

STATE OF MICHIGAN
IN THE SUPREME COURT

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellant.

Supreme Court
No. 132179

Court of Appeals
No. 259763

Tuscola County Circuit
Court No. 03-021922-CK

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INSURANCE INSTITUTE OF MICHIGAN'S
BRIEF AMICUS CURIAE

PROOF OF SERVICE

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STATEMENT OF INTEREST OF AMICUS CURIAE
INSURANCE INSTITUTE OF MICHIGAN

Presently pending before this Court in this matter is Defendant-Appellant Farm Bureau's (Farm Bureau General Insurance Company of Michigan's) application for leave to appeal from the Court of Appeals' unanimous published opinion that affirmed the trial court's grant of summary declaratory judgment in favor of Plaintiff-Appellee Farmers (Farmers Insurance Exchange) in this no-fault auto insurance "priority" dispute. Farmers Ins Exchange v Farm Bureau Gen Ins Co of Mich, 272 Mich App 106 (2006).

Farm Bureau's application challenges the Court of Appeals' construction of the pertinent no-fault statutory personal protection insurance (PIP) benefits insurer-priority provision, MCL 500.3114(5)(a): "The insurer of the owner or registrant of the motor vehicle involved in the accident." The Court of Appeals held that this provision places the responsibility for providing no-fault PIP benefits on Farm Bureau, the no-fault insurer of the owner of the accident vehicle, even though the specific accident vehicle was itself uninsured.

Farm Bureau would have this Court interpret and apply the at-issue statutory language to mean only "the insurer . . . of the motor vehicle involved in the accident." Farm Bureau would also have its policy or contract of insurance, which insures the owner of the accident vehicle but does not insure either the specific accident vehicle or the injured motorcyclist PIP claimant, take precedence over and control the meaning of the at-issue no-fault statutory language.

For all of the reasons stated in this brief, infra, the Insurance Institute of Michigan (“IIM”) respectfully disagrees with Farm Bureau’s application and believes that the Court of Appeals correctly decided the issue(s) in this case and correctly placed the no-fault PIP priority/liability on Farm Bureau rather than on Plaintiff-Appellee Farmers. The IIM believes that the Court of Appeals has given the statutory language its plain meaning, that the language cannot reasonably be interpreted as advocated by Farm Bureau, and that the Court of Appeals opinion is also consistent with each of the several precedents involving the meaning of the same or similar no-fault statutory language.

The IIM believes that most Michigan no-fault insurers, in their day to day handling of no-fault PIP benefit claims, including motorcycle injury claims, typically are familiar with, and already accustomed to following, the rule of law set forth in the Court of Appeals opinion in this case. Moreover, most Michigan no-fault insurers well understand that, as recognized by the Court of Appeals opinion, the No-Fault Act controls the statutorily-required contents of a Michigan no-fault insurance policy, and not vice-versa.

In sum, the IIM believes that the Court of Appeals opinion in this case is correct and that the arguments advanced by Farm Bureau in this case should be rejected by this Court.

Amicus IIM is a government affairs and public information association. It represents more than 90 property/casualty insurance companies and related organizations operating in Michigan.

The IIM's purpose is to serve the Michigan insurance industry and the insurance consumer as a central focal point for educational, media, legislative and public information on insurance issues. In effect, the IIM serves as the official spokesperson for the property/casualty insurance industry in Michigan.

Consistent with its purpose, the IIM has an obvious interest in the correct construction and application of statutes pertaining to insurance, such as the statutes at issue in this case.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

- I. DID THE COURTS BELOW CORRECTLY APPLY THE CONTROLLING PROVISIONS OF THE NO-FAULT ACT IN PLACING THE PRIORITY OF RESPONSIBILITY FOR FURNISHING INJURED MOTORCYCLIST OSENTOSKI'S NO-FAULT PIP BENEFITS ON FARM BUREAU, THE NO-FAULT INSURER OF AN OWNER OF THE UNINSURED MOTOR VEHICLE INVOLVED IN THE ACCIDENT?

Amicus Curiae IIM answers, "Yes."

STATEMENT OF FACTS

The facts pertinent to this appellate matter are undisputed. That is evident from Appellant Farm Bureau's leave-application, Appellee Farmers' response, the Court of Appeals opinion,¹ and the fact that this case was decided by the trial court on the parties' cross-motions for MCR 2.116(C)(10) summary disposition.

This case is a no-fault automobile personal protection insurance (PIP) benefits "priority" dispute over which no-fault insurer, Appellant Farm Bureau or Appellee Farmers, bears the responsibility for furnishing the PIP benefits in this matter.

This case arises out of a July 17, 2002, motor vehicle accident involving a collision between a motorcycle and a 2000 Chevy van.

Rory Osentoski was the operator of the motorcycle. As owner/registrant of the motorcycle, he carried the proper insurance on that vehicle as required by MCL 500.3103(1).

The operator of the van was Lynn Smith. She and her boyfriend, John Petiprin, were co-owners (co-titleholders) of the van. The van was not insured. Lynn Smith did not have any no-fault insurance. John Petiprin did have a no-fault insurance policy from Appellant Farm Bureau. The Farm Bureau policy insured another vehicle that was owned by Mr. Petiprin, a 1986 Ford F250 pick-up truck; but the Farm Bureau policy did not

¹ Farmers Ins Exchange v Farm Bureau Gen Ins Co of Mich, 272 Mich App 106 (2006).

insure the accident vehicle, i.e., the Smith-Petiprin co-owned van, supra.

Motorcyclist Osentoski was injured in the collision with the Smith-Petiprin uninsured van. For his no-fault PIP benefits, he applied to the Assigned Claims Facility, which assigned his claim to Appellee Farmers, pursuant to MCL 500.3171, et seq.

Plaintiff-Appellee Farmers brought the instant action in the Tuscola County Circuit Court against Defendant-Appellant Farm Bureau, seeking a determination that Mr. Osentoski's no-fault PIP benefits were the responsibility of Farm Bureau, not Farmers.

It was Farmers' position that, as the assigned claims insurer, Farmers was the insurer of last resort or lowest priority, and that Farm Bureau bore the higher/highest priority here, pursuant to MCL 500.3114(5)(a), because Farm Bureau is "the [no-fault] insurer of the owner [John Petiprin] or registrant of the [uninsured] motor vehicle [van] involved in the accident."

It was Farm Bureau's position that it was not in the priority chain at all for this accident because its insurance policy on the Petiprin-owned non-involved vehicle did not insure the admittedly uninsured Smith-Petiprin co-owned accident van, and therefore MCL 500.3114(5)(a) did not render Farm Bureau liable because Farm Bureau was not "the insurer of . . . the motor vehicle involved in the accident."

Pursuant to the parties' cross-motions for MCR 2.116(C)(10) summary disposition, the trial court placed the priority of responsibility for motorcyclist Osentoski's PIPs on Farm Bureau and ordered Farm Bureau to pay those benefits and reimburse Farmers

appropriately.

Farm Bureau appealed of right the trial court's no-fault insurance priority decision, supra, but the Court of Appeals (Judges Whitbeck, Zahra, and Donofrio) affirmed in a unanimous published opinion. Farmers Ins Exchange v Farm Bureau Gen Ins Co of Mich, 272 Mich App 106 (2006).

Presently pending before this Court is Farm Bureau's application for leave to appeal the decisions below in this matter. By order dated January 19, 2007, this Court directed that this matter be scheduled for oral arguments, and this Court invited the submission of both supplemental briefs and briefs amicus curiae.

Pursuant to this Court's invitation, supra, the Insurance Institute of Michigan (IIM) submits this brief amicus curiae.

ARGUMENT

I. THE COURTS BELOW CORRECTLY APPLIED THE CONTROLLING PROVISIONS OF THE NO-FAULT ACT IN PLACING THE PRIORITY OF RESPONSIBILITY FOR FURNISHING INJURED MOTORCYCLIST OSENTOSKI'S NO-FAULT PIP BENEFITS ON FARM BUREAU, THE NO-FAULT INSURER OF AN OWNER OF THE UNINSURED MOTOR VEHICLE INVOLVED IN THE ACCIDENT.

A. Introduction

There is no dispute in this case that motorcyclist Rory Osentoski was injured in a motor vehicle accident that renders him MCL 500.3105 qualified to claim MCL 500.3107 no-fault PIP benefits, and that there is no MCL 500.3113 bar or disqualifying impediment to his PIP entitlement. In other words, Mr. Osentoski is entitled to his PIP benefits. The question is “from whom?”

In answering that question, there is also no dispute that the priority of insurer responsibility for providing Mr. Osentoski's PIPs lies either with Plaintiff-Appellee Farmers, the MCL 500.3171, et seq., assigned claims insurer, or Defendant-Appellant Farm Bureau, the no-fault insurer of one of the owners of the uninsured accident motor vehicle. As the assigned claims insurer, Farmers is the no-fault insurer of last resort or lower/lowest priority. Cason v Auto-Owners Ins Co, 181 Mich App 600, 610 (1989); Hunt v Citizens Ins Co, 183 Mich App 660, 665 (1990), lv den 437 Mich 881 (1990); Spencer v Citizens Ins Co, 239 Mich App 291, 301 (2000).

Therefore, there is no possibility that there will be no insurer available to provide

PIP benefits to Mr. Osentoski. If Farm Bureau is in the priority chain of liable no-fault insurers, Farm Bureau owes the PIP benefits; if Farm Bureau is not liable, the priority/liability falls upon Farmers.

Accordingly, the issue in dispute in this matter is whether Appellant Farm Bureau was properly held liable in this matter for Mr. Osentoski's PIP benefits. This Court's recent order of January 19, 2007, framed the issue:

“At oral argument, the parties shall address 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.”

B. Standard of Review

There is absolutely no doubt that the issue in this case, decided below by summary disposition and on the basis of the No-Fault Act, is a purely legal issue that is subject to this Court's de novo review. As noted by the Court of Appeals opinion in this case:

“This Court reviews de novo a trial court's decision on a motion for summary disposition, Collins v Comerica Bank, 468 Mich 628, 631; 664 NW2d 713 (2003), and questions of statutory interpretation, Griffith v State Farm Mut Automobile Ins Co, 472 Mich 521, 525-526; 697 NW2d 895 (2005).”

Farmers Ins Exchange v Farm Bureau Gen Ins Co of Mich, 272 Mich App 106, 110 (2006).

C. Analysis

In disputing its liability in this matter, Appellant Farm Bureau's 2-issue application appears to be questioning 2 different legal aspects of the decisions below. First, Farm Bureau doesn't understand how it could be held liable for paying Mr. Osentoski's PIPs when he is not a named insured on, and is literally a stranger to, the Farm Bureau insurance policy (see Farm Bureau's Issue/Argument II). Second, Farm Bureau doesn't understand how it can be held liable in this matter pursuant to its insurance policy that undisputedly does not insure the specific accident vehicle and simply on the basis that that uninsured vehicle is owned by the Farm Bureau policy's named insured (see Farm Bureau's Issue/Argument I and II).

Both of Appellant Farm Bureau's questions, supra, are specifically answered by Michigan's No-Fault Insurance Act, MCL 500.3101, et seq.

When, as here, a motorcycle operator is injured in a collision with a motor vehicle, the injured motorcyclist typically takes his PIPs from the no-fault insurer of the owner or operator of the motor vehicle involved in the accident. The No-Fault Act treats this as an explicit exception to the norm (of looking first to one's own no-fault insurer), and places the highest PIP priorities on the insurer of the owner or operator of the motor vehicle involved in the accident:

“(1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of

either domiciled in the same household, if the injury arises from a motor vehicle accident . . .”

MCL 500.3114(1) [emphasis added].

“(5) A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

(b) The insurer of the operator of the motor vehicle involved in the accident.

(c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.

(d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.”

MCL 500.3114(5).

This special statutory treatment or allocation of responsibility for an injured motorcyclist’s PIPs is not only clear but by now well-known and well-established. See, e.g., Farmers, supra, 272 Mich App, at 111-112; Auto Club Ins Ass’n v State Auto Mut Ins Co, 258 Mich App 328, 332 (2003).

The PIP liability in this case was placed on Farm Bureau because, in this motorcyclist PIP benefits situation, Farm Bureau fits the first/highest priority criteria of MCL 500.3114(5)(a), supra:

“(a) The insurer of the owner or registrant of the motor vehicle involved in the accident.”

Farmers, supra, 272 Mich App, at 111-116, 119.

Farm Bureau undisputedly is John Petiprin's no-fault "insurer," as Farm Bureau insures a Petiprin-owned vehicle that was not involved in this accident. Mr. Petiprin is also undisputedly a co-"owner" of the specific motor vehicle (albeit uninsured) that was involved in this accident. Therefore, even though Farm Bureau is not the insurer of the accident vehicle, it is "the insurer of the owner or registrant of the motor vehicle involved in the accident" (emphasis added).

Farm Bureau's application repeatedly expresses its utter surprise, disbelief, and dismay that it could somehow be deemed the MCL 500.3114(5)(a) "insurer of the owner or registrant of the motor vehicle involved in the accident," when the specific motor vehicle involved in the accident, although owned by its insured, was itself uninsured.

The specific statutory word configuration at issue here ("the insurer of the owner or registrant . . .") appears repeatedly, in strikingly similar if not identical form, in several places throughout the priority provisions of the No-Fault Act. See MCL 500.3114(4); MCL 500.3114(5); and MCL 500.3115(1).

Contrary to the incredulity expressed in Farm Bureau's application, the Court of Appeals opinion in the instant case is no less than the fourth published Court of Appeals precedent uniformly and consistently interpreting the at-issue or similar statutory language to mean the no-fault insurer of the owner of the accident vehicle even when the insurer does not insure the specific (uninsured) accident vehicle. Farmers, supra, 272 Mich App, at 114-115; Amerisure Ins Co v Auto-Owners Ins Co, 262 Mich App 10, 15 n

3 (2004); Pioneer State Mut Ins Co v Titan Ins Co, 252 Mich App 330, 336-337 (2002); Allstate Ins Co v Sentry Ins Co, 191 Mich App 66 (1991). Farm Bureau cites no contrary authority. This has been the “established” interpretation of this type of no-fault statutory language for more than 15 years.

But let’s not rest on precedent alone when we can textually (re-)examine the language for ourselves. In order to support Farm Bureau’s contention that the at-issue statutory language [“the insurer of the owner or registrant of the motor vehicle involved in the accident”] must be read to mean “the insurer . . . of the motor vehicle involved in the accident,” we must: engage in bad grammar; do violence to the statute by omitting a substantial amount of significant language, supra; and violate the rule of last antecedent. See, e.g., the Court of Appeals analysis in this case, Farmers, supra, 272 Mich App, at 113-114.

But the acid test for dissolving any theoretical possibility or plausibility in Farm Bureau’s interpretation of this statute consists of simply considering the parallel statutory language of the very next sentence/provision of § 3114(5), supra, which states the second priority as “(b) The insurer of the operator of the motor vehicle involved in the accident” [emphasis added]. Assuming that we get to this second priority level only because the vehicle operator is not the vehicle owner or registrant, what operator is going to have an insurance policy on a vehicle that he does not own? In other words, we can’t argue under § 3114(5)(a) that “the insurer of the owner” must be the insurer “of the motor vehicle

involved in the accident” unless we can also argue under § 3114(5)(b) that “the insurer of the operator” must be the insurer “of the motor vehicle involved in the accident” [emphasis added]. And we can’t argue that. The latter will never be the case. Obviously, you go to priority level two (the insurer of the operator) precisely because the owner of the motor vehicle involved in the accident has no motor vehicle insurance and therefore no insurer. If Farm Bureau could be “the insurer of the operator” of the “motor vehicle involved in the accident” without being the insurer of the operated accident vehicle, why couldn’t Farm Bureau also be “the insurer of the owner” of the “motor vehicle involved in the accident” without specifically insuring that owned accident vehicle?

Ultimately, the fundamental problem with Farm Bureau’s application is that the No-Fault Act is applicable, clear, controlling, and contrary to Farm Bureau’s arguments.

It is not surprising that Farm Bureau might want to rely on and exalt its own insurance contract language over the No-Fault Act. It is also not surprising that Farm Bureau might question the No-Fault Act’s choice of placement of no-fault insurer priority of responsibility in motorcycle injury situations – i.e., by putting the motorcyclist’s PIPs, where possible, on the insurer of the motor vehicle owner or operator and without regard to whether the involved accident motor vehicle is itself insured.

But the No-Fault Act trumps non-conforming no-fault insurance policy language, and the Legislature, not an insurance company, gets to make the public policy decisions in the field of statutorily-controlled compulsory no-fault automobile insurance. See, e.g.,

MCL 500.3101(1), (3); Cruz v State Farm Mut Automobile Ins Co, 466 Mich 588, 590, 598, 601 (2002).

This is what the Court of Appeals specifically held in this case:

“Defendant also asserts that it did not contract for the risk imposed on it by the trial court because defendant’s policy did not cover Osentoski or the motor vehicle involved in the accident. The issue before us is one of statutory interpretation and not contractual interpretation. Defendant is precluded from arguing that its contract for insurance coverage prevails over the requirements of MCL 500.3114(5)(a). See State Farm Mut Automobile Ins Co v Ruuska, 412 Mich 321, 336-337; 314 NW2d 184 (1982).”

Farmers, supra, 272 Mich App, at 116-117.

In State Farm v Enterprise Leasing, 452 Mich 25, 27-28, 40 (1996), a case dealing specifically with mandatory motor vehicle liability coverage, this Court held that the insurer-priority provisions of the No-Fault Act cannot be superseded, re-ordered, or shifted by contract.

In support of its argument that its insurance policy/contract controls, over the No-Fault Act, as to who or what is insured, Farm Bureau cites to a very recent published priority decision of the Court of Appeals (almost the same panel as in this case).

Amerisure Ins Co v Coleman, ___ Mich App ___ (No. 270948; rel’d 2/27/07). However, the Coleman opinion does not stand for Farm Bureau’s insurance policy supremacy argument. Indeed, the Court in Coleman relied on the insurance policy precisely because the Court believed that the No-Fault Act itself does not provide the answer to who is an

“insurer” of the operator of an occupied vehicle for purposes of MCL 500.3114(4)(b).

The Coleman opinion reached the correct result but mistakenly overlooked a controlling provision of the No-Fault Act, MCL 500.3114(1), quoted supra, which would have compelled the same result as reliance on policy definitional language.

The No-Fault Act does not expressly “define” the word “insurer” as in “insurer of the owner” or “insurer of the operator,” but the No-Fault Act in effect defines “insurer” by dictating precisely whom an MCL 500.3101(1) no-fault insurance policy “applies to” (i.e., insures).

According to MCL 500.3114(1), a no-fault policy’s PIP coverage “applies to” the named insured, that person’s spouse, and a household relative of either:

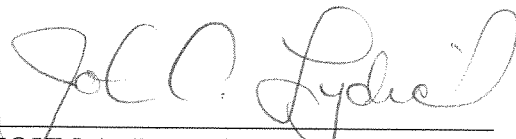
“(1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person’s spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident . . .”

Clearly, a Michigan no-fault insurance policy applies or functions on a household basis, Underhill v Safeco Ins Co, 407 Mich 175, 191 (1979), and the statutorily-enumerated persons, supra, would all call the issuer of the applicable no-fault policy their no-fault “insurer.” And, based on the analysis, supra, a no-fault policy may not conflict with or subtract from that statutory list of PIP insureds.

RELIEF

For all of the foregoing reasons, Amicus Curiae IIM requests that this Honorable Court deny Farm Bureau's application for leave to appeal or, upon full review, affirm the decision of the Court of Appeals.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John A. Lydick", written over a horizontal line.

JOHN A. LYDICK (P23330)

Attorney for Amicus Curiae

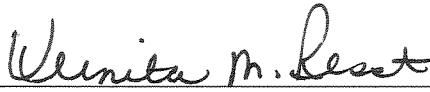
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by placing said documents in the United States mail, properly addressed, with full postage prepaid thereon.



VERNITA M. RESST

Subscribed and sworn to before me
this 28th day of March, 2007



AARON S. MARLOW, Notary Public
Wayne County, MI
My Commission Expires: 12/14/11

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March 28, 2007

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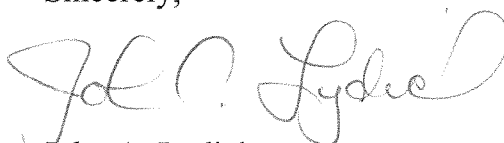
Re: Farmers Ins Exchange v Farm Bureau Gen Ins Co of Mich
Supreme Court No. 132179
Court of Appeals No. 259763
Tuscola County Circuit Court No. 03-021922-CK

Dear Sir/Madam:

Enclosed for filing in the above-referenced matter are an original and seven copies of Insurance Institute of Michigan's Brief Amicus Curiae and Proof of Service.

Your attention to this matter is appreciated.

Sincerely,


John A. Lydick

JAL:vr
Enclosures

cc: Joseph S. Mierzejewski, Esq.
John A. Yeager, Esq.
(with enclosures)

