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STATE OF MICHIGAN

IN THE SUPREME COURT

WILLIE GRIFFIN,

Plaintiff-Appellant,

v

TRUMBULL INSURANCE COMPANY,

Defendant-Appellee,

and

THE MICHIGAN ASSIGNED CLAIMS PLAN , 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 ANSWER TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 2/1/2021 11:55:44 AM

TABLE OF CONTENTS

Index of Authorities	ii
Counter-Statement of Questions Presented	iv
No Grounds for Supreme Court Intervention	v
Counter-Statement of Facts	1
Standard of Review	13
Argument I	13
Argument II	20
Conclusion	22
Relief Requested	23

RECEIVED by MSC 2/1/2021 11:55:44 AM

INDEX OF AUTHORITIES

CASES

Book-Gilbert v Greenleaf,
302 Mich App 538; 840 NW2d 743 (2013) 17

Borgess Med Center v Resto,
273 Mich App 558; 730 NW2d 738 (2007),
vacated 482 Mich 946 (2008) v,vi,13,14

Cooper v Auto Club Ins Ass'n,
481 Mich 399; 751 NW2d 443 (2008) 20

Fradco, Inc v Dep't of Treasury,
495 Mich 104; 845 NW2d 81 (2014) 15

Frierson v West American Ins Co,
261 Mich App 732; 683 NW2d 695 (2004) v,10,11 16,22

In re Reliability Plans of Elec Utilities for 2017-2021,
505 Mich 97; 949 NW2d 73 (2020) 13

Levander v Home Owners Ins Co,
unpublished per curiam decision of the Michigan Court of Appeals,
issued June 18, 2015 (Docket No. 320101) 18,19

Maroky v Encompass Indemnity Co,
unpublished per curiam decision of the Michigan Court of Appeals,
issued October 19, 2017 (Docket No. 333489) 17,18

Mayhew v Phoenix Ins Co,
23 Mich 105 (1871) 20

People v Giovannini,
271 Mich App 409; 722 NW2d 237 (2006) vi,13

Robinson v City of Lansing,
486 Mich 1; 782 NW2d 171 (2010) 17

Titan Ins Co v Hyten,
491 Mich 547; 817 NW2d 562 (2012) 13

RECEIVED by MSC 2/1/2021 11:55:44 AM

STATUTES

MCL 500.3114	*passim*
MCL 500.3114(1)	v,16
MCL 500.3114(3)	17
MCL 500.3114(5)	14-16
MCL 500.3145	16-18
MCL 500.3145(1)	*passim*
MCL 500.3172	6
MCL 500.3172(3)	11

COURT RULES

MCR 2.116(C)(10)	17
MCR 7.305(B)(3)	v
MCR 7.305(B)(5)(a)	v
MCR 7.305(B)(5)(b)	vi

RECEIVED by MSC 2/1/2021 11:55:44 AM

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS MAJORITY CORRECTLY HOLD THAT WHERE A HIGHER PRIORITY INSURER IS IDENTIFIABLE – AS DEMONSTRATED BY THE FACT THAT IT WAS ACTUALLY IDENTIFIED – THEN THE LOWER PRIORITY INSURER IS NOT LIABLE FOR PERSONAL PROTECTION INSURANCE BENEFITS?

Plaintiff-Appellant says "No."

Defendant-Appellee Trumbull Insurance Company says "Yes."

The Court of Appeals majority would say "Yes."

II. WHERE PLAINTIFF DID NOT ACT WITH REASONABLE DILIGENCE TO DISCOVER THE IDENTITY OF THE HIGHER PRIORITY INSURER, SHOULD THE DECISION OF THE COURT OF APPEALS BE AFFIRMED?

Plaintiff-Appellant says "No."

Defendant-Appellee Trumbull Insurance Company says "Yes."

The Court of Appeals did not answer this question.

The trial court said Plaintiff did not act with reasonable diligence.

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NO GROUNDS FOR SUPREME COURT INTERVENTION

Plaintiff argues that this case "involves a legal principle of major significance to the 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." (Plaintiff's Application for Leave to Appeal, p viii.) Critically, however, this is not a case where "higher priority PIP coverage cannot be identified." The majority in this case merely held that where a higher priority insurer is identifiable, a lower priority insurer is not liable (Court of Appeals decision, p 5; Exhibit A). In doing so, the majority correctly applied *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004), which 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). The majority here correctly held that "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." (Exhibit A; p 5) (emphasis added). Where the Court of Appeals correctly applied *Frierson*, there is no need for intervention by this Honorable Court. Also, where the Court of Appeals majority correctly followed *Frierson*, its decision is not "clearly erroneous" and intervention under MCR 7.305(B)(5)(a) is also unwarranted.

Plaintiff also contends that the decision of the Court of Appeals majority conflicts with the majority's holding in *Borgess Med Center v Resto*, 273 Mich App 558; 730 NW2d 738 (2007), vacated and affirmed for the reasons stated in the concurring opinion, 482 Mich 946 (2008). When

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this Court vacated the majority decision in *Borgess Med Center*, and adopted the concurring opinion, which would impose liability on the insurer where "no insurer in a higher priority was identified," *Id.* at 585 (White, J., concurring), it did not affirm or otherwise approve the reasoning of the vacated majority opinion. See *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237, 240–41 (2006) ("A Court of Appeals opinion 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"). By adopting the concurring opinion's rationale that benefits were payable because "no insurer in a higher priority was identified," this Court adopted a rationale fully consistent with that of the majority in this case – where a higher priority insurer *is* identifiable (and in fact identified), then the lower priority insurer is not liable (Exhibit A, p 5). Accordingly, the majority's decision in this case does not conflict with *Borgess Med Center*, and intervention by this Court under MCR 7.305(B)(5)(b) is also unwarranted.

RECEIVED by MSC 2/1/2021 11:55:44 AM

COUNTER-STATEMENT OF FACTS

Introduction

Plaintiff Willie Griffin was injured on May 6, 2016, when he lost control of his motorcycle after a truck changed lanes (Police Report; Appellant's Appendix, pp 36-37). Plaintiff filed suit against his personal automobile insurer, Trumbull Insurance Company, seeking personal protection insurance benefits. Defendant Trumbull moved for summary disposition on the grounds that the insurer of the truck, Harleysville Insurance Company, was the highest in priority for payment of personal protection insurance benefits, and that Trumbull should be summarily dismissed because it was not in the highest order of priority (Defendant's Motion for Summary Disposition, p 3; Exhibit B). Plaintiff did not file suit against Harleysville within one year of the accident as required by MCL 500.3145(1). The trial court requested supplemental briefing from the parties to address the identifiability of the higher priority insurer, Harleysville (Tr. 3/22/18, p 25; Appellant's Appendix, p 31). Following the submission of Supplemental Briefs by both Plaintiff and Defendant, the trial court granted summary disposition for Defendant, finding that with reasonable diligence Plaintiff could have identified the employer of the truck driver, and through the employer, the insurance carrier (Opinion and Order re: Defendants' Motions for Summary Disposition Taken under Advisement, p 2; Appellant's Appendix, p 3). Plaintiff appealed to the Court of Appeals which affirmed in a 2-1 decision, holding that where a higher priority insurer is identifiable, Plaintiff cannot collect personal protection insurance benefits from a lower priority insurer (Exhibit A, p 5). Plaintiff now seeks leave to appeal to this Court.

RECEIVED by MSC 2/1/2021 11:55:44 AM

Factual Background

This case arises from a motorcycle accident that occurred on Dixie Highway in Waterford Township on May 6, 2016 (State of Michigan Traffic Crash Report; Appellant's Appendix, pp 36-37). Plaintiff, the driver of the motorcycle, lost control when a truck changed lanes five to six car lengths in front of him (*Id.,* p 37) (Gonzalez dep, p 15; Appellant's Appendix, p 70). Notwithstanding Plaintiff's assertion in his Statement of Facts that he was entitled to recover PIP benefits under Michigan's No-fault Act, there has been no judicial determination that a motor vehicle was involved in this no-contact accident.

The driver of the truck, Gilbert Gonzalez, was listed on the police report, including his address and telephone number (State of Michigan Traffic Crash Report; Appellant's Appendix, p 37). Plaintiff's counsel sent Mr. Gonzalez a letter on May 11, 2016, only five days after the accident (Letter, 5/11/16; Appellant's Appendix, p 64). This letter advised Mr. Gonzalez that Plaintiff's counsel had been retained to represent Plaintiff, advised Mr. Gonzalez that there was a contingency fee in connection with Plaintiff's counsel's representation of Mr. Griffin, and suggested that he turn the letter over to his insurer (*Id.*). The letter does not inquire about the ownership of the vehicle that Mr. Gonzalez drove at the time of the accident, and it does not ask about insurance coverage (*Id.*). It does not even request a response, other than a brief mention of awaiting "further word" (*Id.*). Mr. Gonzalez did not answer this letter from Plaintiff's counsel (Gonzalez dep, p 29; Appellant's Appendix, p 73).

RECEIVED by MSC 2/1/2021 11:55:44 AM

Trumbull also made efforts to contact Mr. Gonzalez.[1] Trumbull's efforts to contact Mr. Gonzalez consisted of several telephone calls, two letters, and two visits to Mr. Gonzalez' residence at a time when he was not home. Samantha Saba of Defendant Trumbull Insurance first attempted to contact Mr. Gonzalez by telephone on May 18, 2016 (Trumbull claim notes; Appellant's Appendix, p 116). Mr. Gonzalez indicated that he was not able to talk at that time (*Id.*). Ms. Saba again called Mr. Gonzalez on June 1, 2016, receiving no answer and leaving a voicemail message (*Id.*). On that date Ms. Saba mailed out a witness questionnaire (*Id.*). On June 28, 2016, Amber Snyder attempted to contact Mr. Gonzalez by telephone. She spoke with an unknown male at Mr. Gonzalez' number who indicated that Mr. Gonzalez was not going to make a comment and said he would have Mr. Gonzalez call back (Trumbull claim notes; Appellant's Appendix, p 112). On November 1, 2016, Skip Ward of Trumbull Insurance Company attempted to contact Mr. Gonzalez by going to his residence as indicated on the police report (Trumbull claim notes; Appellant's Appendix, pp 104-105). Mr. Ward found no one at home and left a business card seeking a return call (*Id.*). Mr. Ward also attempted calling the telephone number indicated on the police report but received a busy signal on each of three attempts (*Id.*). On November 10, 2016, Skip Ward again went to Mr. Gonzalez' residence and found no one home (Trumbull claim notes; Appellant's Appendix, p 104). On this date Mr. Ward prepared and mailed a letter to Mr. Gonzalez asking that he contact Mr. Ward (*Id.*). On December 27, 2016, Skip Ward closed Trumbull's SIU investigation (Trumbull claim notes; Appellant's Appendix, p 103). At this time,

[1] This was well known to Plaintiff well in advance of Defendant's Motion for Summary Disposition in this matter, which was filed November 14, 2017 (Exhibit B). Defendant Trumbull provided its claim notes to Plaintiff on or about October 11, 2017. Plaintiff confirms this in its Supplemental Brief in Opposition to Defendant's Motion for Summary Disposition, where Plaintiff asserts that "Defendant Trumbull never disclosed the existence of and results of its investigation until October 11, 2017 . . ." (Plaintiff's Supplemental Brief, p 2; Exhibit C).

RECEIVED by MSC 2/1/2021 11:55:44 AM

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).

Plaintiff's only other effort to locate insurance through Mr. Gonzalez was to hire a company to search for insurance coverage for Mr. Gonzalez on April 2, 2017 (MEA Research Services Report; Exhibit D). This search turned up no insurance (*Id.*).

After the instant lawsuit was filed and Defendant Trumbull was served (Service of Complaint filed 7/3/17, See Register of Actions, Exhibit F), Defendant Trumbull noticed Mr. Gonzalez for a deposition, and hired a private investigator to locate him and serve a subpoena on him. Mr. Gonzalez appeared for the deposition on October 23, 2019, where he testified that his employer at the time of the accident was Pavex (Gonzalez dep, p 8; Appellant's Appendix, p 68). Then, by November 2017, counsel for the MACP was able to ascertain that the vehicle involved in the accident was insured by Harleysville Insurance Company (Pavex Documents; Exhibit E).

Procedural Facts

Plaintiff filed the instant lawsuit on April 21, 2017 (Register of Actions; Exhibit F). Plaintiff sued Trumbull Insurance Company, Allstate Insurance Company, Esurance Property and Casualty Insurance Company, John Doe Insurance Company, and the Michigan Assigned Claims Plan (Complaint; Exhibit G). Allstate and Esurance were dismissed by Stipulated Orders, and Plaintiff voluntarily dismissed John Doe Insurance Company (Stipulated Order of Dismissal as to Allstate, 10/18/17; Exhibit H) (Stipulated Order of Dismissal as to Esurance, 9/25/17; Exhibit I) (Voluntary Dismissal of John Doe Insurance Company, 5/21/18; Exhibit J).

Defendant Trumbull moved for summary disposition on November 14, 2017, asserting that it could not be liable for personal protection insurance benefits because Harleysville Insurance

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Company was higher in the order of priority for payment of benefits (Trumbull Motion for Summary Disposition, ¶¶ 7, 8; Exhibit B). Trumbull argued that it was entitled to summary disposition regardless of the fact that Plaintiff's claim against the higher priority insurer, Harleysville, might now be time-barred (Exhibit B, p 6). Defendant argued that this was not a case where Plaintiff's counsel *could not* identify Harleysville as the higher priority insurer. Defendant pointed out that it had sent an investigator who handed Mr. Gonzalez a subpoena, and Mr. Gonzalez then appeared for a deposition and identified his employer, Pavex (Exhibit B, p 8). Defendant argued that "[t]here is no reason Plaintiff could not subpoena Gilbert Gonzalez, name him in the lawsuit or send an investigator within one-year from the date of the lawsuit, as Defendant did, in order to ascertain whether he had automobile insurance on the date of loss." (*Id.*)

Although Plaintiff's counsel had in his possession the claim notes detailing Trumbull's efforts to contact Mr. Gonzalez, Plaintiff did not bring those efforts to the Court's attention in his Response to Defendant's Motion for Summary Disposition. Plaintiff's counsel did enumerate his own efforts to contact Mr. Gonzalez, which consisted of sending a letter on May 11, 2016, and contracting with MEA Research Services, Inc., Ltd, in an effort to determine if Mr. Gonzalez maintained any insurance on the motor vehicle allegedly involved in the accident, and/or any other vehicles at the time of the accident (Plaintiff's Response to Defendant's Motion for Summary Disposition, pp 6-7; Exhibit K). Plaintiff argued that Trumbull was obligated to pay benefits notwithstanding the existence of a higher priority insurer (Exhibit K, pp 10-11). Plaintiff also argued that Trumbull was first in priority for payment of benefits because the higher priority insurer, Harleysville, could not be identified within the one-year statute of limitations (Exhibit K, pp 14-16).

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Trumbull replied to Plaintiff's Response, noting that Plaintiff essentially sought to pass the blame, reasoning that because he failed to notify Harleysville within one year of the accident, Harleysville was no longer responsible for payment and Trumbull should pay instead (Trumbull Reply to Plaintiff's Response to Trumbull Motion for Summary Disposition, p 2; Exhibit W). Trumbull reiterated that Plaintiff could have identified the higher priority insurer but failed to make sufficient efforts to do so (Exhibit W, pp 2-4).

MACP also responded to Trumbull's Motion for Summary Disposition, arguing that both Harleysville and Trumbull were higher than the MACP in priority for the payment of no-fault insurance benefits, and that Plaintiff could only make a claim through the MACP under the circumstances specified in MCL 500.3172, none of which existed in this case (MACP Response to Trumbull Motion for Summary Disposition, pp 8-9; Exhibit L).

MACP also filed its own Motion for Summary Disposition, asserting that Defendant Trumbull was higher in priority than the MACP to provide no-fault benefits to or on behalf of Plaintiff (MACP Motion for Summary Disposition, p 7; Exhibit M). MACP also argued, as in its Response to Trumbull's Motion for Summary Disposition, that Plaintiff could only make a claim through the MACP under the circumstances specified in MCL 500.3172, none of which existed in this case (Exhibit M, pp 7-8).

Plaintiff responded to the MACP Motion for Summary Disposition by arguing that the MACP was obligated by MCL 500.3172 to assign the claim because there was a dispute between insurers as to the obligation to provide coverage (Plaintiff's Response to MACP Motion for Summary Disposition, pp 13-14; Exhibit N).

The MACP filed a Reply, arguing that there was no dispute regarding priority because Plaintiff never submitted a claim to Harleysville, Harleysville never denied benefits, and

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Harleysville was not a party to the lawsuit (MACP Reply to Plaintiff's Response to MACP Motion for Summary Disposition, pp 2-3; Exhibit O). MACP asserted that because Plaintiff never made a claim with Harleysville, Trumbull was highest in priority to provide no-fault benefits to or on behalf of Plaintiff (Exhibit O p 2).

Both the Trumbull Motion for Summary Disposition as well as the MACP Motion for Summary Disposition were heard on March 22, 2018 (Tr. 3/22/18; Appellant's Appendix, p 7). At this time, the trial court opined at the outset that "the bottom line [is] whether or not Harleysville was identifiable." (Tr. 3/22/18, p 4; Appellant's Appendix, p 10). The Court then stated, "the question before this Court is whether the other vehicle's insurance carrier was identifiable before the expiration of the one-year period." (Tr. 3/22/18, p 5; Appellant's Appendix, p 11) The Court indicated that it would ask the parties to brief this issue, which the Court identified as "whether Harleysville was, in fact, identifiable" (Tr. 3/22/18, p 6; Appellant's Appendix, p 12).

Counsel for Plaintiff argued that "I don't know what else I could have done" and pointed out that he sent a letter to which Mr. Gonzalez did not respond, and hired MEA to research which failed to find insurance for Mr. Gonzalez (Tr. 3/22/18, pp 6, 7; Appellant's Appendix, pp 12, 13).

Counsel for Trumbull argued that the letter sent to Mr. Gonzalez was "pretty ambiguous" and did not even ask Mr. Gonzalez to contact Plaintiff's counsel (Tr. 3/22/18, p 8; Appellant's Appendix, p 14). Counsel further pointed out that the MEA search for insurance for Mr. Gonzalez would not reveal the insurer of the truck, which was clearly a work vehicle (Tr. 3/22/18, p 11; Appellant's Appendix, p 17).

The trial court did not, as Plaintiff represents, question both sides at this hearing about the efforts taken before the lawsuit was filed to determine if higher priority coverage existed (Application for Leave to Appeal, p 8). The trial court did remark that most insurance companies

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take an aggressive position to try to identify higher priority insurers, and that Trumbull apparently did not do so (Tr. 3/22/18, pp 23-24; Appellant's Appendix, pp 29-30). Counsel for Trumbull did apparently refer to the unsuccessful conclusion of Trumbull's investigation when he stated that "the mention of the unidentifiable person or whatever, that was in December. And, it is actually a stone-cold fact that if that was December of '16, Trumbull found Gilbert Gonzalez, confirmed paybacks [sic: Pavex] and Harleysville within a year of that." (Tr. 3/22/18, p 24; Appellant's Appendix, p 30.) However, he went on to argue that examination of Trumbull's efforts would be "going down a path that subjects [Trumbull] to basically looking like they didn't do enough, when they didn't have to, it is not their duty . . ." (Tr. 3/22/18, p 25; Appellant's Appendix, p 31.)

The Plaintiff's Supplemental Brief outlined in detail the efforts made by both Trumbull and by Plaintiff's counsel to investigate the existence of an identifiable insurance carrier in higher priority to pay PIP benefits to or on behalf of Mr. Griffin (Plaintiff's Supplemental Brief, pp 2-4; Exhibit C). Plaintiff's counsel's entire effort consisted of a May 11, 2016 letter to Mr. Gonzalez, and of contracting on April 2, 2017 with MEA Research Services, Inc., Ltd., to determine any insurance maintained by Mr. Gonzalez (Exhibit C, pp 2, 4).

Defendant's Supplemental Brief noted that Plaintiff's counsel, having 360 days left in which to contact Mr. Gonzalez after the initial letter of May 11, 2016, apparently did nothing more to contact him (Defendant's Supplemental Brief, p 4; Exhibit P). Further, Defendant Trumbull pointed out, it had been able to subpoena Mr. Gonzalez for deposition, perform his deposition, and learn the identity of his employer and its insurer, all within approximately four months following the service of the Complaint on Defendant (Exhibit P, p 4). Defendant pointed out that "there was nothing stopping Plaintiff – who was represented by counsel five days after the accident – from promptly instituting an action against Defendant, and then issuing a subpoena to depose

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Mr. Gonzalez." (Exhibit P, p 5.) Defendant argued that well within one year of the accident, Plaintiff could have learned that Mr. Gonzalez was driving his employer's vehicle, that the vehicle was registered to Pavex, and that Pavex was insured by Harleysville (Exhibit P, p 5*).*

The trial court issued an Opinion granting summary disposition for Defendant Trumbull on April 27, 2018 (Opinion and Order; Appellant's Appendix, p 2). The Court noted that "[t]he question before the Court . . . is whether Harleysville, the highest priority insurer under the statute, was discoverable within 1 year of the accident, and if so, should Trumbull be dismissed." (Opinion and Order; Appellant's Appendix, p 3.) The Court noted that Plaintiff, in arguing that Harleysville was not readily identifiable, relied on the letter sent by Plaintiff's counsel to Gonzalez on May 11, 2016, and an investigation report dated April 19, 2017 from an entity called MEA Research Services, Inc., Ltd., stating that MEA could not locate any valid insurance on Gilbert Gonzalez (*Id.*). The Court noted that "Plaintiff also relies on Defendant Trumbull's efforts during claim investigation to identify the owner of the involved motor vehicle." (*Id.*) The Court ultimately concluded that with reasonable diligence Plaintiff could have identified Harleysville:

> The Court agrees with Defendant Trumbull that with reasonable diligence Gonzalez's employer could have been identified and through the employer, the insurance carrier. Plaintiff does not document any attempts to contact Gonzalez except for the May 11, 2016 letter. Notably, that letter does not ask for any information from Gonzalez it merely advises that counsel has been retained and suggests that Gonzalez contact his own insurance agent. The MEA report merely states that they were unable to find insurance in Gonzalez's name; indeed, the truck Gonzalez was driving was not insured in his name.

(*Id.*) The Court granted Trumbull's Motion for Summary Disposition because it was not the highest priority insurer as set forth at MCL 500.3114(5) (*Id.*).

The Court also granted summary disposition for MACP, finding there was no basis under MCL 500.3172 for maintaining an action against the MACP. The Court explained that there was

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no dispute between two or more insurers, and there was an identifiable insurer of highest priority (*Id.*).

Plaintiff moved for reconsideration, arguing that no evidence was submitted that the identity of the owner of Mr. Gonzalez' vehicle and its insurer was actually identifiable before October 2017 (when Mr. Gonzalez was deposed) (Plaintiff's Motion for Reconsideration, p 7; Exhibit Q). Plaintiff further argued that Trumbull could not assert a priority dispute as a defense to payment, and that Defendant Trumbull, as an insurer within the priority structure, had a duty to pay claims and seek reimbursement from any insurer in higher priority (Exhibit Q, pp 10, 13).

The trial court denied Plaintiff's Motion for Reconsideration, finding that the issues raised by Plaintiff were thoroughly considered by the Court in deciding the Motions for Summary Disposition (Order re: Motion for Reconsideration; Exhibit R).

Plaintiff appealed to the Michigan Court of Appeals, which affirmed the trial court in a 2-1 decision. The majority held that because a higher priority insurer was identifiable, Trumbull was not liable (Exhibit A, p 5). The majority first noted that as a practical matter, due to the one-year-back rule of MCL 500.3145(1), a plaintiff has one year from the date of injury to identify the highest priority insurer (Exhibit A, p 4). The majority also noted the holding of *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004), that when a higher priority insurer *cannot be identified*, the general rule applies and the injured person must look to his own insurer for personal protection insurance benefits. (Exhibit A, p 5.) The majority opined that "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.*" (Exhibit A, p 5.) The majority further noted that *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." (*Id.*).

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Therefore, the majority concluded, "*Frierson* calls for a binary analysis that asks only whether a higher priority insurer is identifiable." (*Id.*). The Court noted that the undisputed facts established that Harleysville "could have been, and in fact actually was, identified." (*Id.*) The majority held that the trial court erred to the extent that it considered whether Harleysville could have been identified with "reasonable diligence," but that the court still reached the right result, albeit for the wrong reason. (*Id.*) The Court of Appeals therefore affirmed the trial court's decision granting summary disposition to Trumbull (*Id.*).

The majority also affirmed the grant of summary disposition for the MACP. The majority noted that the then applicable MCL 500.3172(3) provided in pertinent 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." (Exhibit A, p 6.) Since no claim was ever made against Harleysville, there was no "dispute" between automobile insurers, and any disagreement between Harleysville and Trumbull was "purely academic and theoretical." (Exhibit A, pp 6-7.) Because there was no actual dispute between insurers, the Court concluded, MCL 500.3172(3) simply did not apply to the facts and circumstances of the case and the trial court correctly dismissed Plaintiff's claim against the MACP (Exhibit A, p 7). Plaintiff has not appealed from the Court of Appeals' determination that there was no "actual dispute" between insurers.

Judge Ronayne Krause concurred in the affirmance of summary disposition for the MACP but dissented from the affirmance of summary disposition for Trumbull. Judge Ronayne Krause disagreed that *Frierson* provided any authority as to what it means to be "identifiable." (Exhibit A, Opinion of Judge Ronayne Krause concurring in part and dissenting in part, pp 1-2). Judge

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Ronayne Krause opined that it would be most consistent with the purpose of the No-Fault Act to require a claimant to exercise due diligence to look for a higher priority insurer. (Exhibit A, Opinion of Judge Ronayne Krause concurring in part and dissenting in part, p 3.) She further opined that Plaintiff exercised the requisite due diligence, and she would therefore reverse the grant of summary disposition for Trumbull (Exhibit A, Opinion of Judge Ronayne Krause concurring in part and dissenting in part, p 4).

Plaintiff moved for reconsideration of the Court of Appeals decision, and the Court denied reconsideration in an Order entered November 19, 2020 (Order, 11/19/2020; Exhibit S). Judge Ronayne Krause would have granted reconsideration, for the reasons and to the extent stated in the concurrence/dissent (Exhibit S).

Plaintiff has now sought leave to appeal to this Honorable Court.

RECEIVED by MSC 2/1/2021 11:55:44 AM

STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562, 567 (2012). This Court also reviews questions of statutory interpretation de novo. *In re Reliability Plans of Elec Utilities for 2017-2021*, 505 Mich 97, 118; 949 NW2d 73, 86 (2020).

I. THE COURT OF APPEALS MAJORITY CORRECTLY HELD THAT WHERE A HIGHER PRIORITY INSURER IS IDENTIFIABLE – AS DEMONSTRATED BY THE FACT THAT IT WAS ACTUALLY IDENTIFIED – THEN THE LOWER PRIORITY INSURER IS NOT LIABLE FOR PERSONAL PROTECTION INSURANCE BENEFITS.

Plaintiff's argument that a priority dispute should not cause a delay in payment proves very little, since there is no "priority dispute" in this case. There is no priority dispute, as the Court of Appeals held (a determination from which Plaintiff did not appeal), because Plaintiff never made a claim to the undisputed highest priority insurer, Harleysville (Exhibit A, 6).

The majority opinion in the case of *Borgess Medical Center v Resto,* 273 Mich App 558; 730 NW2d 738 (2007) vacated 482 Mich 946 (2008), also fails to support Plaintiff's argument that Trumbull was obligated to pay no-fault benefits because that opinion was **vacated** by this Court, which adopted the Court of Appeals' concurring opinion while affirming the result reached by the majority. "A Court of Appeals opinion 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, 240–41 (2006). The concurring opinion which was adopted by this Court affirmed the trial court's judgment awarding plaintiff no-fault benefits while expressly noting that "**no insurer in higher priority was identified**." *Borgess Medical Center,* 273 Mich App at 585 (White, J., concurring) (emphasis

RECEIVED by MSC 2/1/2021 11:55:44 AM

added).[2] That fact distinguishes the instant case from *Borgess Medical Center*. In the instant case, Defendant Trumbull did identify a higher priority insurer, Harleysville, and the existence of this higher priority insurer was the basis for Trumbull's Motion for Summary Disposition (Exhibit B, ¶¶ 5-8).

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." The statute provides in pertinent part:

> (5) A person suffering accidental bodily injury arising from a motor vehicle accident that 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.

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[2] This Court did not, as Judge Ronayne Krause opined in her concurring and dissenting opinion, by "necessary implication" leave intact the majority's holding in *Borgess Med Center*, "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." (Exhibit A, Opinion of Judge Ronayne Krause concurring in part and dissenting in part, p 3 n 2.) When this Court adopted the reasoning of the concurring opinion in *Borgess Med Center*, which would affirm the judgment in favor of the plaintiff for the reason that "no insurer in a higher priority was identified," *Borgess Med Center*, 273 Mich App at 585 (White, J., concurring), it adopted a rationale different from the majority opinion which it vacated. By adopting the concurring opinion's rationale that benefits were payable because "no insurer in a higher priority was identified," this Court adopted a rationale fully consistent with that of the majority in this case – where a higher priority insurer *is* identifiable (and in fact identified), then the lower priority insurer is not liable (Exhibit A, p 5).

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MCL 500.3114(5) (emphasis added).[3] "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). 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; Exhibit T) (Vehicle Registration; Exhibit U). Pursuant to the mandatory directive of MCL 500.3114(5), this is the insurer to whom Plaintiff must look for personal protection insurance benefits.

In order to enforce a claim against Harleysville, Plaintiff, pursuant to MCL 500.3145(1), would have to file suit against Harleysville within one year of the accident, since no written notice was provided to that insurer nor did it pay any benefits:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

[3] MCL 500.3114 was amended effective June 11, 2019, by PA 2019, No. 21. The version in effect at the time of relevant events in this case, and that quoted above, is the version in effect prior to the amendment effective June 11, 2019.

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MCL 500.3145(1).[4] Plaintiff did not file suit against Harleysville within a year of the accident. But this does not mean that Trumbull, the insurer lower in priority, is liable.

The Court of Appeals correctly applied its previous decision in *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004), to hold that only when the highest priority insurer is *unidentifiable*, the insurer next in priority may be liable. 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). In *Frierson*, notably, the higher priority insurer was truly unidentifiable, and was not in fact identified. Not so here. Where, as in this case, the higher priority insurer is identifiable, then the rule of *Frierson* does not apply, and the lower priority insurer is not liable. And, as the panel accurately noted, *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." (Exhibit A, p 5.)

By arguing that the Court of Appeals should have adopted a rule that the lower priority insurer would be liable if the higher priority insurer was not discoverable within a year (Plaintiff's Application for Leave to Appeal, pp 17-18), Plaintiff would have the Court inventing rules out of thin air. However, in discerning the proper interpretation of MCL 500.3114, and MCL 500.3145,

[4] MCL 500.3145 was amended effective June 11, 2019, by PA 2019, No. 21. The version in effect at the time of relevant events in this case, and that quoted above, is the version in effect prior to the amendment effective June 11, 2019.

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a Court must hew to the statutory language. A court "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171, 180 (2010). Courts "cannot read into a statute what the Legislature did not include. . .". *Book-Gilbert v Greenleaf*, 302 Mich App 538, 547; 840 NW2d 743, 749 (2013). The Legislature has not created a discovery rule stating that if a higher priority insurer is not discovered or discoverable within a year, then the next priority insurer is liable. Where such a rule is not found in the statutes, MCL 500.3114, MCL 500.3145, it is not the place of the Courts to legislate it, and the majority in this case properly declined to do so.

In *Maroky v Encompass Indemnity Co,* unpublished per curiam decision of the Michigan Court of Appeals, issued October 19, 2017 (Docket No. 333489) (Exhibit V),[5] the Court of Appeals held that a PIP claimant must look to the insurer of highest priority, and the fact that a claim against that insurer was time-barred did not make the next insurer in priority liable. In *Maroky,* plaintiff first instituted suit against his personal household vehicle insurer (Encompass), and only later instituted suit against the higher priority insurer (OOIDA) of a vehicle owned and furnished by plaintiff's employer. Plaintiff's suit against OOIDA was dismissed as time-barred. The Court of Appeals found that OOIDA was the highest priority insurer under MCL 500.3114(3). However, the fact that suit against OOIDA was time-barred did not mean that Encompass was liable. The Court explained:

> Therefore, <u>because OOIDA is the insurer of highest priority . . . defendant [Encompass] is not liable for plaintiff's PIP benefits.</u> Accordingly, the trial court properly granted summary disposition to defendant under MCR 2.116(C)(10) . . . .

[5] This unpublished case is cited for its articulation of the principle that a lower priority insurer does not become liable simply because a claim against a higher priority insurer is time-barred.

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> Unfortunately for plaintiff, his case against OOIDA was dismissed with prejudice because he failed to file the case within one year of suffering the injuries under MCL 500.3145. Therefore, plaintiff will likely be unable to recover PIP benefits from any source; however, plaintiff's error does not change the order of priority or render defendant liable.

Id. at *5.

In this case too, Plaintiff failed to bring his lawsuit against the highest priority insurer, Harleysville, within a year. Plaintiff's failure does not mean that liability shifts to Trumbull, the lower priority insurer.

Plaintiff argues that the Court of Appeals should have adopted the holding of the unpublished and non-precedential case of *Levander v Home Owners Ins Co,* unpublished per curiam decision of the Michigan Court of Appeals, issued June 18, 2015 (Docket No. 320101) (Appellant's Appendix, p 128), where the Court held that a lower priority insurer would be entitled to summary dismissal if the higher priority insurer was identifiable "before the limitations period elapsed . . . ", but conversely held that the lower priority insurer could be liable for PIP benefits if plaintiff could not identify the higher priority insurer "before expiration of the one year statute of limitations . . .". *Id.* at pp 9, 10. But even if the Court of Appeals had applied the rule advocated by Plaintiff, it would not alter the outcome of this case. This is because, as the trial court found, Harleysville could have been identified within one year of the accident if Plaintiff had acted with reasonable diligence (Opinion and Order; Appellant's Appendix, p 3).

Plaintiff places great weight on the fact that Trumbull's initial efforts, which included several telephone calls, two letters, and two visits to Mr. Gonzalez' residence when he was not there, did not uncover Harleysville as the higher priority insurer. But Plaintiff ignores several key facts, first among them that Trumbull's efforts were concluded in December 2016, four months before the expiration of the one-year limitations period applicable to Plaintiff. After the conclusion

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of Trumbull's unsuccessful efforts, Plaintiff still had four months in which to locate Mr. Gonzalez and learn the identity of his employer, and thereby the identity of Harleysville. Four months was clearly sufficient time to locate Mr. Gonzalez, who was identified as the truck driver on the police report and whose address and telephone number were included on the police report. This is plain from the fact that defense counsel was able to subpoena him and depose him, and thus learn the identity of his employer and of its insurer, within a similar period of time.

The entirety of the efforts undertaken by Plaintiff's counsel were a letter sent five days after the accident, and an inquiry by MEA Research Services, Inc., Ltd., to determine any insurance maintained by Mr. Gonzalez. Plaintiff did not retain an investigator, who surely could have located Mr. Gonzalez, just as the investigator retained by defense counsel did. Nor did Plaintiff subpoena Mr. Gonzalez, as he could have done at any time after instituting a lawsuit, an action that was certainly within his power. 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 (Exhibit T) (Exhibit U). By waiting until the eleventh hour, Plaintiff took the risk that the higher priority insurer would be discovered after the one-year statute of limitations had expired. That does not change the fact that the higher priority insurer was identifiable within one year of the accident. Thus, even under the *Levander* rule that Plaintiff advocates, Plaintiff cannot collect PIP benefits from the lower priority insurer, Trumbull Insurance Company.

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II. PLAINTIFF DID NOT ACT WITH REASONABLE DILIGENCE TO DISCOVER THE IDENTITY OF THE HIGHER PRIORITY INSURER, AND FOR THIS REASON THE DECISION OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

To the extent that Plaintiff relies on the initial unsuccessful investigation undertaken by Trumbull to show that he could not have discovered the identity of the higher priority insurer, Harleysville, such reliance is totally unwarranted, and merely a tactic to divert attention from Plaintiff's own lack of diligence. This Court has expressly recognized that during the claims handling and negotiation processes, "the parties are in an obvious adversarial position and generally deal with each other at arm's length." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 415; 751 NW2d 443 (2008). Moreover, "[w]here the insured has the same knowledge or means of knowledge as the insurer, the insurer cannot be regarded as occupying any fiduciary relationship that would entitle the insured to rely on the insurer's representations . . .". *Id.*, citing *Mayhew v Phoenix Ins Co*, 23 Mich 105 (1871). In this case, both Trumbull and the Plaintiff were in possession of the police report, which provided the name, address, and telephone number of the driver of the motor vehicle allegedly involved in the accident. Plaintiff, the claimant, having the same means as Trumbull to discover the highest priority insurer, and represented by counsel five days after the accident, lacks any basis to claim that it was somehow Trumbull's duty to identify the highest priority insurer.

In fact, the efforts of Plaintiff's counsel, who represented him five days after the accident, were woefully deficient. Plaintiff's entire effort consisted of a letter sent to Mr. Gonzalez five days after the accident, and an inquiry nearly eleven months later into whether Mr. Gonzalez insured any vehicles (Exhibit D) (5/11/16 Letter; Appellant's Appendix, p 64). The letter to Mr. Gonzalez – the driver of the truck allegedly involved in the accident – 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

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agent or insurer handling liability coverage and references "an amicable adjustment of this matter" (5/11/16 Letter; Appellant's Appendix, p 64). 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, Plaintiff's counsel did nothing for nearly eleven months. Plaintiff complains in its Application for Leave to Appeal that Defendant Trumbull did not answer his counsel's letter of December 26, 2016, wherein he asserted that "[a]s we (neither myself nor the Hartford) have been unable to identify the insurer of the owner and/or operator of the vehicle involved in the accident, the next priority lies with the Hartford, Mr. Griffin's auto insurer" (Application for Leave to Appeal, p 6). What did Plaintiff do in response? For another three months, Plaintiff's counsel did absolutely nothing. He did not make any 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 (Exhibit D). When that effort was unsuccessful, Plaintiff finally filed suit on April 21, 2017 (Exhibit F), only fifteen days short of one year after the accident.

At the time of Plaintiff's December 2016 letter to Trumbull, Plaintiff still had four months in which to locate Mr. Gonzalez and learn the identity of his employer, and thereby the identity of Harleysville. Four months was clearly sufficient time to locate Mr. Gonzalez, who was identified as the truck driver on the police report and whose address and telephone number were included on the police report. This is plain from the fact that defense counsel was able to subpoena him and depose him, and thus learn the identity of his employer and of its insurer, within a similar period of time (Service of Complaint filed 7/3/17, See Exhibit F). Yet, Plaintiff did not subpoena Mr. Gonzalez, as he could have done at any time after instituting a lawsuit, an action that was certainly within his power. There is no reason why Plaintiff needed to wait until the one-year period was

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nearly expired to file 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. Plaintiff, who made no such efforts, now asserts that Defendant's ability to serve Mr. Gonzalez occurred by mere "happenstance." (Application for Leave to Appeal, p 7.) Defendant's ability to serve and depose Mr. Gonzalez was no happenstance, but the direct result of Defendant's use of a private investigator, and of the subpoena power, both tools that were completely within the reach of Plaintiff's counsel, and moreover could easily have been employed prior to the expiration of the one-year statute of limitations.

In short, where the identity of the Harleysville, the higher priority insurer, was easily ascertainable with due diligence, but Plaintiff's counsel did not exercise such diligence, it is entirely correct that the lower priority insurer be shielded from liability. Any other result would effectively allow claimants to choose which insurer they wish to claim benefits from, without regard to the statutory rules of priority.

CONCLUSION

The Court of Appeals in this case properly followed *Frierson*, which held that where a higher priority insurer "**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 (emphasis added). In this case, the higher priority insurer could be and was identified. As the Court of Appeals correctly held, "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." (Exhibit A, p 5.) Where the priority statute, MCL 500.3114, does not supply a discovery rule stating that if a higher priority insurer is not

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discovered or discoverable within a year, then the next priority insurer is liable, it is not the place of the courts to legislate it, and the majority in this case properly declined to do so.

In any case, it is clear that the identity of Harleysville, the higher priority insurer, could have been discovered within a year if reasonable diligence had been exercised. Thus, even if the rule advocated by Plaintiff were adopted, the result would be the same, and there is no basis for intervention by this Honorable Court.

RELIEF REQUESTED

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

SECREST WARDLE

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Dated: February 1, 2021

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INDEX OF EXHIBITS

Exhibit A	Court of Appeals Decision, 9/24/2020
Exhibit B	Defendant Trumbull Insurance Company's Motion for Summary Disposition
Exhibit C	Plaintiff's Supplemental Brief in Opposition to Trumbull's Motion for Summary Disposition
Exhibit D	MEA Research Services, Inc., Ltd. Documents
Exhibit E	Pavex Documents
Exhibit F	Register of Actions
Exhibit G	Complaint
Exhibit H	Stipulated Order of Dismissal as to Defendant Allstate Insurance Company, 10/18/17
Exhibit I	Stipulated Order of Dismissal as to Defendant Esurance Property & Casualty Insurance Company, Only, 9/25/17
Exhibit J	Order of Voluntary Dismissal of Defendant John Doe Insurance Company, 5/21/18
Exhibit K	Plaintiff's Answer to Defendant Trumbull Insurance Company's Motion for Summary Disposition and Cross Motion for Summary Disposition
Exhibit L	Defendant MACP's Response to Trumbull's Motion for Summary Disposition and Counter Motion pursuant to MCR 2.116(I)(2)
Exhibit M	Defendant MAIPF's Motion for Summary Disposition
Exhibit N	Plaintiff's Answer to Defendant MAIPF's Motion for Summary Disposition
Exhibit O	Defendant MAIPF's Reply to Plaintiff's Response to MAIPF's Motion for Summary Disposition
Exhibit P	Defendant Trumbull's Supplemental Brief in Support of Motion for Summary Disposition
Exhibit Q	Plaintiff's Motion for Reconsideration
Exhibit R	Order re: Motion for Reconsideration, 6/5/18
Exhibit S	Court of Appeals Order Denying Reconsideration, 11/19/2020

Exhibit T	Harleysville Dec Page
Exhibit U	Registration
Exhibit V	*Maroky v Encompass Indemnity Co,* unpublished per curiam decision of the Michigan Court of Appeals, issued October 19, 2017 (Docket No. 333489)
Exhibit W	Defendant Trumbull's Reply to Plaintiff's Response to Trumbull's Motion for Summary Disposition

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