

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. 133620

Court of Appeals Docket No. 271365

Lower Court Case No. 05-53501-NI

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

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2

MICHIGAN SUPREME COURT

TABLE OF CONTENTS

ARGUMENT 1

 I. INTRODUCTION. 1

 II. THE POLICY EXPRESSLY AFFORDS STATE FARM WITH
 THE RIGHT TO LITIGATE THE ISSUE OF THE UNINSURED
 MOTORIST’S LEGAL LIABILITY TO PLAINTIFF ON THE
 FACTS OF THE ACCIDENT AND TO HAVE THOSE ISSUES
 RESOLVED BY A COURT OF COMPETENT JURISDICTION. 1

RELIEF REQUESTED..... 4

ARGUMENT

I. INTRODUCTION.

On October 19, 2007, this Court issued an order directing the Clerk to schedule oral argument on whether to grant the application or to take other preemptory action in the case. The order directed the parties to address the dissenting opinion in the Court of Appeals at oral argument and afforded the parties with the opportunity to file supplemental briefs with this Court.

Defendant-Appellant State Farm Mutual Automobile Insurance Company now respectfully submits this supplemental brief which addresses the dissenting opinion of Judge O'Connell in the Court of Appeals.

II. THE POLICY EXPRESSLY AFFORDS STATE FARM WITH THE RIGHT TO LITIGATE THE ISSUE OF THE UNINSURED MOTORIST'S LEGAL LIABILITY TO PLAINTIFF ON THE FACTS OF THE ACCIDENT AND TO HAVE THOSE ISSUES RESOLVED BY A COURT OF COMPETENT JURISDICTION.

In his dissenting opinion, Judge O'Connell focused upon the policy requirement that the insured, in order to recover under the uninsured motorist coverage, must be "legally entitled" to collect damages from the uninsured motorist. Judge O'Connell noted that, under a subheading titled "Deciding Fault and Amount," the policy provides:

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?

(Dissenting Opinion, p 3) (Exhibit A).

Judge O'Connell also pointed out that, "Critically, the policy includes language governing the circumstance of the parties not reaching an agreement." *Id.* The parties may consent to having these questions decided according to the arbitration procedure set forth in the insurance policy. Or, if either party refuses to consent to arbitration (or the two arbitrators selected by the parties are unable to agree on a third arbitrator), then the insured is required to file a lawsuit against the owner or driver of the uninsured vehicle and the insurer, defendant-appellant State Farm. *Id.*

This series of progressive stages toward resolution of the two questions (agreement, consent to arbitration, and ultimately litigation) "means that the policy language contemplates the parties being required to attempt to agree on whether the insured is 'legally entitled to collect damages from the owner or driver of the uninsured motor vehicle' *before* any legal proceedings are instituted against defendant or an uninsured party." *Id.* The fact that the policy required the parties to first attempt to agree before any legal proceedings were instituted was significant to Judge O'Connell, because it suggested that the policy required that the insured be legally entitled to collect damages from the uninsured party because of the actual facts of the accident.

This must be considered as meaning that the policy provides coverage only if the insured is "legally entitled" to collect damages from an uninsured owner or driver as a result of the actual facts of the accident, i.e., if the uninsured party would be liable to the insured for breaching a duty in connection with the occurrence of the accident. In this regard, prior to the initiation of legal proceedings, an insured could be legally entitled to recover from an uninsured owner or driver only based on an actual breach of duty related to the accident.

Id.

Having concluded that the policy provides coverage only if the uninsured party actually breached a duty related to the accident, Judge O'Connell reasoned that a default and default judgment are insufficient to establish that the uninsured party breached a duty related to the

accident and could not, therefore, meet the policy requirement that the insured was legally entitled to recover from the uninsured party.

A default judgment entered during legal proceedings solely as a result of the uninsured party's failure to participate in the case, while it might impose legal liability on the uninsured party for that failure, would not mean that the insured was legally entitled to recover damages from the uninsured party at the critical time before legal proceedings were instituted. Thus, considering the relevant policy language as a whole, *Royal Prop Group, supra* at 715, plaintiffs' position that entry of the default and default judgment in this case established defendant's obligation to provide uninsured motorist coverage must be rejected.

Id.

State Farm is in complete agreement with the conclusions reached by Judge O'Connell in his dissenting opinion. The question of whether the "insured is legally entitled to collect damages from the owner or driver of the uninsured motor vehicle" does turn on the "actual facts of the accident," and the proper inquiry is whether the uninsured party breached a duty related to the accident which resulted in the injuries and damages sustained by the insured. Moreover, these conclusions do flow directly from the policy language found under the subheading "Deciding Fault and Amount," and the fact that the parties are first required to reach agreement on the question of whether "the insured is legally entitled to collect damages from the owner or driver of the uninsured motor vehicle" directly supports these conclusions. If the parties are required to reach agreement on this question prior to litigation, it necessarily follows that the question is to be resolved by the existing facts of the accident and the actions of those involved in the accident.

State Farm would add, however, that the dissenting judge's conclusions are also supported by other language contained in the policy. The ultimate conclusion of the dissenting judges is that the insurance policy requires that the question of whether the insured is "legally

entitled” to recover damages from the uninsured party be answered based upon judicial consideration of the actual facts of the accident and the conduct of the parties to the accident. This conclusion is also supported by, as set forth in defendant State Farm’s application, other provisions in the policy.

Subparagraph 2(c) of the policy requires that the insured, after filing a lawsuit and serving the summons and complaint, obtain a judgment in the action which “must be the final result of an actual trial and an appeal, if an appeal is taken.” Subparagraph 3, provides State Farm with the “right to defend on the issues of the legal liability of and the damages owed by such owner or driver,” and this same subparagraph provides that State Farm is “not bound by any judgment against any person or organization obtain without our written consent.”

The inescapable conclusion is that under the uninsured motorist policy, when litigation is the only option (because the parties are unable to reach agreement on these two questions and arbitration is also unworkable), State Farm has the right to actually litigate the issue of the legal liability of the uninsured motorist to the insured based upon the facts of the accident and to have that issue resolved by a court of competent jurisdiction. The policy expressly precludes the insured from resolving that issue by settlement with the uninsured party. The policy expressly prevents the insured from initiating litigation against solely the uninsured party, but expressly requires that State Farm be named a party to any action whether the uninsured party is known or unknown. And the policy expressly provides that State Farm may defend against the insured’s claims in that action on the “issues” of “the legal liability of and the damages owed by such owner or driver.”

RELIEF REQUESTED

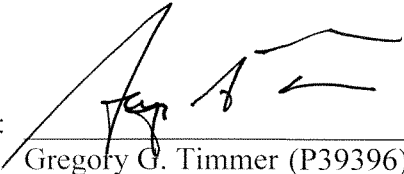
Defendant-Appellant State Farm Mutual Automobile Insurance Company respectfully

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: November 15, 2007

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