

STATE OF MICHIGAN
IN THE SUPREME COURT

RENIE MANZELLA and JOSEPH
MANZELLA,

Plaintiff-Appellees,

Supreme Court # _____

v

COA#: 271365

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

LC#: 05-53501-NI

Defendant-Appellants,

and

ISRAEL MALDONADO MORADO,
FERNANDO OJEDA MIRANDA,
PROGRESSIVE MICHIGAN INSURANCE CO.,

Defendants.

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant State Farm Mutual Automobile Insurance Company appeals from an unpublished, per curiam opinion of the Michigan Court of Appeals, dated January 4, 2007, and a Order of the Michigan Court of Appeals, dated February 27, 2007, denying defendant-appellant's motion for reconsideration. Copies of the opinion and the order are attached as Exhibit A and B, respectively, to the Application for Leave to Appeal.

Plaintiff-Appellee respectfully requests the Supreme Court to deny the Application for Leave to Appeal, as the application fails to address why the issues presented fall within the grounds for granting leave to appeal, as required by MCR 7.302(B).

STATEMENT OF QUESTIONS PRESENTED

1. **DID THE ENTRY OF A DEFAULT AND DEFAULT JUDGMENT LEGALLY ENTITLE PLAINTIFF-APPELLEES TO COLLECT DAMAGES FROM THE OWNER AND DRIVER OF THE UNINSURED MOTOR VEHICLE?**

The Trial Court answered: No.

Court of Appeals answered: Yes.

Defendant-Appellant answers: No.

Plaintiffs-Appellees answer: Yes.

STATEMENT OF FACTS

This case arises out of a motor vehicle accident that occurred on October 4, 2003 on South Center Street (County Road 687) near its intersection with Interstate 94 near Hartford, Van Buren County, Michigan. The accident occurred when plaintiff-appellee, Renie Manzella, while operating a motor vehicle insured by defendant-appellant, State Farm Mutual Automobile Insurance Company (hereafter State Farm), crested the overpass of County Road 687 at Interstate 94 and was faced with a sudden emergency. After she crested the hill, a rear-end motor vehicle accident occurred directly ahead of her in the roadway. There was no clear evidence of an accident, as there were no brake lights or clear indications of the low impact collision. When Renie Manzella realized that there was an accident, she was unable to avoid a second collision. Witness Richard Van Loon observed the accident and testified that there was less than 5 seconds between the impacts. Diana Muirhead, a cashier at a gas station facing the accident scene, testified that she heard only one impact but observed that there were three vehicles involved. A police investigation resulted in a reports assessing hazardous actions to both the driver of the second (Morado) and third (Manzella) vehicles. The first vehicle in the line was assigned no responsibility for the collision. As a result of the accident, Renie Manzella sustained serious physical injuries.

The vehicle that rear-ended the first vehicle in the line of traffic was driven by Israel Morado and owned by Fernando Miranda. (Complaint ¶¶ 7,8). The vehicle and driver were uninsured. (*Id.*, at ¶ 21). However, at the time of the accident, plaintiff-appellee, Renie Manzella was driving a motor vehicle that was insured by defendant-appellant, State Farm, under a policy that included an uninsured motorist coverage endorsement. (*Id.* at ¶ 7; Answer ¶ 7). Under the

terms of the contract, plaintiff-appellees' entitlement to uninsured motorist coverage benefits is centered on the following provisions:

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?

Pursuant to the contract, if the parties were unable to agree on the two questions, the issues could be decided by arbitration – if both parties consented to arbitrate. Plaintiff-appellees asked defendant-appellant to consent to arbitration, but State Farm's adjuster refused. The refusal to arbitrate invoked the following contract provisions:

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.

This lawsuit was initiated by filing a Complaint on April 14, 2005, stated in two counts:

- Count I is a residual tort negligence case against Israel Morado and Fernando Miranda, the owner and driver of the uninsured motor vehicle. The allegations state that the driver of the vehicle was negligent; that his negligence was a proximate cause of the accident and injuries to Renie Manzella; that Renie Manzella has no comparative fault for the accident; and that her injuries amount to a serious impairment of body function. It alleges the owner's liability under MCL 257.401.
- Count II is a claim against State Farm for declaratory relief concerning uninsured motorist coverage and claims entitlement to uninsured motorist benefits by establishing a legal entitlement to recover damages against the owner and driver of an uninsured motor vehicle. .

The Complaint was served on the defendants, Israel Morado and Fernando Miranda, and defendant-appellant, State Farm. State Farm filed responsive pleadings; Morado and Miranda did not.

As to Count I, although the uninsured motorist coverage endorsement gave State Farm a contractual right to appear and defend the owner and driver on the issues of their legal liability and the damages owed – the two questions that invoke uninsured coverage – State Farm opted to not defend. Defaults were entered against defendants Morado and Miranda on October 12, 2005, under MCR 2.603(A)(1). Following a hearing and a presentation of evidence, a default judgment was entered against the owner and driver of the uninsured motor vehicle. Defendant-appellant was noticed and attended the hearing on the entry of the default judgment.

As to Count II, after a course of discovery, defendant-appellant State Farm moved for

partial summary disposition under MCR 2.116(C)(10) as to claims for noneconomic loss damages. Defendant-appellant argued that Renie Manzella's negligence was more than 50% the cause of the accident and her injuries. Plaintiff-appellees argued that the default against Morado and Miranda was an admission of negligence and causation, and "legally entitled" plaintiff-appellees to damages against the owner and driver of the uninsured motor vehicle, pursuant to the uninsured motorist provisions. After briefing and oral argument, the Court held that the default had no effect on the legal entitlement to uninsured motorist coverage. The trial court granted State Farm's motion.

Plaintiff filed a motion for reconsideration of the ruling under MCR 2.119, claiming that the Court's ruling was inconsistent with the admitted negligence of the defaulted owner and driver and with the uninsured motorist endorsement drafted by State Farm. The motion for consideration was also denied. Defendant-appellant then filed a second motion for summary disposition under MCR 2.116(C)(10), as to claims for excess economic loss damages, on the basis that the negligence of plaintiff-appellee, Renie Manzella, was the sole cause of the motor vehicle accident. The trial court granted State Farm's motion.

Plaintiff-Appellee appealed the trial court's ruling to the Michigan Court of Appeals. A majority opinion of the Court of Appeals held that a default judgment entered as against the owner and driver of an uninsured motor vehicle legally entitled the insured to damages for bodily injury sustained in a motor vehicle accident. (Majority Opinion, pg. 2). Defendant-Appellee moved for reconsideration of the ruling, claiming that the implication that State Farm elected not to defend the case created palpable error. The motion for reconsideration was denied.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

A party seeking leave to appeal under MCR 7.302 must address why the issues presented fall within the grounds for granting leave to appeal set forth in MCR 7.302(B). Defendant-Appellant has made no showing as to why its application meets any of the criteria for further appellate review.

II. THE ENTRY OF A DEFAULT AND DEFAULT JUDGMENT LEGALLY ENTITLED PLAINTIFF-APPELLEES TO COLLECT DAMAGES FROM THE OWNER AND DRIVER OF THE UNINSURED MOTOR VEHICLE, AS PROVIDED IN THE STATE FARM INSURANCE POLICY

At the time of the accident, the vehicle owned and operated by named defendants, Israel Morado and Fernando Miranda, was uninsured. However, the vehicle operated by Renie Manzella, was insured by State Farm with coverage for uninsured motorist benefits in the event that Renie Manzella was involved in a collision with an uninsured owner and driver. Under the contract, plaintiff-appellees are entitled to uninsured motorist coverage benefits subject to the following provision:

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?

Pursuant to the contract, if plaintiff-appellees and State Farm were unable to agree on the above two questions, arbitration was a means of resolving the issues, but only if both parties consented to arbitrate. Defendant-Appellant State Farm refused to arbitrate, thereby invoking the

following contract provisions:

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.

As required by the contract, when State Farm refused to arbitrate, plaintiff-appellees filed this lawsuit. 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. Defaults were entered against defendants Morado and Miranda on October 12, 2005. A Default Judgment was entered against defendants Morado and Miranda on June 12, 2006.

The State Farm policy does not define the phrase “legally entitled to collect damages”. When defendant-appellant filed motions for summary disposition on issues of negligence and causation pursuant to MCR 2.116(C)(10), plaintiff-appellees argued that State Farm’s contract language dictated the result of the motion and the lawsuit. Plaintiff-appellees argued that the

entry of the default “legally entitled” plaintiff-appellees to collect damages from the owner and driver of the uninsured motor vehicle. Nevertheless, the trial court entered orders granting motions for summary disposition.

Plaintiff-appellees submit that they are entitled to uninsured motorist coverage, by default, because they are “legally entitled to collect damages from the owner and driver of the uninsured motor vehicle” under the contract, despite any finding of negligence, comparative negligence and causation by the trial judge. This entitlement is confirmed by the fact that the trial judge entered a default judgment against defendants Morado and Miranda, despite his viewpoint of the facts. This calls into question the meaning of “legally entitled to collect damages” and whether the default and default judgment satisfy the contract provision.

In the context of uninsured motorist coverage, the policy language governs the coverage and is subject to the rules of contract interpretation. *Rohlman v Hawkeye-Security Insurance Co.*, 442 Mich 520; 502 NW2d 310 (1993). Insurance contracts are read as a whole and their terms are given their plain and ordinary meaning. *Auto-Owners Insurance Co. v Churchman*, 440 Mich 560, 489 NW2d 431 (1992). However, when an insurance contract is ambiguous in its wording, such that words may be reasonably understood in different ways, the Courts should generally construe the term against the contract drafter unless the drafter presents persuasive extrinsic evidence that the parties intended a contrary result. *Scott v Farmers Insurance Exchange*, 266 Mich App 557; 702 NW2d 681 (2005).

A default establishes a legal entitlement to an award of damages. As noted in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982):

In Michigan, it is an established principle that a default settles the question of liability as to well pleaded allegations and precludes the defaulting party from

litigating that issue.

See also, *American Central Corp. v Stevens Van Lines, Inc.*, 103 Mich App 507; 303 NW2d 234 (1981). In *Stevens*, the Court ruled that entry of a default is equivalent to an admission as to all well pled allegations. Similarly in this case, because plaintiff-appellees' Complaint alleged that defendants Morado and Miranda were negligent, that their negligence was a proximate cause of an accident that caused serious impairment of bodily function to Renie Manzella, the entry of the default settled the liability issue, establishing that plaintiff-appellees are "legally entitled to collect damages from the owner or driver of the uninsured motor vehicle".

Although there are no Michigan decision on point, the Supreme Court of Iowa addressed this issue in *American Family Mutual Insurance v Peterson*, 679 NW2d 571 (Iowa 2004). In *American Family*, Dawn Peterson was injured after being assaulted by her former live-in boyfriend, Adcock, while a passenger in a vehicle he was driving. Her most serious injuries occurred when Peterson jumped from the moving vehicle to escape the assaultive conduct. American Family insured the vehicle operated by Adcock and denied coverage under his policy, based on an intentional acts policy exclusion for coverage. Nevertheless, Peterson sued the assaultive ex-boyfriend and a default judgment was entered in her favor. Then, because Peterson had her own, separate insurance policy with American Family with an uninsured motorist endorsement, she sought to collect uninsured motorist compensation. American Family then filed for declaratory relief that it would not be required to honor the uninsured motorist coverage provisions relying on several contract interpretations.

In addressing Peterson's entitlement to uninsured coverages, one issue the Court in *American Family* was required to address was whether Peterson was "legally entitled to recover"

damages from the ex-boyfriend by virtue of her default judgment, as required in the uninsured endorsement. In deciding this issue in favor of Peterson, the Court in *American Family* held that Peterson was “legally entitled” to damages against the uninsured owner/driver, noting:

Consequently, the binding effect of the tort judgment at issue in this case is not necessarily governed by the doctrine of res judicata and collateral estoppel, but instead by the language of the contract between the parties. If an insured establishes legal entitlement to damages against an uninsured motorist, then the insurer is contractually obligated to pay the insured the damages as specified in the insurance policy. Clearly, “a valid judgment in a tort suit against the uninsured motorist” normally establishes legal entitlement to recover damages against the uninsured motorist. *Nationwide Mut. Ins. Co. v Webb*, 436 A.2d 465, 473 (Md. 1981); accord, *W. Am. Ins. Co. V. Popa*, 723 A.2d 1, 6-7 (Md. 1996) (reviewing cases defining the phrase “legally entitled to recovery”). Thus, an insured generally satisfies the “legally entitled to recover” condition of UM coverage when a valid judgment has been entered against the uninsured motorist.

In *American Family*, the Court held that the default judgment was a legal entitlement to collect damages from the owner and driver of the uninsured motor vehicle. Similarly in this case, plaintiff-appellees were legally entitled to collect damages from defendants Morado and Miranda by virtue of the default and default judgment.

Although plaintiff-appellees have not found any Michigan cases on point, two decisions involving uninsured motorist endorsements suggest that our courts have not seen it necessary to decide whether a default or default judgment establish a legal entitlement to damages from the owner and driver of the uninsured vehicle. In *Morley v Auto Club of Michigan*, 458 Mich 459; 581 NW2d 237 (1998), the issue was whether the plaintiff had filed a timely claim for uninsured motorist benefits against the defendant insurer after obtaining a default judgment against an uninsured motorist. Although the Auto Club policy at issue made a legal entitlement to a recovery a coverage issue, the decision focused only on the timing of plaintiff’s pursuit of coverage. Similarly, in *Bielski v. Wolverine, Ins. Co.*, 2 Mich App 501; 140 NW2d 772 (1956);

aff'd, 379 Mich 280; 150 NW2d 788 (1967), the plaintiff took a default judgment and pursued uninsured motorist benefits under a policy of insurance requiring Wolverine Insurance to pay “all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile”. *Id.*, at 283. The issue in *Bielski* was the alleged refusal of the defendant to arbitrate pursuant to the contract, and there was no challenge as to whether the default judgement established a legal entitlement to damages.

As noted in the majority opinion, uninsured motorist coverage is purely contractual. (Majority Opinion, pg. 1, citing *Rory v Continental Insurance Co.*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). When interpreting policy language, “an insurance contract should be read as a whole and meaning should be given to all terms.” *Rory, supra*. The contract must be construed to avoid a construction that would render any part of the contract surplusage or nugatory. (Majority Opinion pp. 1-2, citing *Rory, supra*).

In analyzing the portion of the uninsured motorist endorsement under the subheading “Deciding Fault and Amount”, the majority opinion of the Court of Appeals correctly points out that three subsections dictate how an uninsured motorist claim is processed when there is no agreement that an insured is legally entitled to collect damages from the owner or driver of the uninsured motor vehicle, and/or the amount. When that conflict occurs, subsection 1 under the subheading provides that parties may consent to arbitration. In this case, State Farm refused the plaintiff-appellees’ offer to arbitrate. This left plaintiff-appellees with only one choice, which is dictated by clauses 2 and 3 under the same subheading as follows:

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.

In light of the directive in *Rory, supra* that an insurance contract must be construed to give every word, clause and phrase effect, avoiding a construction that would render any part of the contract surplusage, subparagraphs 2 and 3 must be read together. To that end, paragraph 2 requires that where arbitration is not agreed to, the insured must file a lawsuit against both the owner or driver of the uninsured motor vehicle and State Farm Insurance. In this case plaintiff-appellees had no option to sue only the uninsured owner or driver, or conversely only State Farm. 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. This was a matter of contract.

Subsection 3 under the subheading the provides that, if the owner and driver of the uninsured vehicle are known and named in the lawsuit, State Farm reserves the right to defend on the legal liability of the owner or driver of the uninsured vehicle. This provision clearly is intended to allow State Farm Insurance to enter an appearance and defend on behalf of the

uninsured owner or driver. As noted in *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), right to defend clauses in insurance policies are intended to prohibit an insured from voluntarily settling claims without the insurer's consent. As stated in *Giffels*, "the purpose of such provisions is to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims, and there is no doubt as to the validity of such provisions". In this case, once defendant denied plaintiffs' claim for uninsured motorist benefits, plaintiff-appellees and defendant-appellant were in an adversarial positions, with State Farm aligned on the defense with the uninsured owner and driver of the vehicle at fault in the accident. Certainly, State Farm cannot be suggesting that it needed to reserve the right to defend itself in a lawsuit for breach of contract.

Defendant-appellant suggests that it has no right to defend the owner and driver because "plaintiff-appellees are in no position and wholly unable to grant State Farm the right to represent uninsured motorist in the litigation." However, the pending litigation is a matter of contract between plaintiff-appellees and defendant-appellant. In the context of that contractual arrangement, defendant-appellant required plaintiff-appellee to sue the known owner and driver and reserved the right to defend the claim. 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.

While defendant-appellant argues that its inability to obtain the cooperation of the uninsured owner or driver, or to contact the uninsured owner or driver, would affect its ability to represent their interests and could result in a default, it must also be noted that under the circumstances a default would be a harsh sanction under MCR 2.313. Further, before the trial court would consider possible sanctions under MCR 2.313, the insurer could request a protective order with good cause that the discovery not be allowed. MCR 2.302. In fact, defendant-appellant has made no showing of its efforts to locate the uninsured owner and driver in this case, and yet claimed to have sufficient evidence to defend the claim by filing a motion for summary disposition on the liability issue.

Finally, defendant-appellant argues that the contract provides the a judgment must be the final result of an actual trial. However, in finding that a default judgment satisfied this condition of the contract, the Court of Appeals stated: “The more sensible and consistent interpretation is that the judgment discussed in the contract may not be a consent judgment or other agreement between the parties”. Ironically, if defendant-appellant position on this point is correct, then the trial judge’s ruling on the summary disposition motion also failed to satisfy the “actual trial” requirement and would not be sufficient to resolve the uninsured motorist claim.

RELIEF REQUESTED

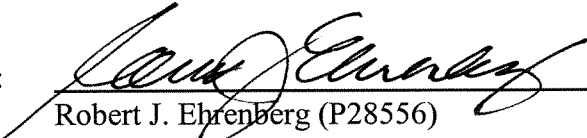
Plaintiff-Appellees request that the Supreme Court deny the Application for Leave to Appeal.

Respectfully Submitted,

Dated: 4-26-07

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