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STATE OF MICHIGAN

IN THE SUPREME COURT

WILLIE GRIFFIN,

Plaintiff-Appellant,

v

TRUMBULL INSURANCE COMPANY,
THE MICHIGAN ASSIGNED CLAIMS PLAN

Defendants-Appellees,

and

ALLSTATE INSURANCE COMPANY, ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, JOHN DOE INSURANCE COMPANY,

Defendants.

Supreme Court 162419

Court of Appeals No. 344272

Lower Court No. 17-006082-NF

/

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DEFENDANT-APPELLEE TRUMBULL INSURANCE COMPANY'S SUPPLEMENTAL BRIEF

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Introduction

This case asks the Court to consider the duty of an undisputed lower priority insurer in the event that the higher priority insurer is not identified until after the one year statutory notice period under MCL 500.3145(1) expired. Defendant Trumbull Insurance Company respectfully submits that the Court of Appeals panel correctly held that where the higher priority insurer was identifiable, the lower priority insurer could not be held liable, even if the higher priority insurer was not actually identified within the one year period of MCL 500.3145(1). The Court has next asked the parties to address whether, **if** the lower priority insurer can be held liable where the higher priority insurer has not been identified until after the expiration of the one year notice period of MCL 500.3145(1), the insured must prove that he or she exercised reasonable, due, or some other degree of diligence in searching for the higher priority insurer. Defendant Trumbull answers that the insured, as the owner of the claim, is required to diligently pursue it under existing legal principles, and this imposes a duty of reasonable or due diligence on the insured. A duty of diligent inquiry on the part of the insured reasonably requires the insured to seek to discover the identity of the higher priority insurer. A contrary rule would allow the insured to choose which insurer should be liable without regard to the statutory priority scheme. Finally, the Court has asked whether the Appellant in this case exercised the requisite degree of diligence in searching for the higher priority insurer. An examination of the facts will show that Plaintiff did not exercise due diligence to discover the identity of the higher priority insurer. Therefore, even if a lower priority insurer could be held liable when the higher priority insurer was not identified within the one year notice period under MCL 500.3145(1), that is not the correct result here, because Plaintiff could have identified the higher priority insurer if he had exercised reasonable diligence in seeking to discover the identity of that insurer.

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I. WHERE A HIGHER PRIORITY INSURER IS IDENTIFIABLE, A LOWER PRIORITY INSURER CANNOT BE HELD LIABLE NOTWITHSTANDING THAT THE HIGHER PRIORITY INSURER WAS NOT IDENTIFIED UNTIL AFTER THE ONE YEAR STATUTORY NOTICE PERIOD UNDER MCL 500.3145(1) EXPIRED.

The Court of Appeals majority correctly applied the prior Court of Appeals decision in *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004). In *Frierson*, the plaintiff was a motorcycle passenger who was injured in a no-contact accident, where the "involved" motor vehicle was never found, and the owner/operator of the motorcycle did not have insurance. Therefore, none of the insurers contemplated in MCL 500.3114(5) were in play. Under those circumstances, the Court held that MCL 500.3114(1) applied: "when an insurer that would be liable under one of the exceptions in MCL 500.3114(1) **cannot be identified,** the general rule applies and the injured party must look to her own insurer for personal protection insurance benefits." *Id.* at 738 (emphasis added). *Frierson* thus stands for the proposition that when the highest priority insurer is **unidentifiable**, the insurer next in priority may be liable. Applying the rule of *Frierson*, where, as in this case, the higher priority insurer is identifiable, the lower priority insurer is not liable.

This result is wholly consistent with the statutory scheme applicable to this case, which delineates a mandatory order of priority. Priority in this case is governed by MCL 500.3114(5), which mandates that a motorcyclist "**shall** claim personal protection insurance benefits from insurers in the . . . order of priority."

> (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. A personal injury insurance policy described in section 3103(2) 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

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> household, if the injury arises from a motorcycle accident. When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.
>
> (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 (emphasis added).[1] The Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive." *Fradco, Inc. v Dep't of Treasury,* 495 Mich 104, 114; 845 NW2d 81 (2014). Analyzing a different section of the No-Fault Act, this Court in *DeVillers v Auto Club Ins Assn,* 473 Mich 562; 702 NW2d 539 (2005), rejecting the rule of judicial tolling of the one-year-back rule of MCL 500.3145(1), emphasized that the statutory rule "must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have it written." *Id.* at 586. And, recognizing that the result could be harsh, the Court concluded: "the Legislature has made it so." *Id.* at 583. This Court "reaffirm[ed] the Legislature's prerogative to set policy and our long established commitment to the application of statutes according to their

[1] The statute quoted is that effective at the time of Plaintiff's accident on May 6, 2016.

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plain and unambiguous terms to preserve the Legislative prerogative." *Id.* at 581. The plain and unambiguous terms of MCL 500.3114(5) require a claimant to seek no fault benefits in the statutory order of priority. In this case, it is undisputed that the first insurer in the line of priority is Harleysville, which insured Pavex, the owner or registrant of the vehicle involved in the accident. (Harleysville Dec Page; Trumbull Appendix, p 34) (Certificate of Insurance; Trumbull Appendix, p 61) (Vehicle Registration; Trumbull Appendix, p 62). Pursuant to the mandatory directive of MCL 500.3114(5), this is the insurer to whom Plaintiff must look for personal protection insurance benefits.

Plaintiff relies heavily on the majority decision in *Borgess Medical Center v Resto,* 273 Mich App 558; 730 NW2d 738 (2007), vacated 482 Mich 946; 754 NW2d 321 (2008), for his argument that "a lower priority PIP insurer is required to pay PIP benefits regardless of whether it is possible that a higher priority PIP insurer existed." (Plaintiff's Supplemental Brief in Support of His Application for Leave to Appeal, p 5.) Even assuming the majority's opinion remains good law despite this Court's vacating it,[2] it does not suggest the result that Plaintiff urges. Critical to the decision in *Borgess* was the fact that the "claimant" in that case was a medical provider, and not the injured person. Noting that the provider under then-existing law could make a direct claim against a no-fault insurer, *Id.* at 569, the majority in *Borgess* distinguished the position of the provider from that of the injured person, who, according to the language of then-effective MCL 500.3114(4), "*shall claim* personal protection insurance benefits from insurers in the following order of priority . . . ." Id. at 571 (emphasis in original). In *Borgess*, the defendant insurer claimed that plaintiff provider must show that a higher priority insurer under MCL 500.3114(1)

[2] "A Court of Appeals decision that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding." *People v Giovannini,* 271 Mich App 409, 414; 722 NW2d 237 (2006).

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did not exist before resorting to the lower priority insurer specified by MCL 500.3114(4). The Court explained as follows:

> Defendant argues that plaintiff must disprove, as a part of its prima facie case, that the general rule stated in subsection 1, as incorporated by subsection 4, does not apply. Subsection 1 states the general rule of priority among no-fault insurers. MCL 500.3114(1); *Belcher v. Aetna Cas. & Surety Co.,* 409 Mich. 231, 240, 293 N.W.2d 594 (1980). Thus, "generally an injured person is required to seek compensation from his own no-fault insurer, regardless of whether that person's insured vehicle is involved in the accident." *Farmers Ins. Exch. v. AAA of Michigan,* 256 Mich.App. 691, 695, 671 N.W.2d 89 (2003). But MCL 500.3114(4), on which defendant heavily relies as the starting point of its argument, does not refer to a claimant such as plaintiff. Instead, subsection 4 plainly refers to, "a *person suffering accidental bodily injury* arising from a motor vehicle accident while an occupant of a motor vehicle *shall claim* personal protection insurance benefits from insurers in the following order of priority...." *Id.* (emphasis added). **Because plaintiff is a health-care provider and not a person injured in a motor vehicle accident, MCL 500.3114 does not by its plain language require a no-fault claimant like plaintiff to prove priority among no-fault insurers.**

Borgess, 273 Mich App at 571 (italics in original, underline and bold emphasis added). Where the "claimant" is the person injured in the motor vehicle accident, then the plain language of MCL 500.3114(5) [analogous to that of the pre-amendment MCL 500.3114(4)] does require him or her to pursue insurers in the mandatory order of priority. Thus, the majority opinion in *Borgess* supports Defendant's position rather than that of Plaintiff. If there is an identifiable higher priority insurer, then the lower priority insurer cannot be liable.

To the extent that the majority's opinion in *Borgess* does support Plaintiff's claim that "a lower priority insurer is required to pay PIP benefits regardless of whether it is possible that a higher priority PIP insurer existed, the case is plainly distinguishable, because, as Judge White noted in her concurring opinion (adopted by this Court, 482 Mich at 946), "**no insurer in higher priority was identified.**" *Borgess,* 273 Mich App at 585 (White, J., concurring) (emphasis added).

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In the instant case, Defendant Trumbull did identify a higher priority insurer, Harleysville, demonstrating that such insurer was identifiable, and thus distinguishing the instant case from *Borgess.*

Plaintiff places great emphasis on the rule that a priority dispute does not justify a delay in payment, citing cases such as *Kalin v DAIIE,* 112 Mich App 497; 316 NW2d 467 (1982) where the Court of Appeals upheld an award of attorney fees on the grounds that it was unreasonable for an insurer to delay payment because of a priority dispute. *Id.* at 509. The Court of Appeals in this case expressly held that there was no priority dispute because Plaintiff never made a claim to the undisputed highest priority insurer, Harleysville. *Griffin v Trumbull Insurance Company*, ___ Mich App ___; 964 NW2d 63, 70 (2020). Plaintiff did not appeal from the Court of Appeals' holding that this case does not involve a priority dispute.

The rule that a priority dispute does not justify a delay in payment of PIP benefits, which was recently cited by this Court in *Esurance Property & Casualty Ins Co v Michigan Assigned Claims Plan*, ___ Mich ___; ___ NW2d ___ (2021), 2021 WL 3161031 at *10, is inapposite to the instant case, because the instant case does not involve a priority dispute. This is true not only, as the Court of Appeals observed, because Plaintiff never made a claim to Harleysville, but also for another reason: **There is no dispute that Harleysville is the higher priority insurer.** This is not a case in which, for example, there is a factual issue about domicile which places two different insurers in possible priority. Instead, from the outset, it was known that the insurer of the commercial vehicle involved in the accident was the higher priority insurer. By essentially failing to make any effort to identify that insurer (an issue addressed *infra*) Plaintiff seeks to undermine the mandatory priority scheme dictated by the Legislature.

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Moreover, it is not the case that the rule adopted by the Court of Appeals would allow an insurer to stonewall or refuse to pay a valid claim with impunity. If an insurer fails to timely pay a claim after reasonable proof of loss has been provided on the grounds that a higher priority insurer exists – whether identified or not yet identified – and such insurer proves unidentifiable, then the lower priority insurer may be liable for attorney fees if its failure to pay was unreasonable, MCL 500.3148(1), as well as statutory interest for overdue benefits, MCL 500.3142(4). The attorney fee and interest provisions are robust protections for claimants under the No-Fault Act.

II. IF DEFENDANT TRUMBULL CAN BE HELD LIABLE FOR PERSONAL PROTECTION INSURANCE BENEFITS WHERE THE HIGHER PRIORITY INSURER WAS NOT IDENTIFIED UNTIL AFTER THE ONE YEAR STATUTORY NOTICE PERIOD OF MCL 500.3145(1) EXPIRED, TRUMBULL SHOULD ONLY BE HELD LIABLE WHERE PLAINTIFF HAS EXERCISED REASONABLE DILIGENCE IN SEARCHING FOR THE HIGHER PRIORITY INSURER.

Plaintiff maintains that it is the duty of the insurer, not the claimant, to identify the higher priority insurer. Plaintiff claims that this is so because Plaintiff paid a premium for insurance coverage (Plaintiff's Supplemental Brief in Support of Application for Leave to Appeal, p 7). But Plaintiff did not pay for coverage under any and all circumstances, but rather, for coverage pursuant to the No-Fault Act. Plaintiff also refers generally to contract provisions allegedly requiring insurers to investigate claims, to argue that lower priority insurers have a duty to identify higher priority insurers. But this Court has explained that where personal protection insurance benefits are concerned, the statute is the "rule book" for deciding issues involved in awarding such benefits. *Rohlman v Hawkeye-Security Ins Co,* 442 Mich 520, 524-525; 502 NW2d 310 (1993). Plaintiff's unsupported reference to a contractual duty to investigate claims in support of his argument that it is the insurer's duty to identify a higher priority insurer is therefore unpersuasive.

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Plaintiff's contention that it is the duty of the insurer and not the claimant to identify the higher priority insurer is contrary to the basic structure of the No-Fault Act, which requires *the injured person* to claim benefits in a specified order, perforce requiring him or her to identify the highest priority insurer. In language already quoted above, MCL 500.3114(5) expressly places on the injured person the duty to claim benefits in the order of priority: "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." MCL 500.3114(5)(a). The statute expressly places the duty on the injured person to claim benefits in the specified order of priority. As this Court aptly wrote in *Covenant Medical Center, Inc. v State Farm Mut Automobile Ins Co,* 500 Mich 191, 200; 895 NW2d 490 (2017), "[t]he foundation of any opinion interpreting a statutory provision is the parsing of the words of the pertinent act or statute under review." In *Covenant*, this Court rejected and overruled a series of cases holding that a no-fault provider could directly sue an insurer. This Court, in rejecting those cases, noted the absence from their analysis "of what language in the no-fault act creates a cause of action for healthcare providers against insurers." *Id.* at 204. Similarly absent from Plaintiff's analysis is any explanation of what language in the No-Fault Act could possibly create a duty on a lower priority insurer to identify insurers higher in the order of priority.

On the other hand, it is unambiguously clear in the language of MCL 500.3114(5) that it is the claimant, not the insurer, who is to ascertain the highest priority insurer in order to make a claim. As Judge Gleicher noted in her concurring opinion in *Titan Ins Co v American Country Ins Co,* 312 Mich App 291; 876 NW2d 853 (2015), "the no-fault act contemplates that claimants will

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utilize MCL 500.3114's priority system to determine where to seek coverage among no fault insurers." 312 Mich App at 304 (Gleicher, J., concurring).

In short, it is the injured person to whom the claim belongs, and who therefore has the duty, as Judge Gleicher observed, to examine MCL 500.3114's priority provisions to determine where to seek coverage among no-fault insurers. See *Estate of Brian Hales v Trowbridge,* 182 Mich App 55, 58; 451 NW2d 867 (1990) (benefits payable under No-Fault Act belong to the injured person).

But what degree of diligence, if any, must the injured party exert in order to comply with the statutory mandate to claim benefits in the statutory order of priority? There can be no dispute that the claim for no-fault benefits belongs to the injured person. As the owner of that claim, it is his or her duty to diligently pursue the claim. As Plaintiff notes, this Court observed in *Moll v Abbott Laboratories,* 444 Mich 1; 506 NW2d 816 (1993), that "[t]he law imposes on a plaintiff, armed with knowledge of an injury and its cause, **a duty to diligently pursue the resulting legal claim**." *Id.* at 29 (emphasis added). In *Moll*, this Court applied a standard of "reasonable diligence", holding that the statute of limitations for a pharmaceutical products liability action begins to run "when the plaintiff discovers or, through the exercise of **reasonable diligence,** should have discovered a possible cause of action." *Id*. at 5. See also *Bowman v St John Hosp & Med Ctr*, ___ Mich ___; ___ NW2d ___ (2021) 2021 WL 3266790, at *8, reh den 964 NW2d 33 (2021) (applying reasonable diligence standard). Defendant submits that the reasonable diligence standard, which this Court has already applied to the duty of a plaintiff to pursue his or her legal claim, is equally applicable in this no-fault action. Effectively synonymous with reasonable diligence, is due diligence, which is defined as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an

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obligation. — Also termed *reasonable diligence*; *common diligence.*" Black's Law Dictionary (11th ed. 2019).

Apart from existing law that imposes on a plaintiff a duty to diligently pursue his or her legal claim, no-fault policy also supports such a rule. Absent a duty of diligence on a claimant to identify the highest priority insurer, the priority standards that have been mandated by the Legislature would be meaningless. Effectively, a plaintiff would be able to choose, without regard to the mandatory priority scheme, which insurer should pay its claim. That was clearly not the intent of the Legislature when it directed that a person "shall claim personal protection insurance benefits from insurers in the . . . order of priority." MCL 500.3114(5).

III. PLAINTIFF DID NOT EXERCISE REASONABLE OR DUE DILIGENCE TO LOCATE THE HIGHER PRIORITY INSURER.

It is eminently clear that with reasonable or due diligence, Plaintiff, who was represented by counsel within five days of the accident, could have identified the higher priority insurer, Harleysville, within the one year notice period set forth in MCL 500.3145. First, Plaintiff knew beyond a doubt that there was a motor vehicle allegedly involved in the accident. There was never any question on this point. Therefore, Plaintiff/Plaintiff's counsel was well aware, for an entire year, that there should be an insurer higher in priority than Plaintiff's PIP insurer. It was Plaintiff's duty as the claimant to identify this higher priority insurer.

The police report contained the name, address and telephone number of the driver of the truck allegedly involved in the accident, Gilbert Gonzalez (Police Report; Plaintiff's Appendix, p 37).[3] Indeed, Plaintiff's counsel sent a letter to Gilbert Gonzalez on May 11, 2016, only five days after the accident (Letter; Trumbull Appendix, p 64). That letter, however, failed to even ask

[3] References to Plaintiff's Appendix are to the Appendix filed with Plaintiff's Application for Leave to Appeal to this Court.

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Mr. Gonzalez to contact Plaintiff's counsel. The letter to Mr. Gonzalez appears solely directed to informing Mr. Gonzalez of the possibility of a suit against him, as it advises him to turn the letter over to his agent or insurer handling liability coverage (*Id.*). The letter does not ask Mr. Gonzalez, who was plainly driving in the course of his employment, to identify either his employer or its insurer (*Id.*). Receiving no response to this letter (predictably, since no response was requested other than mention of awaiting "further word"), Plaintiff's counsel made no further effort to contact Mr. Gonzalez. Not until April 2, 2017, almost eleven months after the accident, did Plaintiff even attempt to ascertain Mr. Gonzalez' insurance coverage (not that of his employer) (Inquiry to MEA Research Services, Inc., Ltd.; Trumbull Appendix, pp 5, 7). Thus the entirety of Plaintiff's investigative efforts consisted of a letter to Mr. Gonzalez, which was not directed to discovering the insurer of the truck involved in the accident, and an inquiry into any insurance carried by Mr. Gonzalez, which also was not designed to uncover the insurer of the truck that he drove in the course of his employment. In short, Plaintiff made *no* efforts to discover the highest priority insurer, as set forth in MCL 500.3114(5): "[t]he insurer of the owner or registrant of the motor vehicle involved in the accident." Plaintiff then waited until April 21, 2017, only fifteen days short of one year after the accident, to finally file suit (Register of Actions; Trumbull Appendix, p 1).

Although it was not required to do so, Trumbull also undertook investigation to attempt to discover the higher priority insurer. Trumbull concluded its attempts in December 2016 (Trumbull Claim notes, Plaintiff's Appendix, p 103). At this time, only eight months after the May 2016 accident, four months remained in which Plaintiff could have located Mr. Gonzalez, learned the identity of his employer and its insurer, and timely filed suit against that insurer within the one year period allowed by MCL 500.3145(1). Indeed, had Plaintiff not waited until the eleventh hour

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to file suit, he could have used the subpoena power, exactly as Trumbull did once suit was filed, to depose Mr. Gonzalez and to discover the identity of his employer and of its insurer. There is no reason why Plaintiff needed to wait until the one year period was nearly expired to commence a lawsuit and exercise subpoena power over Mr. Gonzalez, whose address and telephone number were known at all times. There was nothing stopping Plaintiff – who was represented by counsel five days after the accident – from promptly instituting an action, and then issuing a subpoena to depose Mr. Gonzalez. In short order, Plaintiff could have learned, well within one year following the accident, that Mr. Gonzalez was driving his employer's vehicle, a vehicle that was registered to Pavex, and that Pavex was insured by Harleysville (Harleysville Dec Page; Trumbull Appendix, p 34) (Certificate of Insurance; Trumbull Appendix, p 61) (Registration; Trumbull Appendix, p 62).

Plaintiff may claim that, given Trumbull's unsuccessful investigation, Plaintiff also would have been unsuccessful had it made efforts to locate the higher priority insurer. This potential argument fails in the face of the undisputed fact that Trumbull successfully exercised subpoena power to compel the deposition of Mr. Gonzalez, as Plaintiff also could have done in a timely manner if it had not delayed in filing suit until the eve of the expiration of the one year period set forth in MCL 500.3145(1). But also, in another context, this Court has held that a party's contention that due diligence would have been fruitless does not excuse that party from actually exercising due diligence. See *People v Dye*, 431 Mich 58, n 22; 427 NW2d 501 (1988) (considering prosecution's duty to demonstrate diligent, good faith attempt to locate missing witnesses; "[t]he fact that an attempt may prove unsuccessful does not justify the prosecution's failure to make that attempt"). Thus, Plaintiff's (unwarranted) claim that any efforts to locate Mr. Gonzalez would

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have been futile does not excuse Plaintiff's failure to exercise **any** diligence at all in attempting to do so.

In summary, Plaintiff's efforts to locate the higher priority insurer were not only woefully inadequate, but virtually nonexistent. Plaintiff's counsel's letter to Mr. Gonzalez did not even ask him to identify his employer or its insurer, and the eleven-months-later inquiry regarding Mr. Gonzalez' insurance coverage would likewise not uncover, and of course did not uncover, the identity the insurer of the motor vehicle allegedly involved in the accident. Plaintiff's efforts do not satisfy the requirement of either reasonable diligence or due diligence.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellee Trumbull Insurance Company respectfully requests that this Honorable Court deny Plaintiff-Appellant's Application for Leave to Appeal.

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Dated: October 18, 2021

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