to which the security required by section 3101 was in effect** is abolished except [under certain numerated exceptions].” Under the terms of MCL 500.3135(3), the motor vehicle must have the security required by section 3101 in order

for the owner to receive the benefit to limitations on tort liability. A motor vehicle can only have the required security if it is listed in a policy. If security for the owner for other vehicles was sufficient, and that was the intent of the Legislature, the Legislature would have provided that the owner merely needed to have security under MCL 500.3101 for any vehicle owned by the owner. However, the Michigan Legislature used language requiring that the actual accident vehicle must have the security, which requires that the vehicle be actually included under an insurance policy.

Therefore, in reading the No-Fault Act as a whole, the language used by the Michigan Legislature denotes that coverage must apply to the actual vehicle involved in the accident to say that there is an insurer of the owner. That coverage does not exist just because the owner may be insured for other vehicles as these statutes do not state that the security has to apply to any vehicle owned by the owner but rather the specific accident vehicle. Therefore, there is no “insurer” for an owner who fails to include an owned vehicle under an insurance policy even though other vehicles may be insured.

III. RESPONSE TO APPELLEE’S SUPPLEMENTAL BRIEF

In its supplemental brief, Farmers Insurance Exchange cites to policy provisions contained in Farm Bureau’s policy and admits that the accident vehicle is not an owned automobile or non-owned automobile. Farmers argues, however, that Farm Bureau’s policy does not further address the issue of coverage under the No-Fault Act of vehicles owned by the named insured but not insured under the policy. This argument fails to consider the holding and rationale of *Farm Bureau v Nikkel, supra*. Under *Nikkel*, where the owned and non-owned vehicle definitions fail to trigger coverage, there is no person

insured, and logically no insurer status.

If Farmers is suggesting that Farm Bureau must otherwise have contractual provisions that exclude insured status besides just having definitions that state the conditions under which a person is a person insured by contract, there are two flaws. First, that is the position that existed in a plurality opinion previously but was “repudiated” in *Nikkel*. Second, it is in error because the burden of establishing coverage is always on the claimant, and unless the scope of coverage is established, there is nothing further to consider with respect to exclusions. See *Allstate v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989) (“[T]he proper construction of a contract requires that we first determine whether coverage exists, and then whether an exclusion precludes coverage.”); *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995) (The insuring agreement provision can limit coverage even before any exclusion became applicable and the claimant has the burden of proving coverage.) See also *McKenzie v Auto Club Ins Ass’n*, 458 Mich 214, 226-227; 580 NW2d 424 (1998) (applying *Heniser* to no-fault provisions of an insurance policy).

Since Farmers has admitted in its supplemental brief that the accident vehicle does not meet the definitions of “owned automobile” or “non-owned automobile,” Farm Bureau’s policy does not provide any coverage for the accident vehicle or the resulting damages, thus providing further support that Farm Bureau was not an “insurer” of the owner of the motor vehicle involved in the accident.

CONCLUSION AND RELIEF REQUESTED

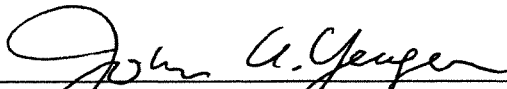
The contract of Farm Bureau does provide for persons insured. The owner of an uninsured vehicle is not one of them. Thus, Farmers as a claimant cannot meet the burden of showing that the scope of coverage by Farm Bureau extends to make Farm Bureau an insurer of the owner for this accident, with resulting priority liability of Farm Bureau under MCL 500.3114(5)(a) since Farm Bureau is not the insurer of the owner for this accident.

For all of the above reasons and for the reasons stated in its application for leave to appeal, Defendant Farm Bureau General Insurance Company respectfully requests the Court to peremptorily reverse or grant its application for leave to appeal and reverse the trial court's December 2, 2004 declaratory judgment and the Court of Appeals' opinion of August 17, 2006, and to direct entry of judgment in favor of Defendant.

Respectfully submitted,

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