

STATE OF MICHIGAN
IN THE SUPREME COURT

RENIE MANZELLA and JOSEPH
MANZELLA,

Plaintiffs-Appellees,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

and

ISRAEL MALDONADO MORADO,
FERNANDO OJEDA MIRANDA,
PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Defendants.

Supreme Court Docket No. _____

Court of Appeals Docket No. 271365

Lower Court Case No. 05-53501-NI

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DEFENDANT-APPELLANT'S REPLY TO PLAINTIFF-APPELLEES' BRIEF
OPPOSING APPLICATION FOR LEAVE TO APPEAL

FILED

MAY 18 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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ARGUMENT

I. THE POLICY AFFORDS STATE FARM WITH THE RIGHT TO DEFEND THE UNINSURED MOTORIST COVERAGE CLAIM ON THE ISSUES OF THE LEGAL LIABILITY FOR AND AMOUNT OF DAMAGES OWED BY THE UNINSURED MOTORIST, AND THE POLICY DOES AND COULD NOT AFFORD THE RIGHT TO DEFEND THE UNINSURED MOTORISTS IN THE LITIGATION.

Defendant-Appellee State Farm has fully addressed in its application what it respectfully submits are the errors in the majority opinion of the Michigan Court of Appeals. State Farm would respectfully take this opportunity to reply to the arguments advanced by plaintiffs-appellees in their opposing brief which they have entitled their “Brief on Appeal.”

Plaintiffs-Appellees assert at page 8 of their opposing brief that:

State Farm filed responsive pleadings but did not enter an appearance on behalf of defendants Morado and Miranda, *although the insurance contract gave State Farm the right to appear and defend the defendants* on the issues of their legal liability and the damages owed. -- i.e. the two questions that invoke uninsured coverage. [Emphasis added].

The policy does not provide for a “right” to defend the uninsured motorists, and this really is the crux of the dispute between the parties. The pertinent policy language provides:

3. If the *insured* files suit against the owner or driver of the *uninsured motor vehicle*, we have the right to defend on the issues of the legal liability of and the damages owed by such owner or driver.

We are not bound by any judgment against any person or organization obtained without our written consent.

Plaintiffs-Appellees admit in their opposing brief that the insured has no ability under the

policy to bring suit against the uninsured motorists alone.¹ This is a significant matter to keep in mind when construing paragraph 3 of the insurance contract, because it means that paragraph 3 is directed at a situation where both the uninsured motorists and State Farm are parties to the litigation. In those circumstances, State Farm has the “right to defend on the issues of the legal liability of and the damages owed by such owner or driver,” and State Farm is not “bound by any judgment against any person or organization obtained without our written consent.”

Plaintiffs-Appellees endeavor to construe this language so as to afford State Farm the right to actually defend the uninsured motorists, baldly asserting at pages 13-14 of their brief that, “This provision clearly is intended to allow State Farm Insurance to enter an appearance and defend on behalf of the uninsured owner or driver.” If such were the intention, it could have been clearly so expressed by a simply statement that State Farm may defend the uninsured owner or motorist in the litigation. That is not what the policy says; rather, it expressly provides that State Farm may defend the claim for uninsured motorists benefits “on the issues” of the legal liability of and the damages owed by the uninsured motorists and that State Farm is not bound by any judgment entered against the uninsured motorists or against any other “person or organization obtained without our written consent.” In the present case, State Farm defended plaintiff-appellees’ claim for uninsured motorist coverage on the issues of the liability of and the damages owed by the uninsured motorists and obtained summary disposition on the issue of liability. The default entered against the uninsured motorists by plaintiffs-appellees was taken

¹ Plaintiffs-Appellees state:

The policy requires that, to invoke uninsured coverage, that the insured must sue both, unless the owner or driver are unknown. In this case, because the owner and driver were known, plaintiff-appellees had no other option but to sue both, regardless of whether or not the owner or driver could be located. (Brief on Appeal, p 13).

without State Farm's consent, and the parties have contractually agreed that State Farm is not bound by that default or the default judgment which was entered after State Farm was dismissed from the action.

In support of their bald assertion that paragraph 3 of the policy was intended to allow State Farm to enter an appearance and to defend the uninsured motorists, plaintiffs-appellees cite *Coil Anodizers v Wolverine*, 120 Mich App 118, 123; 327 NW2d 416 (1982), citing *Giffels v Home Ins Co*, 19 Mich App 146; 172 NW2d 540 (1969) for the proposition that "right to defend clauses in insurance policies are intended to prohibit an insured from voluntarily settling claims without the insurer's consent." (Plaintiffs-Appellees Brief on Appeal, p 14). They then reason that paragraph 3 must be a "right to defend" the party provision, because the uninsured motorists and the insurer are adverse to the plaintiff-appellee insured's interests in the action for uninsured motorists benefits, and "Certainly, State Farm cannot be suggesting that it needed to reserve the right to defend itself in a lawsuit for breach of contract." (*Id.*)

Ironically, the case and plaintiffs-appellees' position in this case proves precisely why paragraph 3 is needed as it is written. State Farm cannot defend the uninsured motorists. State Farm has no contractual relationship with those parties, they are not "insureds" under its policy, and on the facts of this case, State Farm cannot even contact them to obtain their permission to have an attorney represent them. Paragraph 3 constitutes the agreement between plaintiffs-appellees and their insurer, State Farm, that the insurer may defend plaintiffs-appellees' claim for uninsured motorist benefits on the issues of the legal liability of and damages owed by the uninsured motorists. The parties also agreed in the very same paragraph of the policy that State Farm will not be "bound by any judgment against any person or organization obtained without our written consent." Paragraph 3 is designed to address precisely this case, as it allows State

Farm to defend on the merits of plaintiffs-appellees' claim, while allowing plaintiffs-appellees to default the uninsured motorists without any binding effect on the uninsured motorist claim.

Plaintiffs-Appellees respond to State Farm's assertion that the parties to the uninsured motorist policy are unable and lack authority to bind the uninsured motorists to an agreement that the uninsured motorists shall be defended by State Farm by asserting that the consent of the uninsured motorists is not needed.² Plaintiffs-Appellees argue:

State Farm needs no contractual agreement with the uninsured motorist parties to defend the claims brought in the litigation. This is analogous to a third party liability situation, where a claimant sues a permissive driver of a motor vehicle owned and insured by another party. In that scenario there is no contractual relationship between the insurer and the permissive driver, yet the insurer similarly has the right to defend on the issues of liability under the insurance contract, without obtaining the written consent of the permissive driver.

(Plaintiffs-Appellees Brief on Appeal, pp 14-15).

Plaintiffs-Appellees' reliance upon what they view as the analogous circumstance of the permissive motor vehicle operator is profoundly misguided. Contrary to plaintiffs-appellees' assertion, there is in fact a contractual relationship between the insurer and the permissive operator, as all permissive operators are "insureds" under all motor vehicle liability policies issued in the State of Michigan, and one need only check one's own policy to see that this is the case. As an "insured" under the policy, the permissive driver has rights under the policy of

² This is a somewhat shocking statement for an attorney to make, as it supposes an ability on the part of an attorney to represent a client without the client's knowledge and without the client's consent. To make matters worse, at the conclusion of the litigation, the entity footing the bill for the defense will be seeking to recover any judgment rendered in the action. Yet, informed consent to that arrangement is not required?

insurance, and the insurer has corresponding rights including the right to defend the insured. If the permissive operator refuses the insurer's defense, the permissive driver also forfeits the benefits of the policy including indemnification from any judgment entered against him in the underlying litigation.

An uninsured motorist, on the other hand, is not an insured under insurance policy. He or she has no rights under the policy, and if a judgment is rendered against the insurer in favor of the insured on the uninsured motorist coverage claim, the insurer may seek recovery of a like amount from the uninsured motorist. This is vastly different from the circumstances of a permissive operator who is an insured under the insurance policy and whose status as an insured protects the permissive operator from a subrogation claim by the insurer if the policy is required to pay an adverse judgment. There is an ever pending, ever present conflict of interest between the uninsured motorist and the insurer which is not present in the permissive operator situation. While the latter may not have purchased the policy, he or she has the full rights and obligations of an insured under the policy.

II. CONCLUSION

The uninsured motorist coverage clearly and unequivocally identifies two questions which must be decided before the insured is entitled to uninsured motorist benefits.

Deciding Fault and Amount

Two questions must be decided by agreement between the *insured* and us:

1. Is the *insured* legally entitled to collect damages from the owner or driver of the *uninsured motor vehicle*; and
2. If so, in what amount?

If there is no agreement on these two questions between the insurer and the insured, the policy then provides for voluntary arbitration. However, if as in the present case, both the insurer and the insured are unable to agree on arbitration, the policy provides for litigation between State Farm and the insured.

2. If either party does not consent to arbitrate these questions or if the arbitrators selected by each party cannot agree on the third arbitrator, the *insured* shall:
 - a. file a lawsuit in the proper court against the owner or driver of the *uninsured motor vehicle and us*, or if such owner or driver is unknown, against us; and
 - b. upon filing, immediately give us copies of the summons and complaint filed by the *insured* in that action, and
 - c. secure a judgment in that action. The judgment must be the final result of an actual trial and an appeal, if an appeal is taken.
3. If the *insured* files suit against the owner or driver of the *uninsured motor vehicle*, we have the right to defend on the issues of the legal liability of and the damages owed by such owner or driver.

We are not bound by any judgment against any person or organization obtained without our written consent.
[Emphasis added.]

Significantly, the policy clearly and unequivocally requires the insured to file suit against State Farm. If the owner or driver of the uninsured motor vehicle are known, then the insured is required to “file a lawsuit in the proper court against the owner or driver of the *uninsured motor vehicle and us*,” If such owner or driver is not known, then the insured is required to file suit

against State Farm alone.

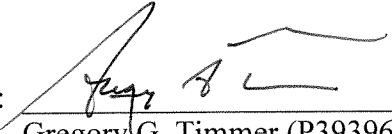
Paragraph 3 of the policy, quoted immediately above, applies to those situations where the owner or driver of the uninsured motor vehicle is known, and the insured files suit against the owner or driver and State Farm. Paragraph 3 specifies that State Farm has the “right to defend on the issues of the legal liability of and the damages owed by such owner or driver.” The policy does not afford State Farm with the right to defend the owner or driver of the uninsured motor vehicle; rather, the policy affords State Farm with the right to defend itself in the coverage litigation on the “issues” of the legal liability of and the damages owed by such owner or driver. The circuit court correctly allowed State Farm to defend itself on the issues of the legal liability of and the damages owed by defendants Morado and Miranda, and the circuit court correctly determined that neither of these defendants was legally liable to plaintiffs-appellees. The Michigan Court of Appeals erred in holding that State Farm must either defend the uninsured defendants or become bound by a default entered as a result of the uninsured defendants’ failure to answer the complaint. The insurance policy does not provide State Farm with a right to defend the uninsured defendants. Rather, the policy affords State Farm with the right to “defend on the issues” of the legal liability of the uninsured motorists and the damages owed by the uninsured motorists.

RELIEF REQUESTED

Defendant-Appellant State Farm Mutual Automobile Insurance Company respectfully request this Honorable Supreme Court reverse the January 4, 2007 opinion of the Michigan Court of Appeals and to affirm the order entered on May 22, 2006 which granted summary disposition in favor of defendant-appellant. Alternatively, defendant-appellant respectfully requests that leave to appeal be granted.

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Dated: May 18, 2007

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