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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. 162419

Court of Appeals Case No. 344272

Wayne County Circuit Court
Case No. 17-006082-NF
Hon. Susan L. Hubbard (P44546)

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PLAINTIFF-APPELLANT WILLIE GRIFFIN'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

This Court has asked Plaintiff/Appellant, Willie Griffin, to file a supplemental brief in support of his leave application that addresses three specific questions. The first 2 questions asked by this Court are legal questions. The third asks that he apply legal standards identified in answering the second question to the facts in this case.

The answer to the first question is clearly "Yes" as Michigan law is clear that "the lower priority insurer, who was provided timely notice under MCL 500.3145(1), can be held liable for personal protection insurance benefits if the higher priority insurer was not identified until after the one-year statutory notice period under MCL 500.3145(1)." To hold differently would contradict 40 years of precedent affirming that a priority dispute does not justify denying payment of PIP benefits and that attorney fees will be owed if a lower-priority insurer refuses to pay PIP benefits because it is possible that higher priority PIP coverage existed. See infra, at pp 2-5.

The answer to the second question is "No" where, as in this case, the insured paid premiums to his own PIP insurer to protect him from economic loss. Simply put, there is no requirement – statutory, contractual, common-law or otherwise – that "the insured must prove that he or she exercised reasonable, due, or some other degree of diligence in searching for a higher priority insurer". See infra at pp 6-9. But, that said, insureds do have a duty to diligently pursue legal claims including PIP claims. Here, Griffin did so – by promptly notifying Trumbull of his PIP claim and

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cooperating with its investigation by providing available information that was pertinent to his claim – as he was contractually required to do. See infra at pp 9-11.

The third question asked by this Court is "whether the appellant exercised the requisite degree of diligence in searching for a higher priority insurer". Respectfully, there is no specific duty requiring that PIP insureds search for a higher priority PIP insurer than the PIP insurer that was paid premiums to provide PIP protection. PIP insureds have a duty only to diligently pursue the claim for PIP benefits. But, that common-law duty is satisfied by doing what is statutorily or contractually required.

Here, Griffin exercised the due diligence required under the circumstances in this case as he did everything that was statutorily and contractually required of him. Thus, Trumbull was obligated to pay his claim for PIP benefits regardless of whether a higher priority PIP insurer was identified after the statutory notice period expired.

ARGUMENT

I. PIP BENEFITS ARE OWED WHERE A LOWER PRIORITY PIP INSURER WAS TIMELY NOTIFIED OF THE CLAIM AND NO HIGHER PRIORITY PIP INSURER WAS IDENTIFIED UNTIL AFTER THE ONE-YEAR NOTICE PERIOD EXPIRED.

The No-Fault Act was adopted in Michigan almost 50 years ago because the Legislature recognized that the existing tort liability system in Michigan was not an effective way to compensate persons injured in motor vehicle accidents for their economic losses. As this Court observed in *Parks v DAIIE*, 426 Mich 191, 207, 393 NW2d 833 (1986), "[t]he no-fault act was intended to minimize uncertainties and to provide a relatively simple means of compensating those injured in automobile accidents." Effectively, Trumbull is

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asking this Court to negate the Legislature's clear intent in adopting the No-Fault Act by permitting PIP insurers to use the priority scheme as a way to avoid paying PIP benefits.

In *Shavers v Attorney General*, 402 Mich 554, 578-79, 267 NW2d 72 (1978), this Court described how 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." It further observed that "[t]he goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." Id. In sum, it was designed to ensure prompt reimbursement for economic loss and to avoid the need for litigation. Id at 621-623. Here, neither goal has been fulfilled because Trumbull refused to pay PIP benefits even after it closed its investigation into whether higher priority coverage existed.

The Michigan Courts have long held that priority is not a defense to paying a claim for PIP benefits. In *Kalin v DAIIE*, 112 Mich App 497, 510, 316 NW2d 467 (1982), for example, the Court of Appeals observed that "[a] claimant who is clearly entitled to no-fault benefits should not be forced to hire an attorney merely because the circumstances of his accident create problems of priority among insurers." It further held that attorney fees were owed because it was unreasonable for DAIIE to refuse to pay PIP benefits simply because a priority dispute existed. This Court evidently saw no need to review the Court of Appeals' holding in *Kalin* as leave to appeal was denied. See *Kalin v DAIIE*, 417 Mich 853 (1982).

Subsequently, in *Darnell v Auto-Owners Ins Co,* 142 Mich App 1, 12, 369 NW2d 243 (1985), the Court of Appeals applied this Court's holding in *Kalin* by also concluding that attorney fees were owed because it was unreasonable for the defendant insurer to refuse

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to pay PIP benefits on grounds that a higher priority insurer existed. See also *Bloemsma v Auto Club Ins Ass'n*, 174 Mich App 692, 697, 436 NW2d 442 (1989), in which the Court of Appeals, relying on *Darnell*, similarly affirmed that no-fault attorney fees were owed as "a dispute of priority among insurers will not excuse the delay in making timely payments".

In recent years, this Court has cited these prior cases favorably and thus reaffirmed that a lower-priority PIP insurer can be held liable for payment of PIP benefits even if priority is disputed. Most recently, this Court did so in *Esurance Prop & Cas Co v Michigan Assigned Claims Plan*, ___ Mich App ___, ___ NW2d ___ (2021) when it cited not only *Bloesma*, supra, but also *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719, 737, 650 NW2d 129 (2002), which cited *Darnell*, supra. Without question, it is well-established in Michigan that a lower-priority PIP insurer can be held liable for PIP benefits – and attorney fees will be owed if PIP benefits are not paid because priority was disputed!

In *Borgess Medical Center v Resto*, 273 Mich App 558, 730 NW2d 738 (2007), vacated on other grounds, but affirmed, 482 Mich 946 (2008) this Court addressed this question by affirming the Court of Appeals' holding that no-fault attorney fees were owed where a lower priority PIP insurer failed to pay PIP benefits because it was possible that a higher priority PIP insurer existed. It did so by adopting the concurring opinion below, which observed that the defendant insured the motor vehicle occupied and "no insurer in a higher priority was identified." Id at 585. Similarly, in this case, no higher priority PIP insurer was identified. Thus, the result should be the same – PIP benefits must be paid!

While the Court of Appeals' majority opinion in *Borgess v Resto* was vacated on other grounds, the fact that this Court affirmed its holding that attorney fees were owed

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under MCL 500.3148(1) cannot be ignored. Simply put, this Court affirmed that holding because Michigan law is absolutely clear that a lower priority PIP insurer is required to pay PIP benefits regardless of whether it is possible that a higher priority PIP insurer existed.

Although the facts in this case differ slightly from *Borgess v Resto,* what the Court of Appeals said is nonetheless instructive. In the majority opinion, the Court held that a lower priority insurer may not avoid paying PIP benefits "by claiming that its speculation that a higher-priority insurer might exist" was not a true priority dispute. Id at 580. In other words, a lower priority PIP insurer may not refuse to pay PIP benefits on the grounds that a prima facie case was not established because a higher priority PIP insurer might exist. Clearly, the possibility of higher priority PIP coverage cannot defeat the insured's claim for PIP benefits from a lower priority insurer. If it could, PIP benefits would too often be denied.

While the Court of Appeals' majority opinion in *Borgess v Resto* focused on the wording of MCL 500.3114(1) as the basis for that conclusion, the concurring opinion did not do so. The concurring opinion, which this Court adopted, held that PIP benefits were owed by the lower priority PIP insurer because "no insurer higher in priority was identified." Id at 585. In so holding, the concurring opinion rejected the defense's contention that PIP insureds must demonstrate that no higher priority PIP insurer existed in order to establish a prima facie case for payment of PIP benefits by a lower priority PIP insurer. Effectively, Trumbull now seeks to impose that standard even though this Court previously rejected it.

Putting such an undue burden on premium-paying PIP insureds would only ensure that PIP benefits would not be promptly paid as the No-Fault Act (and the Legislature) intended. It would affirm that PIP benefits need not be paid whenever it is possible that higher priority PIP coverage existed. There is no reason that this Court should now deviate

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from over four decades of precedent in Michigan that has affirmed that priority status is not a valid defense to paying PIP benefits. To do so would be contrary to the goal of ensuring prompt adequate reparations. It also would effectively negate the goal of avoiding litigation.

II. PIP INSUREDS LIKE GRIFFIN NEED NOT PROVE DILIGENCE IN SEARCHING FOR A HIGHER PRIORITY PIP INSURER BECAUSE PREMIUMS WERE PAID FOR PROTECTION FROM ECONOMIC LOSS IN THE FORM OF PIP BENEFITS.

A. PIP insureds should not need to hire attorneys or investigators or file a lawsuit (so subpoenas can be issued) simply to get PIP benefits paid.

As was noted at the start of the first argument section, this Court observed in *Parks*, 426 Mich at 207, that the No-Fault Act "was intended to minimize uncertainties and to provide a relatively simple means of compensating those injured in automobile accidents." Requiring that PIP insureds conduct a diligent search for higher priority PIP coverage in order to get PIP benefits paid would negate the goal of simplifying post-accident compensation. It would instead ensure a system where PIP insureds would be required to hire not only lawyers, but also investigators, to protect their right to recover PIP benefits. Clearly, that is not what the Legislature intended when it adopted the No-Fault Act in 1972. In fact, it is precisely what the Legislature sought to avoid by adopting a no-fault system.

In *Kalin*, 112 Mich App at 510, the Court of Appeals astutely observed (in 1982) that "[a] claimant who is clearly entitled to no-fault benefits should not be forced to hire an attorney merely because the circumstances of his accident create problems of priority among insurers." That same rationale was cited by an ethics opinion which held that attorneys must advise persons injured in motor vehicle accidents that legal counsel is not needed to make a claim for PIP benefits. See Ethics Opinion, C-223, which states, in

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pertinent part, the following: "[w]here a client is entitled to benefits under the no-fault automobile insurance act, a lawyer has a duty to advise the client that the claim may be initiated and recovered from the client's no-fault carrier without assistance from a lawyer."

The same reasoning applies to Trumbull's claim that PIP insureds seeking to recover PIP benefits must hire investigators to determine if higher priority PIP coverage existed. Simply put, an insured that has paid his or her own insurer for PIP protection should not be required to also incur the added expense of hiring lawyers and investigators, especially as every dime spent on lawyers and investigators means that less is recovered.

Similarly, PIP insureds should not be required to file a lawsuit so that subpoenas can be issued in the hopes of obtaining information from recalcitrant witnesses. The No-Fault Act was designed to avoid litigation, not require it. *Shavers* at 621-623. In such situations, PIP benefits should be promptly paid, not denied or delayed pending litigation.

Moreover, PIP insurers are just as capable of filing lawsuits as PIP insureds. A declaratory relief action can be filed to determine whether or not PIP coverage is owed. If a declaratory relief action is filed, a lower priority PIP insurer presumably will have the same ability as its insured to issue a subpeona, and thus, compel testimony (or production of records) that may be relevant to determining whether higher priority coverage existed.

B. PIP insurers are required to investigate a claim for PIP benefits but are also protected if PIP benefits are paid to insureds that were not owed.

The burden of investigating whether higher priority coverage existed naturally should fall on the PIP insurer because it was paid a premium to provide coverage for its insured.[1]

[1]In *Safeco Ins Co of America v Parks*, 170 Cal App 4th 992, 88 Cal Rptr 3d 730 (2009), the California Court of Appeals observed that "[t]he duty of good faith and fair dealing implied in every insurance contract includes a duty on the part of the insurer to

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That is true not only because priority rules and well-established precedent in Michigan compel such a result, but because PIP policies provide that claims for PIP benefits will be investigated (and paid unless the investigation confirms that PIP benefits are not owed).

All insurance policies that provide PIP coverage in Michigan affirm the rights and duties that are owed by the contracting parties, i.e., the insurer and the insured. The PIP insured must promptly notify the PIP insurer of his or her PIP claim so that it can be investigated. The insured also must cooperate with the insurer's investigation by providing available information known to be pertinent to its investigation of that claim.[2] The insurer, in turn, must pay PIP benefits if, as in this case, the insured complies with those conditions.

Typically, the insurance contract also will protect the PIP insurer in the event that payment is made to its insured and higher priority coverage is subsequently identified.[3] In short, PIP policies permit insurers to recover payments made to a PIP insured under such circumstances. They also provide that there can be no duplicate payment of PIP benefits so there is no concern that a PIP insured will recover a "double-dip" on PIP benefits owed.[4]

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investigate claims submitted by its insured." Thus, "an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." Id, quoting from *Egan v Mutual of Omaha Ins Co,* 24 Cal 3d 809, 819, 169 Cal Rptr 691, 620 P2d 141 (1979). "These duties, however, arise after the insured complies with the claims procedure described in the insurance policy". Id.

[2]Trumbull's policy expressly stated the duties that are owed by its insured in its "duties after accident or loss" provisions. Those provisions required prompt notification of "how, when and where the accident or loss happened", cooperation with "the investigation or settlement of any claim", and submission of "a written proof of claim".

[3]Trumbull's policy included a "right to recover payments" provision designed to ensure that it would be reimbursed if it paid PIP benefits to its insured and it later discovered that a higher priority PIP insurer should have paid the PIP benefits owed.

[4]Trumbull's policy included a "duplication of benefits" provision, which protected it from paying "duplicate payments for the same elements of loss" under its PIP coverage.

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In addition, the common-law right of equitable subrogation in Michigan further protects insurers that pay PIP benefits when it is subsequently discovered that a different PIP insurer should have paid. Recently, this Court affirmed that a common-law right of equitable subrogation in such instances. See *Esurance v MACP,* slip op at pp 4-5, in which this Court held that "an insurer who erroneously pays PIP benefits may be reimbursed under a theory of equitable subrogation when the insurer is not in the order of priority and the payments are made pursuant to its arguable duty to pay to protect its own interests."

In sum, PIP insurers have a duty to not only investigate a claim for PIP benefits where the insured has complied with the policy's conditions but to pay PIP benefits to the insured and seek reimbursement from a higher priority PIP insurer if one is later identified. It is not the PIP insured's responsibility to search for higher priority PIP coverage so long as prompt notification of the claim is provided and there is cooperation with the insurer's investigation into the PIP claim by providing the available information known to the insured.

III. GRIFFIN NEED ONLY EXERCISE DUE DILIGENCE IN PURSUING HIS LEGAL CLAIM. HERE, GRIFFIN DID SO BY PROMPTLY NOTIFYING HIS PIP INSURER TRUMBULL OF HIS CLAIM AND COOPERATING WITH ITS INVESTIGATION INTO HIS CLAIM BY PROVIDING AVAILABLE INFORMATION KNOWN TO HIM.

PIP insureds are the same as other persons who have a right to make a legal claim. They too must be diligent in pursuing that claim.[5] However, the diligence required to protect

[5]This Court has also asked what level of diligence is required. Due diligence is the proper standard as it takes into account the circumstances presented. That is true whether asking if the insured diligently searched for higher priority coverage or whether he or she diligently pursued his or her legal claim. Due diligence is defined as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." It thus incorporates other related and potentially relevant standards such as "reasonable diligence", "ordinary diligence" and "necessary diligence". See Black's Law Dictionary (10th Edition), p 553.

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one's right to make a legal claim does not require that PIP insureds diligently search for higher priority PIP insurers, especially where, as in this case, the insured paid his own PIP insurer to protect him. economic loss. That is true unless the PIP insured fails to notify his or her insurer that he or she is seeking PIP benefits, fails to cooperate with its investigation into that claim or fails to provide available information known to be pertinent to that claim.

In *Moll v Abbott Laboratories*, 444 Mich 1, 29, 506 NW2d 816 (1993), this Court observed that "[t]he law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim." Although the issue in the *Moll* case was whether the discovery rule extended the statute of limitations for bringing a medical malpractice action, the same duty to diligently pursue a legal claim presumably applies to PIP claims as recovery is likewise precluded if notice was not timely provided. Simply put, statutes of limitation "encourage plaintiff[s] to pursue claims diligently". *Larson v Johns-Manville Sales Corp,* 427 Mich 301, 309, 399 NW2d 1 (1986). That axiom also holds true for the one-year notice period for claiming PIP benefits under MCL 500.3145(1).

Without question, Griffin diligently pursued his claim for PIP benefits. He notified Trumbull immediately. [Appx 118].[6] He hired an attorney to assist him with his claim. [Appx 117]. His attorney faxed the police report to Trumbull within 2 weeks of the accident. [Appx 116]. His attorney mailed a letter to the truck driver that caused the motorcycle crash asking him to notify his insurer of Griffin's claim and to contact him directly. [Appx 64]. At Trumbull's request, he completed an application for no-fault benefits and signed releases

[6]All citations contained in this section are to the appendix previously filed by Griffin with his leave application unless a footnote is provided that states differently.

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for medical records and wage loss information. [Appx 111 and Appx 121].[7] He also agreed to be interviewed, and was interviewed, as part of Trumbull's investigation. [Appx 105-106].

During this period, Griffin's attorney repeatedly demanded that Trumbull pay his PIP benefits. [Appx 123-124]. He identified all other insurers potentially responsible for paying PIP benefits. He notified each potential insurer that Griffin was making a claim for PIP benefits.[8] He also filed a claim for PIP benefits with the Michigan Assigned Claims Plan when none of the insurers notified by him agreed to start paying Griffin's PIP claim.[9] Lastly, his attorney hired a company to investigate whether the truck driver was insured.[10] When that failed, he sued all insurers potentially responsible for paying his PIP benefits.[11]

Admittedly, neither Griffin nor his attorney hired an investigator to hound the truck driver for information about who owned and insured the truck that he was driving. But, there was no requirement that he (or his attorney) do so in order to protect his right to recover PIP benefits from Trumbull. No statutory provision required that he do so. No prior cases in Michigan required that he do so. And most importantly, nothing in his contractual agreement with Trumbull required that he do so. Under the policy, Trumbull was clearly the party responsible for investigating whether a higher priority PIP insurer existed in this case.

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[7]The application for no-fault benefits that Griffin submitted to Trumbull was attached as Exhibit E to the appendix that the MACP filed with the Court of Appeals.

[8]See Exhibit 12 to Griffin's Answer to Trumbull's Summary Disposition Motion.

[9]The application for no-fault benefits filed with the MACP on December 30, 2016, was attached as Exhibit M to the appendix that the MACP filed in the Court of Appeals.

[10]See Exhibit 5 to Griffin's Answer to Trumbull's Summary Disposition Motion.

[11]The complaint that Griffin filed against all known potentially responsible PIP insurers is attached as Exhibit N to the MACP appendix filed in the Court of Appeals.

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CONCLUSION

Here, the no-fault claims process worked basically as the No-Fault Act intended only to break down because Trumbull refused to pay Griffin's claim for PIP benefits even after it closed its investigation into whether higher priority PIP coverage existed. There was no valid grounds for Trumbull refusing to pay Griffin's PIP claim at that point. PIP benefits were owed regardless of whether it was possible that higher priority PIP coverage existed. The fact that a higher priority PIP insurer was later identified does not change the fact that Trumbull was required to pay Griffin's PIP claim when its investigation failed to identify a higher priority PIP insurer. Any other result would gut the No-Fault Act's goal of providing prompt adequate reparations to persons injured in motor vehicle accidents like Griffin. It would also ensure that lawsuits would be required before any PIP benefits would be paid.

RELIEF REQUESTED

Plaintiff/Appellant, Willie Griffin, by and through his counsel, respectfully requests that this Honorable Court reverse the lower courts' decision to summarily dismiss his claim for PIP benefits against Trumbull as he paid a premium for PIP coverage to protect him from the economic loss that he sustained after he was injured in a motor vehicle accident and he complied with all applicable duties owed by him by diligently pursuing his PIP claim. He also requests that this Court remand this case to the trial court for entry of a judgment as a matter of law in his favor under MCR 2.116(I)(2) as he is clearly entitled to PIP coverage and Trumbull is the PIP insurer responsible for paying his claims for PIP benefits.

Respectfully submitted,

Dated: September 27, 2021

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