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STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIE GRIFFIN,

Plaintiff/Appellant,

v

TRUMBULL INSURANCE COMPANY,

Defendant/Appellee.

Supreme Court Case No. _____

Court of Appeals Case No. 344272

Wayne County Circuit Court
Case No. 17-006082-NF
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APPLICATION FOR LEAVE TO APPEAL
ON BEHALF OF PLAINTIFF/APPELLANT WILLIE GRIFFIN

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TABLE OF CONTENTS

Index of Authorities. iii

Jurisdiction iv

Opinion/Order Appealed From iv

Question Presented. v

Grounds for Appeal. v

Standard of Review. vii

Introduction. 1

Statement of Facts. 3

Argument. 13

I. LEAVE TO APPEAL SHOULD BE GRANTED IN THIS PIP BENEFITS CASE BECAUSE GRIFFIN WAS ENTITLED TO PIP BENEFITS FROM HIS OWN PIP INSURER, TRUMBULL, WHERE HIGHER PRIORITY COVERAGE COULD NOT BE IDENTIFIED UNTIL AFTER THE STATUTORY NOTICE PERIOD EXPIRED.

A. Trumbull was required to pay Griffin's claim for PIP benefits after its investigation failed to identify higher priority coverage for his claim. . . . 13

B. *Frierson* does not stand for the "binary" conclusion that PIP benefits must be paid only if higher priority PIP coverage cannot be identified. 16

C. The operative question is whether higher priority PIP coverage could have been identified before the statutory notice period expired. Here, both parties tried but failed to do so and thus PIP benefits were owed. 18

Conclusion. 19

Relief Requested. 20

RECEIVED by MSC 12/31/2020 1:59:22 PM

INDEX OF AUTHORITIES

Cases

Allstate Ins Co v Citizens Ins Co, 118 Mich App 594, 325 NW2d 505 (1982) 13-14

Bahri v IDS Prop Cas Ins Co, 308 Mich App 420, 864 NW2d 609 (2014).. ix

Borgess Med Center v Resto, 273 Mich App 558, 730 NW2d 738 (2007), vacated on other grounds, but affirmed, 482 Mich 946 (2008) viii

Darnell v Auto-Owners Ins Co, 142 Mich App 1, 369 NW2d 243 (1985) 13-14

Federal Kemper Ins Co v The Western Ins Co, 97 Mich App 204, 293 NW2d 765 (1980) 14

Frierson v West American Ins Co, 261 Mich App 732, 683 NW2d 695 (2004) . . . . . passim

Gyarmati v Bielfield, 245 Mich App 602, 629 NW2d 93, (2001) ix

Greene v A P Prods, Ltd, 475 Mich 502, 717 NW2d 855 (2006). ix

Levander v Home-Owners Ins Co, unpublished per curiam opinion of the Michigan Court of Appeals, Docket No. 320101 (June 18, 2015) 17

MEEMIC Ins Co v DTE Energy Co, 292 Mich App 278, 807 NW2d 407 (2011) ix

Sharper Image v Dep't of Treasury, 216 Mich App 698, 550 NW2d 596 (1996) ix

Shavers v Attorney General, 402 Mich 554, 578-579, 267 NW2d 72 (1978) 13

West v Gen Motors Corp, 469 Mich 177, 665 NW2d 468 (2003) ix

Statutes

MCL 500.3114(1) 15

MCL 500.3114(5). . . . . passim

MCL 500.3145(1) 17

RECEIVED by MSC 12/31/2020 1:59:22 PM

INDEX OF AUTHORITIES, Continued

Court Rules

MCR 2.116(C)(10) . . . . . ix, 8

MCR 2.116(I)(2) . . . . . ix, 8, 20

MCR 7.215(J). 2

MCR 7.303(B)(1). vii

MCR 7.305(C)(2). vii

MCR 7.305(B)(3) viii

MCR 7.305(B)(5)(a) viii

MCR 7.305(B)(5)(b) viii

RECEIVED by MSC 12/31/2020 1:59:22 PM

OPINION AND ORDERS APPEALED FROM

Plaintiff/Appellant, Willie Griffin, seeks leave to appeal from the Court of Appeals' non-unanimous, yet published, opinion that was issued on September 24, 2020. In that split 2-1 ruling, the Court of Appeals, via the majority's opinion, affirmed the trial court's decision to dismiss Griffin's claim for PIP benefits against Trumbull on the grounds that higher priority PIP coverage existed under MCL 500.3114(5) – even though Trumbull's own efforts to identify higher priority PIP coverage failed and it closed its investigation months before the statutory one-year notice period expired. Griffin moved for reconsideration, but his motion for reconsideration was denied by the Court of Appeals – again in a 2-1 ruling - that was issued on November 19, 2020.

RECEIVED by MSC 12/31/2020 1:59:22 PM

QUESTION PRESENTED

I. Whether leave to appeal should be granted because the lower courts wrongly held that PIP benefits were not owed by Griffin's PIP insurer, Trumbull, even though higher priority PIP coverage could not be identified until after the statutory notice period expired?

Plaintiff/Appellant says "Yes".

Defendant/Appellee says "No".

The trial court would say "No".

The COA majority would say "No".

The COA dissent would say "Yes".

This Court should say "Yes".

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JURISDICTION

This Court is entitled to exercise its jurisdiction to review a case after a decision in the Court of Appeals. MCR 7.303(B)(1). In a civil case, an application for leave to appeal must be filed with this Court within 42 days of the Court of Appeals' decision or its subsequent ruling on a timely motion for reconsideration. MCR 7.305(C)(2). Here, the Court of Appeals issued its published opinion on September 24, 2020. Griffin moved for reconsideration in a timely fashion, but his motion was denied on November 19, 2020. This application for leave to appeal was filed 42 days after reconsideration was denied. Accordingly, this Court has discretion to exercise its jurisdiction under MCR 7.303(B)(1).

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GROUNDS FOR APPEAL

The issue on appeal in this case "involves a legal principle of major significance to this state's jurisprudence" under MCR 7.305(B)(3) because the Court of Appeals' majority decision effectively negates the well-established rule in no-fault jurisprudence that requires PIP insurers to pay PIP benefits when higher priority PIP coverage cannot be identified and seek subrogation for PIP benefits paid if higher priority coverage is subsequently identified. Leave to appeal also should be granted under MCL 7.305(B)(5)(a) because the Court of Appeals' majority decision "is clearly erroneous and will cause material injustice" as it ensures that PIP carriers will refuse to pay PIP benefits whenever it is possible that higher priority PIP coverage may be subsequently identified, thus denying injured PIP claimants "prompt adequate reparations" for covered economic losses as intended under the No-Fault Act. Further, leave should be granted in this PIP benefits case because the majority decision "conflicts with a Supreme Court decision or another decision of the Court of Appeals". MCR 7.305(B)(5)(b). Specifically, the majority's decision conflicts with the holding in *Borgess Med Ctr v Resto*, 273 Mich App 558, 730 NW2d 738 (2007), vacated on other grounds, but affirmed, 482 Mich 946 (2008), which confirmed that it is unreasonable for PIP carriers to refuse to pay PIP benefits because higher priority coverage may be found.

RECEIVED by MSC 12/31/2020 1:59:22 PM

STANDARD OF REVIEW

A trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280, 807 NW2d 407 (2011). A motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423, 864 NW2d 609 (2014). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183, 665 NW2d 468 (2003). In reviewing a summary disposition motion under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507, 717 NW2d 855 (2006). Summary disposition for the opposing party is proper under MCR 2.116(I)(2) when it appears to the court that the opposing party, not the moving party, is entitled to judgment as a matter of law. *Gyarmati v Bielfield*, 245 Mich App 602, 604, 629 NW2d 93, (2001), citing *Sharper Image v Dep't of Treasury*, 216 Mich App 698, 701, 550 NW2d 596 (1996).

RECEIVED by MSC 12/31/2020 1:59:22 PM

INTRODUCTION

Plaintiff-Appellant, Willie Griffin, paid ample premiums to Defendant/Appellee, Trumbull Insurance Company, for PIP coverage. He did so in order to ensure that he was protected from economic loss if he was injured in a motor vehicle accident in Michigan. Yet, the majority opinion below has ensured that Griffin will not recover the PIP benefits for which he paid premiums to Trumbull to protect him. And, by publishing its opinion, the majority has ensured that prompt payment of PIP benefits will similarly be denied to rightful PIP claimants whenever it is possible that a higher priority PIP insurer could be identified.

Evidently, there is a new rule of law in Michigan. No longer are injured PIP claimants entitled to prompt payment of PIP benefits. Instead, they must immediately retain lawyers, investigators, and process servers and they must file lawsuits so that witnesses with information critical to determining if higher priority coverage existed can be subpoenaed. Without question, that is not how the no-fault system was supposed to work in Michigan!

Having given up the right to sue for minor injuries, prompt reimbursement of covered economic losses was supposed to be guaranteed under the No-Fault Act to all persons injured in motor vehicle accidents in Michigan. Yet somehow Willie Griffin has recovered no PIP benefits, even though he paid premiums to ensure that he would be fully covered.

According to the majority opinion, Trumbull was obligated to pay Griffin's claim for PIP benefits only if higher priority PIP coverage "cannot be identified". But, there is no statutory support for the majority's conclusion. There is only its misinterpretation of what the Court of Appeals previously said in *Frierson v West American Ins Co*, 261 Mich App 732, 683 NW2d 695 (2004) – a case where higher priority PIP coverage was never found.

By adopting a "binary" assessment of whether higher priority PIP coverage "cannot be identified" – one that does not consider whether higher priority PIP coverage could have

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been identified based on information known or discoverable with due diligence before the statutory notice period expired – the majority effectively ensures that PIP carriers will not pay PIP benefits whenever it is possible that higher priority PIP coverage may be found. It also places an unjust and manifestly unfair burden on the injured PIP claimant to establish that it was "absolutely impossible" for higher priority PIP coverage to be identified.

Because of the majority's decision in this case, Griffin will never be reimbursed for his economic losses. Moreover, since the majority's opinion is published, and thus, binding precedent under MCR 7.215(J), Griffin will not be the only person injured in a motor vehicle accident in Michigan, who is entitled to PIP benefits, but still recovers nothing, because the highest priority PIP insurer could not be identified before one-year notice period expired.

Fundamentally, the majority's ruling in this case stands no-fault law on its head! It places all the burden on the injured PIP claimant and none on the PIP insurer that was paid premiums to provide an injured PIP claimant like Griffin with economic loss protection. In so doing, it ignores the Legislature's intent that prompt, adequate reparations be paid.

It also mistakenly assumes that because higher priority PIP coverage was subsequently identified, it could just as easily have been identified before the statutory one-year notice period had expired. But, that assumption is demonstrably false in this case! Here, higher priority PIP coverage could not be identified. If higher priority coverage could have been identified, Trumbull would have done so; but instead, it closed its investigation.

What happened after the statutory one-year notice period expired should not determine whether Trumbull was obligated to pay PIP benefits to Griffin. Here, Trumbull should have paid PIP benefits when it failed to identify higher priority PIP coverage. Any other result negates the No-Fault Act's goal of ensuring prompt payment of PIP benefits.

RECEIVED by MSC 12/31/2020 1:59:22 PM

STATEMENT OF FACTS

Willie Griffin was injured in a motor vehicle accident on May 6, 2016, while he was operating a motorcycle on Dixie Highway in Waterford, Michigan. [Appx 35, Ex. 4, MVA Report, p 1]. He lost control of the motorcycle when a truck traveling in the lane next to him suddenly merged into his lane and he crashed. [Appx 37]. An independent witness confirmed that the truck would have hit Griffin if he had not swerved. [Appx 37; see also P's Ans to D's SD Mtn, Ex. 2, Ansel Dep Tr, p 14]. Because a motor vehicle was involved in the accident, Griffin was entitled to recover PIP benefits under Michigan's No-Fault Act.

After Griffin crashed, the truck stopped. [Appx 37]. The police were called to the scene and statements were taken. [Appx 37]. Because he was injured, Griffin was transported by ambulance to the emergency room at a local hospital. [Appx 37]. He was treated for injuries including a fractured collar bone, closed head injuries and road rash. [Appx 49-50, Ex. 5, Griffin Dep Tr, at pp 41-42]. He underwent surgery on his fractured collar bone and hardware was implanted. [Appx 49-50; Ex. 5, Griffin Dep Tr, at pp 41-42].

The police report identified the truck driver as Gilbert Gonzalez. [Appx 37]. But, only an address, and phone number were provided for him. [Appx 37]. The police report did not identify the owner (or registrant) of the truck that Gonzalez was driving, nor did it identify the insurer of the truck. [Appx 36-37]. Because Gonzalez was listed as a witness only, and the police did not identify the truck that he was driving as a vehicle involved in the accident, the information available from the police report in this case was very limited. [Appx 36-37].

After he was injured, Griffin promptly retained an attorney to represent him and his attorney sent a letter to Gonzalez (at the address provided for him on the police report). That letter informed Gonzalez that he represented Griffin. It also asked Gonzalez to

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contact his insurer (or agent) about Griffin's claim. [Appx 63-64; Ex. 6, Kief Letter, 5/11/16]. Gonzalez received that letter, but did not respond. Gonzalez did not inform his employer, Pavex, regarding the letter that he received. [Appx 65, Ex. 7, Gonzalez Dep, pp 26-28].

Gonzalez did, however, complete an incident report that was provided to him by his employer, Pavex, immediately after the motor vehicle accident occurred. [Appx 76, Ex. 8, P Incident Report]. But, Pavex, in turn, did nothing. [Appx 80]. Specifically, Pavex did not provide "prompt notice" to its insurer, Harleysville, of the "accident" or "loss" as is required of it to avoid coverage being excluded. [Appx 91, Ex. 9, Harleysville Policy, at p 8 of 12].

Fortunately, Griffin had his own personal auto insurance coverage with Trumbull at the time that he was injured. [Appx 96, Ex. 10, Trumbull Policy Declarations (Griffin), at p 1]. Griffin's auto policy with Trumbull covered 2 motor vehicles and he paid $2,435.00 annually to secure it for a period running from May 6, 2016 to May 6, 2017. [Appx 97-98].

Contact with Trumbull was made immediately after Griffin was injured. After Griffin retained counsel, his attorney also promptly informed Trumbull in writing that he was representing Griffin on his claim for PIP benefits. [Appx 100, Ex. 11, Trumbull Claims Log]. Trumbull's claims adjuster, Samantha Saba, contacted Griffin's attorney, Jason Kief. [Appx 116]. He provided her with a copy of the police report. [Appx 117]. She also observed that it did not identify the owner or insurer of the truck that Gonzalez was driving. [Appx 116].

On May 18, 2016, Saba reached Gonzalez at the telephone number identified on the police report, but Gonzalez said that "he was not able to talk now". [Appx 116]. On June 1, 2016, Saba phoned Gonzalez again and left a voice mail message for him. [Appx 116]. She also "mailed out [a] witness questionaire", presumably to Gonzalez. [Appx 116]. Saba also called the other witness listed on the police report, Cheryl Ansel. She left a

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message when no one answered, asking Ansel to call back, but she did not. [Appx 116].

On June 6, 2016, Trumbull refused to pay Griffin's PIP benefits, pending the results of its investigation into whether other PIP coverage existed. [Appx 121, Ex. 12, Reed Letter, 6/6/16]. Trumbull assigned the case to its Special Investigation Unit (SIU) where investigator Skip Ward reviewed the file and started investigating whether higher priority coverage existed for Griffin's PIP claim. [Appx 114-115]. Investigator Ward then spoke with the Trumbull's claims adjuster and they developed an "investigation plan". [Appx 113].

On June 28, 2016, a different Trumbull claims adjuster, Amber Snyder, again called Gonzalez at the phone number that was listed on the police report. [Appx 112]. She spoke with an "unk[nown] male" who first said that Gonzalez "is not going to make a comment" and then said he "would have him call back" before the call was disconnected. [Appx 112]. Snyder called back but no one answered the telephone. She left a voice mail message. [Appx 112]. She also sent out a subrogation letter, presumably to Gonzalez. [Appx 112].

On June 30, 2016, Griffin submitted an Application for No-Fault Benefits to Trumbull. [P's Ans to D' MACP's SD Mtn, Ex. 12]. When no payment was forthcoming from Trumbull, Griffin also sought PIP coverage from Allstate and Esurance. Allstate insured the motorcycle that Griffin was operating, but its policy did not include PIP coverage. Esurance insured the motor vehicle of the motorcycle owner, but not the motorcycle itself; thus, it was not higher in priority than Trumbull to provide coverage for Griffin under MCL 500.3114(5).

On October 27, 2016, Griffin was interviewed at his attorney's office by Skip Ward, i.e., the investigator assigned to the claim by Trumbull's SIU. [Appx 105-106]. On November 1, 2016, Ward attempted to make contact with Gonzalez by going to the address identified for him on the police report. [Appx 105]. No one was home so he left a

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business card asking Gonzalez to call him. [Appx 105]. He then phoned Gonzalez three times but received only a busy signal. [Appx 104]. He also obtained a search report which showed no trucks owned by Gonzalez and no business affiliation noted for him. [Appx 105].

On November 10, 2016, Ward phoned the other witness listed on the police report, Cheryl Ansel. [Appx 104]. No one answered so he left a voice mail message asking her to call him. [Appx 105]. Ward also again attempted to make direct contact with Gonzalez at the address listed on the police report but no one answered the door when he knocked. [Appx 104]. He also mailed a letter to Gonzalez requesting that he contact him. [Appx 105].

On December 9, 2016, Ward spoke with claims adjuster Kim Reed at Trumbull and told her that "all possible attempts had been made to interview Gilbert Gonzalez, the driver of the truck identified in the police report". [Appx 104]. He informed Reed that "Gonzalez failed to respond to these efforts" as did the only other witness, Cheryl Ansel. [Appx 104].

On December 21, 2016, Ward made one final attempt to make contact with Cheryl Ansel, i.e., the other witness on the report, by going to her home address. Unfortunately, she was not at home. [Appx 103]. He left a business card for Ansel asking her to contact him. [Appx 103]. Subsequently, on December 23, 2016, Ward closed his investigation. [Appx 103]. On December 27, 2016, Trumbull likewise closed its investigation. [Appx 103].

On December 26, 2016, Griffin's counsel, Jason Kief, wrote again to Trumbull demanding that it pay his client's PIP claim as the highest priority insurer that could be identified. [Appx 122, Ex. 13, Kief Letter to Trumbull, 12/26/16]. Trumbull did not respond.

On December 30, 2016, Griffin applied for PIP benefits with the MACP, because no payment was forthcoming from Trumbull and no other coverage could be identified. He completed the required forms. The MACP, however, refused to assign his claim to an

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insurer for payment of PIP benefits, and instead, similarly demanded more information about the motor vehicle accident and the available insurance coverage for his PIP claims.

In April, 2017, Griffin's counsel, recognizing that recovery on his PIP claims would be barred if a lawsuit was not filed, hired a private company to search for insurance coverage. Unfortunately, that search also came up empty. [P's Ans to MACP's Mtn, Ex. 6].

On May 1, 2017, Trumbull informed Griffin's counsel that it would not be paying his PIP claims "due to lack of information" but did not specify what information was needed. [Appx 125, Ex. 13, Saba Letter, 5/1/17]. Having identified no other PIP coverage available for his unpaid claims, Griffin sued Trumbull (and also the MACP, Allstate and Esurance).

After the lawsuit was filed, Trumbull noticed Gonzalez for a deposition and hired a process server to serve him with a subpoena compelling him to attend that deposition. By happenstance, the process server encountered Gonzalez at his home and he served him.

After contacting Trumbull's counsel about the deposition, Gonzalez appeared and was deposed. In his deposition, he confirmed that the truck that he was driving was owned by a company called Pavex. He also acknowledged that he had received the prior letters from counsel about the claim, but neither responded, nor informed his employer, Pavex, about any letters he received concerning the crash. [Appx 73, Ex. 7, Gonzalez, pp 27-28].

After Gonzalez was deposed, in October, 2017, Pavex provided information confirming that it was insured under a commercial auto policy with Harleysville at the time of the accident on May 6, 2016. It further confirmed that Gonzalez was working for Pavex when the motorcycle crash occurred. It also produced a copy of the incident report. But, again, Pavex never reported the incident to Harleysville, as is required for it to be covered.

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Trumbull moved for summary disposition under MCR 2.116(C)(10), contending that Griffin's claim for PIP benefits against it should be dismissed because Harleysville was a higher priority insurer for payment of Griffin's PIP claim under MCL 500.3114(5). In so moving, Trumbull conveniently failed to mention that its SIU investigated whether higher priority coverage existed in this case and no higher priority coverage could be identified. Instead, Trumbull argued that Griffin was not entitled to coverage for his unpaid PIP claims, because he failed to diligently investigate whether higher priority coverage could be found.

In support of its motion, Trumbull observed that Gonzalez was served with a subpoena for deposition during discovery in this case at the address identified for him on the police report and he subsequently appeared and he was deposed. In response, Griffin outlined the efforts that had been taken by his counsel to contact Gonzalez, which included mailing a notice of retention letter to him at the address provided in the police report and also hiring a private company to investigate whether Gonzalez had his own PIP coverage. He further requested a judgment as a matter of law in his favor under MCR 2.116(I)(2).

When the motion was argued, the trial court questioned both sides about the efforts taken before this lawsuit was filed to determine if higher priority coverage existed. Griffin's counsel noted the efforts that he had taken before the lawsuit was filed to find higher priority coverage. He also advised the trial court that he not only applied for PIP benefits with Trumbull on June 30, 2016, but he requested in December, 2016 that Trumbull pay the claim because it was obligated to do so unless higher priority coverage was identified.

Trumbull's counsel said nothing about its own failed attempts to locate Gonzalez. Instead, Trumbull focused on the fact that Gonzalez was ultimately served with a subpoena and deposed. In short, Trumbull's counsel argued that it was "a stone cold fact" that

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Gonzalez could have been found, and thus, higher priority coverage could have been identified within one year of when accident occurred. [Appx 30; Ex. 2, SD Mtn Hrg Tr, p 24].

Trumbull further contended that Griffin alone was responsible for finding out whether higher priority coverage existed in this case, because "it is not in any way, shape, or form, [Trumbull's] responsibility to identify the insurer or the owner of the vehicle." [Appx 22; Ex. 2, SD Mtn Hrg Tr, p 16]. Trumbull also suggested that if it was responsible for paying Griffin's PIP claim that would effectively permit PIP claimants to choose a lower priority insurer even though higher priority coverage existed. [Appx 28; Ex. 2, SD Mtn Hrg Tr, p 22].

The trial court, as it stated at the outset of the hearing, opted to take the case under advisement before issuing a ruling on all motions pending in the case. In light of the arguments presented at the motion hearing, the trial court asked the parties to file supplemental briefs describing those steps taken before the lawsuit was filed to address whether higher priority coverage existed. Trumbull's counsel expressed his concern that by doing so "I am going down a path that subjects my client to basically looking like they didn't do enough", while noting again Trumbull's position that "it is not their duty" to investigate whether higher priority PIP coverage exists for a particular PIP claim. [p 25].

The parties filed supplemental briefs as requested by the trial court at the motion hearing. Trumbull again said nothing about its own failed investigation efforts in this case. Griffin, in contrast, having received answers to his outstanding discovery requests, detailed the facts regarding Trumbull's investigation into whether higher priority coverage existed.

Notwithstanding the additional information provided regarding Trumbull's own failed investigation efforts, and its inability to make contact with Gonzalez before litigation was filed, the trial court issued an Opinion and Order on June 6, 2017, dismissing Griffin's

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claims for PIP benefits from Trumbull. In sum, the trial court held "that with reasonable diligence Gonzalez's employer could have been identified and through the employer, the insurance carrier" and it granted summary disposition for Trumbull "because it is not the highest priority insurer" under MCL 500.3114(5). [Appx 3; Ex. 1, Opinion and Order, p 2].

When discussing whether Harleysville could have been identified, the trial court noted the letter that Griffin's counsel sent to Gonzalez and also the investigation report from the company his counsel hired to locate available insurance coverage for Gonzalez. [Appx 3]. The court further observed that Griffin cited "Defendant Trumbull's efforts during claim investigation to identify the owner of the involved motor vehicle" as support for his claim that Harleysville was not "readily identifiable" as a higher priority insurer. [Appx 3].

But, the trial court concluded, without further explanation, that even though Trumbull also failed to make contact with Gonzalez, Griffin "with reasonable diligence" could have identified his employer, Pavex, and its insurer, Harleysville, before this lawsuit was filed. [Appx 3]. The court identified no additional steps that could have been taken. Instead, the court addressed only why the efforts by Griffin's counsel were not good enough. The trial court did not explain why Griffin should have accomplished what Trumbull also failed to do.

Griffin moved for reconsideration, but reconsideration was denied by the trial court, which concluded that "[t]he issues raised in Plaintiff's motion for reconsideration were thoroughly considered by the Court in deciding the motions for summary disposition." [Appx 7]. Again, no explanation was given as to how Griffin could have discovered that a higher priority PIP insurer existed in this case before this lawsuit was filed when Trumbull also similarly investigated and it too was unable to make contact with Gonzalez (until, by happenstance, Gonzalez decided to respond when he was subpoenaed for a deposition).

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On June 15, 2018, Griffin filed his timely claim of appeal by right against Trumbull and the MACP, challenging the trial court's decision to summarily dismiss his PIP claims on the grounds that a higher priority insurer existed in this case under MCL 500.3114(5).

After the appellate briefing was completed, the case called and oral argument was held on February 5, 2020. Seven months after the case was argued, the Court of Appeals issued a published (albeit non-unanimous) opinion in this case on September 24, 2020.

The majority opinion affirmed the trial court's decision to dismiss Griffin's claim for PIP benefits against Trumbull. It concluded that "[i]n this case, Harleysville could have been, and in fact actually was, identified" and "thus, due to the simple fact that Harleysville was identifiable, the general [priority] rule does not apply and plaintiff "cannot collect PIP benefits from Trumbull, because Harleysville was a higher priority insurer." Slip op at 5. It further concluded that the trial court erred by even considering whether "Harleysville could have been identified with 'reasonable diligence'", as "the general rule [of priority] applies" only "if a higher priority insurer cannot be identified." [Italics in majority opinion].

In support of that holding, the majority relied on *Frierson v West American Ins Co*, 261 Mich App 732, 683 NW2d 695 (2004), which it read as calling for "a binary analysis that asks only whether a higher priority insurer is identifiable" and "does not take into consideration the effort required to identify a higher-priority insurer such as Harleysville." Further, it distinguished the prior result in *Borgess Med Center v Resto*, supra, because it "[did] not include any discussion of whether a priority insurer could have been identified".

The dissenting opinion agreed that *Frierson* established "a conditional test: *if* a higher-priority insurer cannot be identified," *then* the "default rule" regarding insurer priority applies." [Italics in dissenting opinion]. But, the dissenting opinion disagreed that "Frierson

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provides any authority, guidance, nor insight into what it means to be "identifiable", because, in *Frierson*, unlike in this case, "it was simply agreed that no higher-priority insurer could be identified" and consequently, "no actual analysis was undertaken" in the *Frierson* case to determine whether a higher priority PIP insurer could have been identified.

As the dissenting opinion recognized, the question of whether a higher priority PIP insurer can be identified was not addressed by the No-Fault Act. Slip op at p 2. But, its goal was to "ensure prompt reimbursement to injured persons" and to avoid the need for litigation." And, by crafting an "absolute impossibility" standard out of whole cloth", the majority opinion "contravenes the purposes of the no-fault act." Slip op at 3. If a standard were to be created, "such a standard would at least not undermine the purposes of the no-fault act" and a due diligence standard presumably would not do so if it was adopted. Id.

The dissenting opinion then further concluded that "to the extent plaintiff was obligated to search for a higher-priority insurer as a precondition to receiving no-fault benefits from his insurer of default priority, plaintiff exercised due diligence in carrying out that search." Slip op at p 4. Accordingly, the dissenting opinion would have reversed the trial court's decision to dismiss Griffin's claim for PIP benefits against Trumbull. Id, at p 4.

Griffin moved for reconsideration of the majority's decision to affirm the trial court's ruling that he was not entitled to PIP benefits from Trumbull. But, the majority affirmed its published decision. Again, it was a split 2-1 ruling, as the dissenting judge would have granted reconsideration for the reasons stated in her prior concurring/dissenting opinion.

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ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED IN THIS PIP BENEFITS CASE BECAUSE GRIFFIN WAS ENTITLED TO PIP BENEFITS FROM HIS OWN PIP INSURER, TRUMBULL, WHERE HIGHER PRIORITY COVERAGE COULD NOT BE IDENTIFIED UNTIL AFTER THE STATUTORY NOTICE PERIOD EXPIRED.

A. Trumbull was required to pay Griffin's claim for PIP benefits after its investigation failed to identify higher priority coverage for his claim.

As the Courts have often noted, Michigan adopted its no-fault insurance system "to provide victims of automobile-related accidents with assured, adequate, and prompt payment for economic losses." *Shavers v Attorney General,* 402 Mich 554, 578-579, 267 NW2d 72 (1978). Here, Willie Griffin, a premium-paying insured under Michigan's no-fault system, has yet to recover a dime towards the economic losses that he sustained in this motor vehicle accident, despite his efforts to force all PIP insurers that could be identified as potentially being responsible for paying his PIP benefits to step up and pay his claims.

As things currently stand in this PIP benefits case, Griffin will recover no PIP benefits, despite paying ample premiums to Trumbull for PIP coverage to protect him if he was injured in a motor vehicle accident. In contrast, Trumbull gets to keep his premiums and pay nothing on his PIP claims, simply because he failed to do what it also could not do: identify the truck's owner or operator (and its insurer) before the limitations period ran.

In Michigan, it is well-established that priority disputes among insurers should not cause delay in payment of benefits to which the claimant is entitled. *Darnell v Auto-Owners Ins Co,* 142 Mich App 1, 12-13, 369 NW2d 243 (1985). In *Darnell,* failing to pay PIP benefits based on an alleged priority dispute justified an award of attorney fees under MCL 500.3148(2), because otherwise payment of PIP benefits would be unreasonably delayed. As support for its holding, this Court in *Darnell*, supra, relied on *Allstate Ins Co v Citizens*

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Ins Co of America, 118 Mich App 594, 603-604, 325 NW2d 505 (1982); *Federal Kemper Ins Co v The Western Ins Co*, 97 Mich App 204, 208, 293 NW2d 765 (1980), which stand "for the proposition that priority claims should be handled by paying the insured and having the insurance companies thereafter dispute their liabilities." *Darnell,* 142 Mich App at p 13.

This Court previously addressed an issue similar to the one presented in this case when it affirmed the Court of Appeals' holding that attorney fees were owed under MCL 500.3148(2) because failing to do so based on alleged priority dispute resulted in an unreasonable delay in paying PIP benefits to the injured PIP claimant. See *Borgess Med Center v Resto*, 273 Mich App 558, 730 NW2d 738 (2007), vacated on other grounds, but affirmed, 482 Mich 946 (2008). In *Resto*, supra, this Court agreed with the Court of Appeals that the PIP insurer was wrong when it claimed that PIP benefits do not need to be paid until the PIP claimant has established that no higher priority PIP insurer existed.[1]

Effectively, *Resto* involved the same sort of factual scenario that was presented in this case. But, unlike this case, a higher priority PIP insurer was never identified, not even after the lawsuit was filed, because Resto could not be found. There was no dispute that the PIP carrier in question insured the owner of the van that Resto was in when he was injured. But, it nonetheless refused to pay his medical bills, because it could not find him,

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[1]The Court of Appeals' majority opinion in *Borgess v Resto* was vacated by this Court for the reasons stated in the concurring opinion, but its decision to affirm the trial court and hold the defendant insurer responsible for paying the PIP claim was affirmed. The majority opinion, unlike the concurring opinion, distinguished between injured persons and providers as PIP claimants, when it held that providers, in particular, could not be denied payment on priority grounds. The concurring opinion did not agree with that distinction, but agreed that priority was not a defense to paying the PIP claim. As such, the majority opinion, even if not controlling, is persuasive, as it is being cited here only for a proposition that is very well-established in no-fault jurisprudence in Michigan.

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after he was discharged from the hospital, and thus, it could not determine if he had his own personal auto coverage at the time that he was injured. If he did, that PIP coverage would have been higher priority for him under the general rule of priority. MCL 500.3114(1).

The Court of Appeals in *Resto* held that a priority question is not a defense to a PIP claim, when it stated that "[t]he well-settled case law in this state holds that an insurer may not delay or deny paying an otherwise proper claim in order to first litigate a question of priority among insurers because to do so would frustrate the purpose of this statute." Id, 273 Mich App at 572-573. In sum, it affirmed that "[u]nder existing case law, defendant may not assert a real priority dispute as a defense [to paying a PIP claim]." Id at 574. This Court agreed when it affirmed that ruling, regardless of whether it disagreed with the majority's decision to distinguish provider claims from claims by individual PIP claimants.

The same conclusion clearly holds true in this case. The fact that the key witness to determining PIP coverage in this case ultimately shared his knowledge (albeit after the statutory notice period for making a claim for PIP benefits) should make no difference to whether a premium-paying insured like Griffin recovers PIP benefits. Instead, Trumbull should have paid Griffin's PIP claims while continuing to search for a higher priority PIP insurer from whom it could potentially seek reimbursement for PIP benefits paid to Griffin.

Simply put, PIP benefits should not be denied nor delayed because it is possible that higher priority PIP coverage may exist. If PIP insurers are free to deny or delay paying PIP benefits in the hopes that more information will resolve the question of whether higher priority coverage existed, prompt adequate payment of PIP benefits will not be provided.

To put the burden on the PIP claimant to prove a negative is not consistent with the No-Fault Act's goal of providing "prompt, adequate payment" to persons injured in motor

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vehicle accidents. Id at 573. That goal is also undermined if a PIP claimant must succeed in contacting a non-compliant witness to determine if higher priority coverage existed. Clearly, a lower priority insurer like Trumbull is required to pay PIP benefits in such cases.

B. *Frierson* does not stand for the "binary" conclusion that PIP benefits must be paid only if higher priority PIP coverage cannot be identified.

As the majority opinion noted in its discussion of *Frierson,* supra, the facts in that case differ from the facts in this case. Unlike this case, the motor vehicle that caused the motorcycle to crash in *Frierson* did not stop after the accident occurred, and thus, it was never identified. Yet, the majority opinion nonetheless concluded here that its holding in *Frierson*, i.e., that a lower priority PIP insurer is obligated to pay PIP benefits only if a higher priority PIP insurer "cannot be identified", applies equally to the facts in this case.

For the majority, *Frierson* created a "binary" analysis of whether PIP coverage could be identified – one in which the one-year statutory notice period would not be considered nor would the due diligence exercised by the parties in seeking to locate coverage. For the majority, hindsight would always be 20/20. If higher priority coverage happened to be identified after the statutory notice period expired, then no PIP benefits would be owed. If a reluctant witness later showed up and helped to identify higher priority PIP coverage, then the PIP insurer next up in priority would be rewarded for refusing to pay PIP benefits.

The problem is that *Frierson* did not reach the holding that the majority opinion said it did. Or if it did, it did so only in dicta because the facts in *Frierson* were not the same as the facts in this case. In *Frierson*, the unidentified vehicle stayed unidentified so higher priority coverage was never located. But, here, the key witness with information as to higher priority PIP coverage was unwilling to share it until after the notice period expired. The facts are not the same, and therefore, the analysis cannot be the same as in *Frierson*.

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Previously, in *Levander v Home-Owners Ins Co*, unpublished per curiam opinion of the Michigan Court of Appeals, Docket No. 320101 (June 18, 2015), the Court of Appeals recognized this point. In *Levander*, a politically and ideologically diverse panel of judges (Murphy, Stephens and Gadola) unanimously agreed that what this Court said in *Frierson* should be interpreted as meaning that higher priority PIP coverage could not be identified before the one-year notice period expired. Yet, without even addressing that prior, albeit unpublished, decision, the majority read *Frierson* differently and held instead that a "binary" analysis must be applied where hindsight will always be 20/20 and PIP benefits will not be owed even if higher priority coverage could not be identified before the notice period ran.

Respectfully, the majority opinion simply got it wrong. In *Levander,* this Court read *Frierson* differently than the majority did and it did so in a case with facts closely analogous to this case. Given its similar facts, what the Court of Appeals said in *Levander* regarding its interpretation of *Frierson* should have been persuasive in this case, when it concluded:

> We hold that the analytical framework from *Frierson* is equally applicable here, such that, if plaintiff could not identify Sumpter's vehicle under the circumstances presented, and thus, could not identify Progressive as the purported higher priority insurer under MCL 500.3114(5) before expiration of the one-year statute of limitations, MCL 500.3145(1), Home-Owners could be held liable to pay PIP benefits. In its ruling, the trial court simply concluded that "[p]laintiff's failure to timely file the claim against . . . [Progressive] does not allow plaintiff to seek damages against the next insurer in priority [Home-Owners] under MCL 500.3114(5)." **The trial court did not appear to entertain or consider, under the facts and circumstances surrounding this case, whether Progressive was identifiable as higher priority insurer under MCL 500.3114(5) before expiration of the one year limitations period.** Accordingly, we remand this case to the trial court for consideration of this issue and application of the *Frierson* decision. . . . . [Emphasis added].

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The same result should have been reached in this case as the relevant facts are basically identical. Instead, this Court misread *Frierson*, and thus, it created a new legal rule that effectively undermines the No-Fault Act's goal of ensuring prompt payment of PIP benefits.

C. The operative question is whether higher priority PIP coverage could have been identified before the statutory notice period expired. Here, both parties tried, but failed to do so, and thus, PIP benefits were owed.

The Court of Appeals (via its majority opinion) ignored the operative question that existed in this case, i.e., whether higher priority PIP coverage could have been identified before the statutory notice period expired. Instead, the majority focused myopically on whether this case was identical to *Frierson* and then simply concluded that this case was not one where higher priority coverage "cannot be identified" as was the case in *Frierson*.

The trial court, in contrast, recognized that the question was whether higher priority coverage could have been identified. But, it erred by concluding that reasonable diligence would have revealed that information despite the considerable efforts undertaken to do so.

Here, higher priority PIP coverage could not be identified before the statutory notice period expired. Both parties investigated. Both parties tried to make contact with Gonzalez. Both searched for whether other higher priority PIP coverage existed. But, ultimately, both parties failed to find higher priority coverage despite the time and effort expended to do so.

PIP benefits should have been paid to Griffin after Trumbull closed its investigation. At that point, there was simply no excuse for not doing so. The fact that higher priority PIP coverage was subsequently identified in this case should not be the sole deciding factor when it comes to whether a premium-paying insured like Griffin recovers his PIP benefits.

Under these circumstances, Griffin is clearly entitled to recover PIP benefits from Trumbull. Any other result would violate the contractual agreement between the parties.

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CONCLUSION

The result in this case is precisely what the Legislature sought to avoid by passing the No-Fault Act. Instead of prompt payment of economic losses incurred by a premium-paying insured, a PIP action must be litigated before wage loss or medical bills are paid. If this result stands, there is nothing stopping PIP insurers from stonewalling their own insureds on the grounds that it is possible that other higher priority PIP coverage exists. PIP insurers can claim in almost every case that there may be higher priority PIP coverage.

Effectively, such a result creates a significant new burden on PIP claimants that was never intended when the Legislature passed the No-Fault Act. Simply put, it requires that PIP claimants like Griffin not only retain legal counsel to understand the No-Fault Act's priority rules, but also, hire investigators to ensure that all known witnesses with potentially relevant information about higher priority PIP coverage are located and also interviewed. It makes it all but impossible for the injured person to handling his or her own PIP claim. It further assumes that key witnesses will be willing to speak with investigators if contacted.

This Court should grant leave to appeal (and reverse) the majority's decision to affirm the trial court's ruling that summarily dismissed Griffin's claim for PIP benefits against Trumbull. The majority opinion negates the No-Fault Act's goal of ensuring prompt payment of PIP benefits by concluding (wrongly) that a higher priority insurer could have been identified before the statutory notice period expired. In actuality, the opposite conclusion is true given the considerable efforts taken to contact the truck driver that was involved in the motor vehicle accident before this lawsuit was filed. The result in this case (and other similar PIP cases) should not depend on whether a key priority witness is willing to cooperate with the parties' investigation into whether higher priority coverage existed.

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RELIEF REQUESTED

Plaintiff/Appellant, Willie Griffin, by and through his counsel, respectfully requests that this Honorable Court grant leave to appeal from the lower courts' decision to summarily dismiss his claim for PIP benefits against Trumbull on the grounds that a higher priority PIP insurer could have been identified before the statutory notice period expired. He further requests that this Honorable Court reverse and remand this case to the trial court for entry of a judgment as a matter of law in his favor on MCR 2.116(I)(2) because higher priority coverage could not be identified before the statutory one-year notice period had expired, and therefore, Trumbull is responsible for paying his claims for PIP benefits.

Respectfully submitted,

Dated: December 31, 2020

/s/ Steven A. Hicks
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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

WILLIE GRIFFIN,

Plaintiff-Appellant,

v

TRUMBULL INSURANCE COMPANY and MICHIGAN ASSIGNED CLAIMS PLAN,

Defendants-Appellees,

and

ALLSTATE INSURANCE COMPANY, ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANY,

Defendants.

FOR PUBLICATION
September 24, 2020
9:00 a.m.

No. 344272
Wayne Circuit Court
LC No. 17-006082-NF

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and TUKEL, JJ.

TUKEL, J.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants Trumbull Insurance Company (Trumbull) and the Michigan Assigned Claims Plan (MACP). The trial court held that Trumbull was not the highest-priority no-fault insurer for purposes of plaintiff's claim for personal protection insurance (PIP) benefits and that the MACP was not required to assign an insurer because another insurer, Harleysville Insurance Company (Harleysville), was the highest-priority insurer. We affirm.

I. UNDERLYING FACTS

In May 2016, plaintiff was driving his motorcycle when a truck merged into plaintiff's lane. Plaintiff crashed while attempting to avoid the truck, but the truck did not actually make physical contact with plaintiff. The truck driver's name, telephone number, and residential address were recorded in the police report of the incident. Five days after the crash, plaintiff's attorney

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sent a letter to the truck driver informing him that plaintiff intended to take legal action. The letter asked the truck driver to forward the letter to his insurance company, but did not ask for the truck driver to actually contact plaintiff or his attorney in any way. Plaintiff additionally informed Trumbull, the insurer of his motor vehicles, of his accident, but Trumbull refused to pay plaintiff any PIP benefits. Rather, Trumbull attempted to locate the truck driver; despite multiple telephone calls and visits to the truck driver's residence, these attempts to contact the truck driver were unsuccessful. Trumbull then closed its investigation without having made contact with the truck driver.

In April 2017, 11 months after the accident, plaintiff retained MEA Research Services, Inc., Ltd. (MEA Research Services), a Dallas, Texas company, to attempt to identify the truck driver's insurance provider. MEA Research Services was unsuccessful and informed plaintiff that it could not identify any insurance provider for the truck driver. Plaintiff failed to take any additional actions to communicate with the truck driver or to identify his insurance provider or the insurance provider of the truck he drove the day of the accident. Plaintiff then filed a complaint in April 2017 seeking, in relevant part, PIP benefits from Trumbull and for the MACP to assign his claim to an insurer.

In September or October of 2017, Trumbull hired an investigator to serve the truck driver with a subpoena. The investigator found the truck driver and gave the subpoena to the truck driver. The truck driver appeared for a deposition within one month and, in his deposition, stated that he was driving a work truck for his former employer the day of the accident. Based on this information, it was determined that the insurer of the truck at the time of the accident was Harleysville.[1]

After identifying Harleysville as the highest-priority insurer under MCL 500.3114(5),[2] Trumbull moved for summary disposition under MCR 2.116(C)(10) and argued that it was not

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[1] The parties agree that Harleysville is the highest-priority insurer.

[2] At the time of plaintiff's injury, MCL 500.3114(5), as amended by 2002 PA 38, stated:

> 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.

The 2002 amendment worked no change regarding the priorities.

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required to pay any PIP benefits to plaintiff because Harleysville was the highest-priority insurer. The MACP also filed a motion for summary disposition under MCR 2.116(C)(10) and argued that plaintiff's claim against it should be dismissed because plaintiff was insured by Trumbull at the time of the accident. Plaintiff opposed both motions, but following a hearing and supplemental briefing the trial court granted summary disposition to Trumbull and the MACP.

In granting Trumbull's motion, the trial court determined that Harleysville could have been identified within one year of the accident if plaintiff had acted with "reasonable diligence." The trial court emphasized that plaintiff sent only one letter to the truck driver, a letter that did not even ask him for any information, but instead suggested that he contact his own insurance company. The trial court also stated that the MEA Research Services' search was limited to any personal automobile insurer the truck driver may have had. Finally, the trial court highlighted that Trumbull ultimately was able, with a subpoena, to secure the truck driver's participation in a deposition, something plaintiff had never even tried. Thus, the trial court ruled, Trumbull was not the highest-priority insurer. The trial court additionally granted summary disposition to the MACP because there was no dispute between two or more insurers and Harleysville was identifiable as the highest-priority insurer.

Plaintiff then moved for reconsideration and the trial court denied plaintiff's motion. This appeal followed.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016).

The moving party has the initial burden to support its claim with documentary evidence, but once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the moving party asserts that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present such evidence. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). Finally, "[i]ssues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When

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the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011).

III. ANALYSIS

A. IDENTIFICATION OF HARLEYSVILLE

Plaintiff argues that the trial court's ruling that Harleysville was identifiable as the highest-priority insurer had plaintiff acted with reasonable diligence, and thus that plaintiff's claim against Trumbull must be dismissed, was erroneous. We disagree.

When interpreting the no-fault act, "[t]erms contained in the no-fault act are read in the light of its legislative history and in the context of the no-fault act as a whole." *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004). Furthermore, "[g]iven the remedial nature of the no-fault act, courts must liberally construe its provisions in favor of the persons who are its intended beneficiaries." *Id*. Thus, while courts interpreting the no-fault act must give every word in the statute its plain and ordinary meaning in light of the larger statutory scheme, *Driver*, 490 Mich at 246-247, courts also must construe provisions of the no-fault act in favor of its insured beneficiaries, *Frierson*, 261 Mich App at 734.

The no-fault act establishes the order in which potential insurers are responsible for paying PIP benefits. See MCL 500.3114. The no-fault act also limits the liability of insurers through MCL 500.3145(1), commonly referred to as the one-year-back rule. "The one-year-back rule is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before an action is brought." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 203; 815 NW2d 412 (2012). Thus, as a practical matter, a plaintiff has one year from the date of his or her injury to identify the highest-priority insurer as established by MCL 500.3114, because only the highest-priority insurer is liable for a plaintiff's PIP benefits. If the highest-priority insurer is identifiable within that time, then only that insurer is liable for a plaintiff's PIP benefits. See MCL 500.3114; 500.3145(1). But, "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." *Frierson*, 261 Mich App at 738.

Plaintiff relies heavily on *Borgess Med Ctr v Resto*, 273 Mich App 558, 585; 730 NW2d 738 (2007)[3] and *Frierson* to argue that lower-priority insurers are responsible for the payment of benefits when higher-priority insurers cannot be identified. In *Borgess Med Ctr*, 273 Mich App at 585 (WHITE, J., *concurring*), the "[d]efendant indisputably insured the owner of the occupied vehicle, and no insurer in a higher priority was identified" so the defendant was liable for the

[3] The Michigan Supreme Court vacated the majority opinion of this Court in *Borgess Med Ctr v Resto*, 273 Mich App 558; 730 NW2d 738 (2007), but affirmed this Court's judgment "for the reasons stated in the concurring opinion." *Borgess Med Ctr v Resto*, 482 Mich 946; 754 NW2d 321 (2008). Plaintiff asks this Court to rely on the majority decision; for the reasons stated later we decline to do so.

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plaintiff's PIP benefits. *Borgess* does not include any discussion of whether a higher-priority insurer could have been identified.

In *Frierson*, the highest-priority insurer could not be identified because the plaintiff was a passenger on a motorcycle when an unidentified motor vehicle turned into the plaintiff's lane, causing the operator of the motorcycle the plaintiff was riding on to crash while attempting to avoid hitting the oncoming motor vehicle. *Id*. at 733. "The police were unable to locate the motor vehicle and there [was] no information regarding the vehicle, its driver, or its insurance." *Id*. Consequently, the identity of the driver of the motor vehicle that caused the motorcycle crash was not identifiable and "the parties agree[d] that the insurers listed in subsections a to d of MCL 500.3114(5) either [did] not exist or [could not] be identified." *Id*. at 737. In light of the impossibility of identifying an insurer under MCL 500.3114(5), the *Frierson* Court held that "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). Thus, under *Frierson*, the general rule that an injured party's own insurer is liable for PIP benefits only applies if a higher-priority insurer under MCL 500.3114 *cannot be identified*.[4]

Frierson did not hold that the general rule applies if a higher-priority insurer could not be identified within a reasonable time or through reasonable efforts. Rather, *Frierson*, simply holds that the general rule applies if a higher-priority insurer *cannot be identified*. As such, *Frierson* calls for a binary analysis that asks only whether a higher-priority insurer is identifiable. In this case, Harleysville was a higher-priority insurer than Trumbull, and the undisputed facts establish that Harleysville could have been, and in fact actually was, identified. *Frierson* does not take into consideration the effort required to identify a higher-priority insurer such as Harleysville. Thus, due to the simple fact that Harleysville was identifiable, the general rule does not apply and plaintiff cannot collect PIP benefits from Trumbull, because Harleysville was a higher-priority insurer. See *Frierson*, 261 Mich App at 738. Consequently, while the trial court erred to the extent it considered whether Harleysville could have been identified with "reasonable diligence," the trial court still reached the right result for the wrong reason. Accordingly, the trial court's decision to grant summary disposition to Trumbull is affirmed. See *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998) ("[T]his Court will not reverse where the trial court reached the right result for the wrong reason.").

B. PLAINITFF'S CLAIMS AGAINST THE MACP

Plaintiff argues that because this case involved a priority dispute between two insurers the MACP should have assigned an insurer to pay plaintiff's PIP benefits. We disagree.

When plaintiff sued the MACP, he alleged that, in the event Trumbull was not responsible for paying his claim for PIP benefits, there was a priority dispute that required the MACP to assign

[4] The exceptions to MCL 500.3114(1) referenced in *Frierson*, 261 Mich App at 738, create rules of priority for specific circumstances, such as MCL 500.3114(5), which establishes priority for accidents involving motorcycles. See MCL 500.3114(1), (2), (3), and (5).

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his claim. As discussed above, a plaintiff seeking PIP claims ordinarily must turn to the plaintiff's own insurer or an insurer of one of the vehicles or drivers involved in the accident. However, "[e]ven when there does not appear to be any applicable PIP coverage, the Legislature provided that an injured person could obtain PIP benefits through the MACP." *Spectrum Health Hosp v Mich Assigned Claims Plan*, 330 Mich App 21, ___; 944 NW2d 412, 418 (2019) (Docket No. 343563); slip op at 5, citing MCL 500.3172(1). Thus, "[a]ll self-insurers or insurers writing insurance as provided by the no-fault insurance act are required to participate in the MACP, with the associated costs being 'allocated fairly among insurers and self-insurers.' " *Id*., quoting MCL 500.3171(2). With this comprehensive scheme,

> the Legislature ensured that every person injured in a motor vehicle accident would have access to PIP benefits unless one of the limited exclusions in the no-fault act apply, and the losses suffered by uninsured persons injured in motor vehicle accidents could be indirectly passed on to the owners and registrants of motor vehicles through insurance premiums. [*Id*.]

Specifically, MCL 500.3172(3), as amended by 2012 PA 204,[5] provides, in relevant part, that a claim will be assigned to the MACP if "the obligation to provide personal protection insurance benefits cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss."

Plaintiff argues that subsection (3) applies in light of the purported dispute between Trumbull and Harleysville regarding PIP coverage for plaintiff. The no-fault act does note define "dispute." "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. "We may consult dictionary definitions to give words their common and ordinary meaning." *Krohn v. Home–Owners Ins. Co*, 490 Mich. 145, 156; 802 NW2d 281 (2011) (citations omitted).

The word "dispute" is defined as "to engage in argument: debate," "to struggle against: oppose," and "to contend over." *Webster's Collegiate Dictionary* (11th ed). Harleysville has not taken any part in this case and no evidence has been presented showing that Harleysville refused to provide plaintiff with PIP benefits. Consequently, even though Harleysville is undoubtedly the highest-priority insurer in this case and Trumbull argues that Harleysville, not Trumbull, should provide plaintiff with PIP benefits, there is no "dispute" in this case "between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss." MCL 500.3172(3). As applicable here, any disagreement between Harleysville and Trumbull is purely academic and theoretical, as no claim ever was made against Harleysville. Harleysville has not actually disagreed, and given its status as a non-party, could not disagree, with Trumbull's argument in this case that Harleysville is the highest-priority insurer and that it should provide PIP

[5] MCL 500.3172 has since been amended by 2019 PA 21. The current version of MCL 500.3172 did not become effective until June 11, 2019, after the events at issue in this case. Consequently, the former version of MCL 500.3172 applies in this case.

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benefits to plaintiff. Accordingly, because there is not an actual dispute between two or more insurers, applying MCL 500.3172(3)'s clear and unambiguous language as written, we conclude that subsection (3) simply does not apply to the facts and circumstances of this case. Accordingly, the trial court correctly dismissed plaintiff's claim against the MACP.

C. SANCTIONS

Plaintiff argues that the trial court should have sanctioned Trumbull for failing to affirmatively disclose its failure to locate the truck driver. We disagree.

An issue raised in the trial court and pursued on appeal is preserved even if the trial court failed to address or decide the issue. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Plaintiff raised this issue at the trial court level, but the trial court failed to address or decide this issue. Nevertheless, "This Court may address the issue because it concerns a legal question and all of the facts necessary for its resolution are present." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 751 n 40; 880 NW2d 280 (2015). We choose to do so here.

Plaintiff requested sanctions pursuant to what is now MCR 1.109(E)(5),[6] which states:

> The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> (a) he or she has read the document;
>
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The following subsection, MCR 1.109(E)(6) states

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

[6] MCR 2.114, the court rule relied on by plaintiff below, was repealed, effective as of September 1, 2018. The language previously found in MCR 2.114(D) has been retained in MCR 1.109(E).

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Finally, MCR 1.109(E)(7) also provides for sanctions if "a party plead[s] a frivolous claim or defense."

Plaintiff points to the failure of Trumbull's counsel to affirmatively inform the trial court that it had unsuccessfully attempted to contact the truck driver before plaintiff filed this lawsuit. According to plaintiff, the failure of Trumbull's counsel to inform the court, coupled with its argument that plaintiff could have identified the truck driver's insurer with reasonable diligence, "clearly violate[d] the duty to be candid" and was, in fact, "dishonest." Plaintiff's argument fails for two reasons: (1) plaintiff's argument is not supported by the record, and (2) under *Frierson*, Trumbull's previous failed attempts to contact the truck driver and identify Harleysville are not relevant because Harleysville was eventually identified.

First, plaintiff's argument is not supported by the record. Trumbull's summary-disposition argument was that it was not the highest-priority insurer. To support that argument, Trumbull asserted that plaintiff could have discovered the truck's insurer with reasonable diligence. Trumbull never argued, however, that it did not try to identify the insurer or that identifying the insurer would be easy. Instead, Trumbull simply asserted that plaintiff could have done it with reasonable diligence. In doing so, Trumbull relied on plaintiff's lack of effort in attempting to learn the insurer's identity and its own ability to obtain the truck driver's presence at a deposition with just one subpoena. While Trumbull's earlier efforts to contact the truck driver, including sending several letters, making a few phone calls, and visiting his home multiple times, may well have been relevant (more so to plaintiff's responsive arguments than defendant's position), plaintiff's assertion that the trial court was misled by Trumbull's "dishonesty" does not reflect the briefing below. Moreover, contrary to plaintiff's assertion that "defense counsel still declined to inform the trial court that its investigation was also unsuccessful" even when pressed by the trial court, the record reflects that Trumbull's counsel intentionally declined to comment on its own efforts because he was "worried that if [he] g[o]t too far into that, [he was] going down a path that subjects [his] client to basically looking like they didn't do enough, when they didn't have to"—an assertion plaintiff has not opposed with any legal authority. Thus, Trumbull did not mislead the trial court.

Second, Trumbull's failed efforts to contact the truck driver were irrelevant. As discussed earlier, under *Frierson*, 261 Mich App at 738, Trumbull would only be liable for plaintiff's PIP benefits if Harleysville could not be identified. But Harleysville was identified. Thus, prior efforts to identify Harleysville or to contact the truck driver were frankly irrelevant to this binary analysis. Consequently, Trumbull should not have been sanctioned.

IV. CONCLUSION

Affirmed. Trumbull and MACP, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Jonathan Tukel
/s/ Kirsten Frank Kelly

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

WILLIE GRIFFIN,

Plaintiff-Appellant,

v

TRUMBULL INSURANCE COMPANY and MICHIGAN ASSIGNED CLAIMS PLAN,

Defendants-Appellees,

and

ALLSTATE INSURANCE COMPANY, ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANY,

Defendants.

FOR PUBLICATION
September 24, 2020

No. 344272
Wayne Circuit Court
LC No. 17-006082-NF

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and TUKEL, JJ.

RONAYNE KRAUSE, P.J. *(concurring in part and dissenting in part)*

The majority accurately and fairly recites the factual background in this matter and the general legal principles applicable to this matter, so I will not repeat them. Furthermore, I concur entirely with the majority's analysis and disposition of plaintiff's claims against the MACP. I respectfully disagree with some of the majority's analysis of *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004), and I respectfully draw a different conclusion regarding plaintiff's diligence and whether Harleysville was "identifiable" within the meaning of the no-fault act. I would reverse the trial court's dismissal as to Trumbull, and under the circumstances I would decline to address the issue of sanctions without prejudice with the possibility of plaintiff raising the issue again on remand.

Initially, I agree with the majority that *Frierson* sets forth a conditional test: *if* a higher-priority insurer "cannot be identified," *then* the "default rule" regarding insurer priority applies. *Frierson*, 261 Mich App at 738. However, I disagree that *Frierson* provides any authority,

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guidance, nor insight into what it means to be "identifiable." In *Frierson*, it was simply agreed by the parties that no higher-priority insurer could be identified. *Id*. at 737. No actual analysis was undertaken. Indeed, if the Court had addressed whether any party made adequate efforts to locate a higher-priority insurer, that analysis would have been dicta. Additionally, the Court in *Frierson* was faced with a question of whether the injured plaintiff's own insurer or the MACP[1] was liable for payment of benefits, *not* whether the plaintiff received benefits or received nothing. The holding in *Frierson* was based on the purpose of the no-fault act as described by our Supreme Court: to ensure that persons injured in motor vehicle accidents receive benefits, and to impose primary responsibility for paying those benefits on the person's own insurer by default. *Id*. at 737-738, citing *Parks v DAIIE*, 426 Mich 191, 204; 393 NW2d 833 (1986). *Frierson* did not create or identify an "absolute impossibility" standard, it merely applied longstanding legal principles to a situation in which identifying another insurer happened to be absolutely impossible.

"When interpreting the meaning of a statute, our primary goal is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). However, the no-fault act does not expressly specify how to address situations in which a higher-priority insurer is presumed to exist but has not been identified. To the extent construction of a statute is necessary, we must strive "to prevent absurd results, injustice, or prejudice to the public interest." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). Any such construction must be consistent with the underlying legislative purpose of the no-fault act and must liberally favor "the persons who are its intended beneficiaries." *Frierson*, 261 Mich App at 734.

Our Supreme Court has explained that "[t]he no-fault act was intended to minimize uncertainties and to provide a relatively simple means of compensating those injured in automobile accidents." *Parks*, 426 Mich at 207. Furthermore, the no-fault act

> was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accident assured, adequate, and prompt reparation for certain economic losses. [*Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978).]

The no-fault system was, in part, specifically designed to ensure prompt reimbursement to injured persons, especially those lacking in substantial financial means, and to avoid the need for litigation. *Id*. at 621-623.

Here, the majority crafts an "absolute impossibility" standard out of whole cloth. No such standard was created or applied in *Frierson*, and such a standard contravenes the purposes of the no-fault act. No-fault claimants are not required to prove that a higher-priority insurer is unavailable, and insurers of default priority may not delay or refuse to pay a claim. *Borgess Med*

[1] Strictly speaking, the MACP's predecessor, the Michigan Assigned Claims Facility.

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Ctr v Resto, 273 Mich App 558, 568-576; 73 NW2d 738 (2007), vacated on other grounds and affirmed 482 Mich 946 (2008).[2] If any standard for determining when or how a higher-priority insurer "cannot be identified" is to be crafted, it would ideally come from the Legislature or from our Supreme Court. However, were this Court to create a standard nonetheless, it would be most consistent with the purposes of the no-fault act to require a claimant to exercise due diligence to look for a higher-priority insurer. The due diligence standard is a familiar one, and it "means undertaking reasonable, good-faith measures under the circumstances, not necessarily everything possible." *Ickes v Korte*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 346490, slip op at p 4). Such a standard would at least not undermine the purposes of the no-fault act.

That being said, Trumbull argues that plaintiff could have done more to identify Gonzalez's insurer. That is true. However, it is almost always true under any circumstance. Thus, diligence is not evaluated based on whether a person could have done more, but rather whether that person did enough. *Ickes*, ___ Mich App at ___ n 2 (slip op at p 4). Plaintiff points out that any costs invested into discovering Gonzalez's insurer would be costs not recoupable from any benefits ultimately paid. I agree with plaintiff that the goals of the no-fault act would be thwarted by requiring claimants to expend a significant portion of their benefits simply seeking to obtain those benefits in the first place.

Furthermore, Trumbull conducted its own search for a higher-priority insurer. I do not wish to suggest that Trumbull either was or was not obligated to undertake that search. Nevertheless, presuming Trumbull had no such obligation, a party that acts gratuitously must still act non-negligently. *Hart v Ludwig*, 347 Mich 559, 563-565; 79 NW2d 895 (1956). Under the circumstances, the relationship between an insured and his own insurer imposed upon Trumbull a requirement to carry out that investigation competently and thoroughly. See *Hill v Sears, Roebuck and Co*, 492 Mich 651, 660-661; 822 NW2d 190 (2012); see also *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205-206; 544 NW2d 727 (1996). Trumbull's assumed obligation means its

[2] Our Supreme Court vacated the majority opinion in *Borgess* but nevertheless affirmed this Court "for the reasons stated in the concurring opinion." The concurring opinion disagreed with the majority as to a single issue: whether there was a legal distinction between a "claimant" and a "person suffering accidental bodily injury" under MCL 500.3114(4). *Borgess*, 273 Mich App at 585 (WHITE, J., concurring). That distinction had been cited by the majority as only one alternative basis for its holding. *Id.* at 571-572. Peremptory orders from our Supreme Court constitute binding precedent to the extent they can be understood, even if only by reference to other opinions. *Woodring v Phoenix*, 325 Mich App 108, 115; 923 NW2d 607 (2018). By necessary implication, our Supreme Court left intact the *Borgess* majority's holding, with which the concurrence clearly agreed, that it would contravene the purpose of the no-fault act and settled caselaw for an injured person's own insurer, i.e., the insurer of default priority, to refuse to pay benefits because the claimant had not disproved the availability of a higher-priority insurer. *Borgess*, 273 Mich App at 572-573. I would agree with the *Borgess* majority in any event, but even if I did not, I conclude that we are bound to follow it by MCR 7.215(C)(2) and MCR 7.215(J)(1). The majority accurately observes that there was no discussion in *Borgess* of whether a higher-priority insurer could have been identified, but based on its conclusion that the claimant was not obligated to do so, no such discussion would have been warranted and has no relevance.

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inability to identify Harleysville should be conclusive as to whether Harleysville *was* able to be identified as of one year from the accident. It is not clear whether Trumbull specifically informed plaintiff that it was searching for a higher-priority insurer, but it did promptly advise plaintiff that it was investigating his claim for coverage, and it apparently told plaintiff at some point before the suit was commenced that it had not been able to find a higher-priority insurer. Any reasonable person would be expected to place some reliance on that investigation, and that reliance does not display a lack of diligence.

Trumbull accurately notes that if plaintiff had commenced the instant lawsuit earlier, he would have gained the power of subpoena. Indeed, when Gonzalez was eventually subpoenaed, Harleysville was rapidly identified. It is somewhat speculative whether Gonzalez would have responded to an earlier subpoena, given his apparent refusal to discuss the matter with anyone while he was still employed by the same employer. More importantly, however, Trumbull's argument contravenes the purpose of the no-fault act. Creating a duty for injured persons to commence suit against their own insurer immediately after an accident as a matter of course will drastically increase litigation and costs to injured persons and insurers, obliterate any hope of fulfilling the no-fault act's purpose of making benefit payments simple and straightforward, usurp the Legislature's power to create limitations periods, clog court dockets, and otherwise re-create problems the no-fault act was intended to solve. It is blatantly against public policy to hold it against a party for failing to seek litigation as a first resort or failing to file a suit earlier when it was actually timely.

I would hold that to the extent plaintiff was obligated to search for a higher-priority insurer as a precondition to receiving no-fault benefits from his insurer of default priority, plaintiff exercised the requisite due diligence in carrying out that search. I would therefore reverse the dismissal of plaintiff's claims against Trumbull.

/s/ Amy Ronayne Krause

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Court of Appeals, State of Michigan

ORDER

Willie Griffin v Trumbull Insurance Company

Docket No. 344272

LC No. 17-006082-NF

Amy Ronayne Krause
Presiding Judge

Kirsten Frank Kelly

Jonathan Tukel
Judges

The motion for reconsideration is DENIED.

Presiding Judge

Ronayne Krause, J., would grant the motion for reconsideration for the reasons, and to the extent, as stated in the concurrence/dissent in this case.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 19, 2020
Date

Chief Clerk