# STATE OF MICHIGAN

# COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

FARMLAND MUTUAL INSURANCE COMPANY and GREAT WEST CASUALTY COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 27, 2005

No. 261717
Ingham Circuit Court
LC No. 04-000113-ND

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Plaintiff Department of Transportation (MDOT) brought suit seeking property protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*. In separate orders, the trial court granted summary disposition in favor of defendants Great West Casualty Company (hereinafter "Great West") and Farmland Mutual Insurance Company (hereinafter "Farmland") pursuant to MCR 2.116(C)(10). MDOT appeals by right, asserting that both orders were granted in error. We affirm.

## I. Facts and Proceedings

In January 2003, a Peterbilt semi-tractor pulling a 1977 TRMC tank-trailer carrying liquefied petroleum westbound on I-69 near Flint left the roadway and crashed onto the railroad tracks beneath the expressway. The accident severely damaged the expressway overpass and the railroad tracks, and several other businesses also suffered property damage as a result of the accident. Seymour Transport, Inc., an affiliate of Grammer Industries, Inc. (hereinafter, "Grammer/Seymour"), held title to the trailer, but had leased it to North Central Cooperative, L.L.C. (hereinafter "NCC"), in November 2002. NCC was also the title-holder for the tractor involved in the accident. NCC maintained insurance coverage for the tractor and trailer through Farmland. Grammer/Seymour also insured the trailer through Great West.

Farmland began paying claims for property damage resulting from the accident as they were submitted. Farmland asserts that prior to MDOT's submission of its claim for property damage resulting from the accident, it had already paid out $341,861.89. MDOT submitted a

claim to Farmland in excess of $1,000,000 for the damages it sustained. Farmland offered to pay MDOT $658,138.11, the amount it claimed remained under the policy limit of $1,000,000. MDOT believed the amount tendered was insufficient and filed the present action.

In its complaint, MDOT alleged that both Farmland and Great West were liable for reimbursement costs for separate motor vehicles. Specifically, MDOT asserted in its complaint that Farmland insured the semi-tractor, while Great West insured the tank trailer. After limited discovery, Farmland filed a motion for summary disposition under MCR 2.116(C)(10), arguing that since it insured NCC, it was responsible for $1,000,000 under its policy with NCC for the accident. Farmland also argued that it properly paid claims as they came in, and had no obligation to await for all claims to be submitted. Its motion did not discuss whether it insured both the tractor and trailer. In its response, MDOT argued that because it had a year in which to file a claim, Farmland had both a legal and equitable duty to refrain from making payments on any claims until the expiration of one year.

The trial court granted Farmland's motion, holding that there was no statutory requirement that it withhold payment on validly submitted claims, and that there was no duty to pay the claims on a pro-rata basis.

Thereafter, Great West filed a motion for summary disposition under MCR 2.116(C)(10), arguing that it was not the insurer of the trailer, because NCC had a long term lease on the trailer from Grammer/Seymour, making NCC the statutory owner of the trailer. Because NCC was the statutory owner of the trailer, Farmland, not Great West, was the responsible insurer. MDOT argued in response that Great West was the proper insurer because it had provided insurance for the trailer, and that the driver was a permissive user of the trailer, thus making Great West responsible. The trial court agreed with Great West, and therefore granted it summary disposition.

## II. Analysis

On appeal, MDOT first asserts that Farmland, as the insurer of both motor vehicles, is liable for up to $2,000,000 under the no-fault act, MCL 500.3101 *et seq*., because that act mandates that statutory owners of motor vehicles provide security in the form of insurance providing up to $1,000,000 per vehicle per accident for accidental property damage.

We conclude that MDOT failed to preserve this issue because it failed to raise it in the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We frequently will not address an issue neither raised nor decided by the trial court, on the basis that it is not properly preserved. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992); *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). Although we will at times decide a legal issue when the facts necessary to its resolution are properly before us, that is usually invoked when a party raises the issue to this Court as an alternative means to affirm. See

*Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991).

Here, MDOT never argued that Farmland was the responsible insurer for both motor vehicles, and thus liable for up to $1,000,000 for each vehicle. Instead, MDOT argues the exact opposite, i.e., that Farmland was the insurer of only one motor vehicle (Great West allegedly being responsible for the other), and that it failed to properly disburse the $1,000,000 it was liable for under the no-fault act. It was only after the trial court concluded that Great West was not the responsible insurer for the tank trailer that MDOT first argued that Farmland must therefore be liable for $1,000,000 for each motor vehicle. However, that was first made on appeal, not in the trial court. Because MDOT never raised this issue to the trial court, and because such an important issue should first be presented to and decided by the trial court, we hold that MDOT failed to preserve this issue.

MDOT next contends that, because Farmland knew or should have known that the $1,000,000 limit contained in MCL 500.3121(5) was insufficient to cover all of the property damage claims that would be made against it as a result of the accident, Farmland should have prorated its distribution of benefits. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

In *Babcock v Liedigk*, 198 Mich App 354, 361; 497 NW2d 590 (1993), we held that the question of whether insurance proceeds that are insufficient to satisfy claims should be prorated is a policy question to be left for the Legislature and, consequently such a rule should not be imposed by the judiciary. MDOT's attempts to distinguish *Babcock* by arguing that unlike *Babcock*, which involved an aggregate insurance fund covering a policy period, in this case potential claimants would not have had to wait more than one year for their claims to be resolved because of the one-year limitation period for asserting claims following an accident contained in MCL 500.3145(2). We disagree with MDOT's premise that the waiting period for the satisfaction of verified claims would necessarily be limited to one year under the pro rata distribution scheme plaintiff proposes. Rather, even if all potential claims for property damage are asserted within one year following an accident in accord with MCL 500.3145(2), a determination of the validity of some of those claims could take years if a trial (and possibly an appeal therefrom) were necessary to determine the validity of any claims. See *Babcock*, *supra* at 360-361. Therefore, the following reasoning set forth in *Babcock* is equally applicable here:

> [w]hile justice might be served in some cases by ensuring that all claimants got at least a portion of their claims paid instead of some claimants receiving all the insurance proceeds and others receiving none, justice would not be served for those claimants who had to patiently wait for the payment of their claims until it could be determined that no other potential claims existed, or if claims did exist, a determination of the validity and extent of those claims. [*Id*. at 361.]

Thus, payment of valid property protection claims could be subject to lengthy delays under a pro

rata distribution scheme, and under *Babcock* it is within the legislative, and not the judicial purview, to impose such a potential burden. *Id*. Accordingly, a pro rata distribution of the benefits was not required by statute or by case law, and because this case is not an equitable interpleader action, see *Moore v McDowell*, 54 Mich App 657, 660; 221 NW2d 446 (1974), we reject mandating a pro rata distribution of the insurance proceeds. Accordingly, the trial court correctly granted summary disposition in favor of Farmland.

MDOT also asserts that the trial court erred in granting summary disposition in favor of Great West because Great West's insurance policy covering the trailer extended coverage to Clingan as a permissive user of the trailer. We disagree. Interpretation of unambiguous language in an insurance contract is reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

MDOT asserts that although Grammer/Seymour was not required to insure the trailer it held title to for purposes of the no-fault act because it was not the "owner" or "registrant" of the trailer under the act, MCL 500.3101(2)(g)(ii); MCL 500.3101(2)(h), Grammer/Seymour chose to insure the trailer through Great West, and Great West filed a Michigan Certification Form pursuant to MCL 500.3163(1) subjecting Great West to the property protection insurance system set forth in the no-fault act. MCL 500.3163(1) states:

> An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.

MDOT contends that Clingan (the deceased driver of the tractor-trailer) was an "operator" of the trailer pursuant to MCL 500.3163(1) and that Clingan was an "insured" under Grammer/Seymour's policy with Great West.

The Great West insurance policy defines an "insured" as "[a]nyone else while using with your [Grammer/Seymour's] permission a covered 'auto' you own, hire or borrow." The policy defines the term "auto" as including a trailer. Great West does not deny that Clingan seems to fit within this definition of an "insured." However, Great West points out that the policy contains an exclusion for "truckers." The policy defines a "trucker" as "any person or organization engaged in the business of transporting property by 'auto' for hire." In relevant part, the trucker exclusion states:

> However, none of the following is an "insured":
>
> **a.** Any "trucker", or his or her agents or "employees", other than you and your "employees":
>
> * * *

> **(2)** If the "trucker" is not insured for hired "autos" under an "auto" liability insurance form that insures on a primary basis the owners of the "autos" and their agents and "employees" while the "autos" are being used exclusively in the "truckers" [sic] business and pursuant to operating rights granted to the "trucker" by a public authority.

Under this provision of the Great West policy, the trucker exclusion would not apply, and Clingan would be a permissive user of the trailer, if the NCC agreement with Farmland insures Grammer/Seymour on a primary basis.

Farmland's policy states that "insureds" include "[a]nyone else who is not otherwise excluded under paragraph (2) above and is liable for the conduct of an insured but only to the extent of that liability." We conclude that Grammer/Seymour is not an "insured" under this provision because Grammer/Seymour was not liable for any conduct of Farmland's "insureds." Vehicle related tort liability for accidental property damage has been abolished in Michigan. MCL 500.3135(3). Therefore, neither Clingan nor NCC could be held liable for the accidental property damage, and, accordingly, Grammer/Seymour could not be held liable under a vicarious liability theory. Thus, Clingan was not an insured under the Great West policy, and Great West cannot be held responsible for covering plaintiff's losses under the no-fault act.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette