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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 REPLY BRIEF IN SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

The position that Trumbull has taken in this PIP case amply demonstrates the need for this Court to not only reverse the Court of Appeals' holding that Trumbull was not required to pay the PIP benefits that Griffin is owed, but to also reaffirm that lower priority PIP insurers like Trumbull must protect premium-paying insureds like Griffin from covered economic losses by promptly paying PIP benefits whenever higher priority PIP coverage cannot be readily identified based on information that is known or available after a motor vehicle accident. In sum, this Court should stop PIP insurers from denying PIP benefits to premium-paying insureds whenever it is possible that higher priority PIP coverage existed.

ARGUMENT

I. TRUMBULL MUST PAY PIP BENEFITS EVEN THOUGH IT WAS A LOWER PRIORITY PIP INSURER UNDER MCL 500.3114(5) WHERE HIGHER PRIORITY PIP COVERAGE WAS NOT IDENTIFIED BEFORE THE STATUTORY NOTICE PERIOD DESPITE BOTH PARTIES' EFFORTS TO DETERMINE IF IT EXISTED.

A. Trumbull avoids answering the first question asked because it is clear that a lower priority PIP insurer must pay PIP benefits where a higher priority PIP insurer was not identified before the notice period expired.

In answering the first question posed by this Court in granting oral argument on Griffin's leave application, Trumbull presumes that a higher priority PIP insurer was "identifiable" in this case despite its own unsuccessful efforts to do so. It is a perplexing conclusion where, as in this case, the truck driver that caused the crash evaded all attempts to contact him until after the statutory notice period expired. It is even more baffling because Trumbull ended its own investigation into whether higher priority PIP coverage existed when its investigator concluded that higher priority PIP coverage could not be identified without the truck driver's cooperation. Nonetheless, Trumbull asks this

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Court to assume that higher priority PIP coverage was "identifiable" in this particular case before the statutory notice period expired. Clearly, there is no basis for that assumption.

Having re-framed the first question to assume facts that are not true in this case, Trumbull not surprisingly finds support for its position in the majority opinion below which concluded that this case was not one where higher priority PIP coverage "cannot be identified", and thus, held that its previous holding in *Frierson v West American Ins Co*, 261 Mich App 732, 683 NW2d 695 (2004) was not controlling. But, in so contending, Trumbull makes the same mistake that the Court of Appeals did in its majority opinion – it concludes that higher priority PIP coverage could be identified before the statutory notice period expired simply because it was subsequently identified. But, that conclusion is flawed because it assumes that what was true after the notice period ran was also true before it ran. Here, that assumption cannot be reconciled with the fact that both Griffin and Trumbull tried and failed to identify any higher priority PIP coverage before the notice period expired.

If anything, the Court of Appeals' decision in *Frierson* supports the conclusion that Trumbull was required to pay PIP benefits to Griffin as its insured. As in this case, higher priority PIP coverage was not identified in *Frierson* before the statutory notice period expired. But, in this case, unlike *Frierson*, it was identified after the statutory notice period expired. That fact, however, should not result in a different outcome in this case because the operative question is whether PIP benefits must be paid by a lower priority PIP insurer where higher priority PIP coverage "was not identified" before the statutory notice period expired. That is the question that this Court actually asked. Trumbull tries to avoid addressing that question directly because it is clear that it must be answered affirmatively.

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B. The No-Fault Act does not mandate that a person injured in a motor vehicle accident conduct an exhaustive investigation for higher priority PIP coverage in order to simply recover PIP benefits from a lower priority PIP insurer that was paid to protect its insured from covered economic losses by making prompt, adequate payment of PIP benefits.

The No-Fault Act requires that a person injured in a motor vehicle accident seek PIP benefits from the highest priority insurer that can be identified by making a claim for PIP benefits based on the order of priorities established by MCL 500.3114 and MCL 500.3115. Here, Griffin did precisely that by making a claim for PIP benefits with Trumbull because it was not clear from the accident report who owned (or which company insured) the truck that caused him to crash his motorcycle. When Trumbull failed to promptly pay his PIP benefits, he also made claims for PIP benefits with all other potentially responsible PIP insurers that could be identified based on the order of priorities established under MCL 500.3114(5), and also the Michigan Assigned Claims Plan (MACP) under MCL 500.3173a.

Making a claim for PIP benefits based on the order of priorities under MCL 500.3114(5) is all that is required. There is no statutory requirement that a PIP claimant also conduct an exhaustive investigation into whether higher priority PIP coverage existed.

Trumbull conveniently forgets that the No-Fault Act is a remedial statute designed to ensure prompt payment of PIP benefits that compensate a person injured in a motor vehicle accident for covered economic losses. PIP insureds like Griffin pay premiums to PIP insurers like Trumbull to ensure that happens without undue delay. Requiring that every stone be uncovered in an effort to identify higher priority PIP coverage before PIP benefits are paid would defeat the No-Fault Act's goals and unduly burden PIP claimants.

Trumbull's focus on the statutory language that establishes the order of priorities for motorcycle crashes involving a motor vehicle, i.e., MCL 500.3114(5), is thus misguided.

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Admittedly, MCL 500.3114(5) states that the PIP claimant "shall" claim PIP benefits based on the order of priorities under MCL 500.3114(5). But, here, Griffin did exactly that by trying to make contact with Gonzalez regarding whether he had coverage for the motor vehicle accident that he caused and contacting Trumbull as the PIP insurer next highest in priority under MCL 500.3114(5). Griffin did not simply go to Trumbull and demand that it pay his claim for PIP benefits. Recognizing that it was possible that higher priority PIP coverage existed, he tried to contact Gonzalez and he cooperated with Trumbull's investigation. Lastly, his counsel hired a private company to investigate whether Gonzalez was insured.

No one disputes that the order of priorities for claiming PIP benefits is established by MCL 500.3114(5) in cases where a motorcyclist like Griffin is injured in a motor vehicle accident. And, no one is arguing that a lower priority PIP insurer under MCL 500.3114(5) is not required to pay PIP benefits when higher priority PIP coverage can be identified. Here, both parties recognized the possibility that higher priority PIP coverage existed under MCL 500.3114(5). Accordingly, both parties attempted to identify higher priority PIP coverage based on the available information about the truck driver that caused the crash.

Unfortunately, those efforts failed. When they did, Trumbull was required to pay PIP benefits to Griffin because it was the next highest priority PIP insurer under MCL 500.3114(5) and Griffin paid premiums to Trumbull to ensure that he would be protected. But, instead, Trumbull led Griffin to believe that it was still "investigating", when it was not, and thus forced him to sue to recover the PIP benefits for which he paid ample premiums.

C. The well-established rule that priority disputes do not justify a delay in paying PIP benefits clearly applies where Trumbull did not pay PIP benefits because it was possible that higher priority coverage existed.

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Trumbull is mistaken when it contends that no priority dispute existed in this case. As such, Trumbull is unable to distinguish the admittedly well-established precedent in Michigan which holds that a priority dispute does not justify a delay in paying PIP benefits.

In this case, the trial court held, and the Court of Appeals unanimously agreed, that there was not "a priority dispute between 2 or more insurers" as is required under MCL 500.3173a. Consequently, the Michigan Assigned Claims Plan was not required to assign Griffin's claim for PIP benefits for payment by an assigned insurer under MCL 500.3173a.[1]

But, that ancillary holding below does not mean that there was no priority dispute in this case as to Griffin's claim against Trumbull. Here, Griffin claimed PIP benefits from Trumbull because higher priority PIP coverage could not be identified. Trumbull did not pay his claim for PIP benefits because it was possible that higher priority PIP coverage existed.

The priority dispute in this case was the same as in *Borgess Med Ctr v Resto*, 273 Mich App 558, 730 NW2d 738 (2007), vacated on other grounds, but affirmed, 482 Mich 946 (2008), where this Court agreed that attorney fees were owed as it was unreasonable to not pay PIP benefits because it was possible that higher priority PIP coverage existed.

The fact that higher priority PIP coverage was identified after the statutory notice period expired does not change the fact that Trumbull refused to pay PIP benefits to Griffin because it was possible that higher priority PIP coverage existed. Here, the crux of the dispute was about whether there was higher priority PIP coverage than Trumbull. Consequently, the well-established rule in Michigan that a priority dispute does not justify a delay in paying PIP benefits is clearly applicable in this case and it should be controlling.

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[1]Griffin did not seek leave to appeal from that ruling because MCL 500.3173a requires that a PIP claim be assigned only where "2 or more insurers" are identified within the order of priorities and neither paid PIP benefits because priority is disputed.

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Locating higher priority PIP coverage after the statutory notice period expired does not retroactively justify Trumbull taking the position it did, especially where, as in this case, its own coverage investigation failed and it still refused to pay PIP benefits to its insured. If PIP insurers like Trumbull can simply claim that it is possible higher priority PIP coverage existed in order to deny or delay paying a claim for PIP benefits, the goal of prompt, adequate, reparations for covered economic losses is nothing more than a "pipe-dream".

II. PIP INSUREDS LIKE GRIFFIN MUST COOPERATE WITH A LOWER PRIORITY INSURER'S INVESTIGATION INTO WHETHER HIGHER PRIORITY COVERAGE EXISTED BY PROVIDING ALL KNOWN AND AVAILABLE INFORMATION BUT THERE IS NO REQUIREMENT THAT PIP INSUREDS HIRE LEGAL COUNSEL OR CONDUCT AN EXHAUSTIVE INVESTIGATION INTO WHETHER HIGHER PRIORITY PIP COVERAGE EXISTED, MUCH LESS FILE A LAWSUIT TO GAIN SUBPOENA POWER OVER WITNESSES, SIMPLY TO GET PIP BENEFITS PAID.

Trumbull effectively contends that Griffin alone had a duty to investigate whether higher priority PIP coverage existed. Trumbull points to no statutory or contractual provision that expressly supports its position that Griffin as the PIP claimant was solely responsible for investigating whether higher priority PIP coverage existed. Instead, it relies exclusively on the fact that MCL 500.3114(5) requires that a PIP claimant "shall" make a claim for PIP benefits in accordance with the statute's priority provisions. But, that is something that Griffin clearly did. He made a claim for PIP benefits with every PIP insurer identified before the statutory notice period expired. Without question, Griffin fulfilled his statutory duty to claim PIP benefits according to the order of priorities established under the No-Fault Act.

Simply put, there is no statutory duty that requires a PIP claimant to conduct an exhaustive investigation into whether higher priority PIP coverage existed. There also is no contractual duty to do so. To the extent that Griffin, as a PIP claimant, was required to investigate whether higher priority PIP coverage existed, that duty arose solely from the common-law duty that requires all persons to act diligently in order to protect a legal claim.

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But, here, Griffin clearly did that. He tried to contact the truck driver Gonzalez. He then turned to Trumbull as his PIP insurer for protection, having paid premiums to ensure that he was covered. Trumbull, in turn, acted on his PIP claim by starting its own investigation into whether higher priority coverage existed. It did so because it owed him a duty to do so. What Trumbull did not do was pay PIP benefits owed after its investigation concluded without successfully identifying whether higher priority PIP coverage existed in this case.

III. GRIFFIN EXERCISED THE LEVEL OF DILIGENCE THAT WAS REQUIRED OF HIM IN PURSUING HIS CLAIM FOR PIP BENEFITS GIVEN THAT HE PAID PREMIUMS TO TRUMBULL TO ENSURE THAT HE WAS PROTECTED, HE PROMPTLY NOTIFIED TRUMBULL OF HIS PIP CLAIM AND HE COOPERATED WITH ITS SEARCH FOR WHETHER HIGHER PRIORITY COVERAGE EXISTED.

Trumbull essentially contends that Griffin should have accomplished what it failed to accomplish when it investigated whether higher priority PIP coverage existed in this case. The duplicitous nature of its argument should not be ignored. Trumbull does not identify a single thing that Griffin could have done to ensure that higher priority PIP coverage was identified before the statutory notice period expired other than suing immediately so that Gonzalez could be subpoenaed. But, that is not an option limited to PIP claimants nor is it feasible in most cases as PIP claimants understandably want to avoid incurring attorney fees and often naively believe that benevolent PIP insurers will pay what is owed. Trumbull also could have brought a declaratory relief action to garner subpoena power over Gonzalez. Even so, there would be no guarantee that Gonzalez would have been served, much less that he would have responded as he subsequently did.

Trumbull argues that Griffin had 4 months left to take action by locating Gonzalez or suing him after it “concluded its attempts” to identify higher priority PIP coverage for his claim. But, Trumbull conveniently ignores the fact that it never bothered to advise Griffin

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that its investigation was concluded. Having previously told him that it was not paying PIP benefits because the claim was under investigation, it just ignored his counsel's inquiries. Moreover, Griffin did not sit idly by as Trumbull falsely contends. Before the statutory notice period expired, his counsel hired a private company to investigate whether Gonzalez was insured. Unfortunately, that effort to identify higher priority PIP coverage also failed, presumably because Gonzalez neither owned, nor insured, the truck that he was driving.

IV. THE MICHIGAN ASSIGNED CLAIMS PLAN ADDRESSES QUESTIONS NEITHER ASKED BY THIS COURT NOR RIPE FOR DETERMINATION BY THIS COURT AS GRIFFIN DID NOT APPEAL THE LOWER COURTS' HOLDING THAT HE HAD NO VALID CLAIM AGAINST THE MACP UNDER MCL 500.3173a. ACCORDINGLY, THIS COURT SHOULD NOT ADDRESS WHETHER THE MACP ALSO HAD A DUTY TO INVESTIGATE WHETHER HIGHER PRIORITY COVERAGE EXISTED.

The Court of Appeals unanimously agreed with the trial court's conclusion that Griffin did not have a valid claim for PIP benefits against the Michigan Assigned Claims Plan (MACP) under MCL 500.3173a. In short, the MACP's duty to assign a PIP insurer to handle Griffin's PIP claim was not triggered under MCL 500.3173a because there was not "a priority dispute between 2 or more insurers" as is required by that statutory provision.[2]

In seeking leave to appeal to this Court, Griffin did not challenge the lower court's holding that the MACP was not required to pay PIP benefits (or assign his PIP claim for payment of benefits) under MCL 500.3173a. The MACP did not respond to Griffin's leave application, presumably because no issues were raised as to his claim against the MACP.

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[2]Here, the priority dispute addressed whether a lower priority PIP insurer, i.e., Trumbull, was required to pay PIP benefits even though it was possible that higher priority PIP coverage existed. In other words, it was a priority dispute between Trumbull and a potential PIP insurer that would be higher in priority than Trumbull if it could be identified. It was not "a priority dispute between 2 or more insurers" within the order of priorities where both had refused to pay PIP benefits because priority was disputed.

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This Court agreed to hear oral argument on Griffin's leave application and asked that three specific questions be addressed. None of those questions pertained to Griffin's claim for PIP benefits from the MACP under the assigned claims plan. Yet, the MACP has now weighed in with a supplemental brief that ostensibly addresses the questions asked.

On the one hand, the MACP agrees with Griffin that a lower priority PIP insurer like Trumbull must pay PIP benefits where higher priority PIP coverage was not identified before the statutory notice period expired. But, on the other hand, the MACP also curiously concludes that leave should be denied and that no further action should be taken in this case, even though the analysis employed by the Court of Appeals' majority opinion is at odds with its view that a lower priority PIP insurer must pay PIP benefits in such instances.

As Griffin noted in his supplemental briefing, the majority opinion below undercuts well-established precedent in Michigan. Those cases are the very same cases that the MACP cites in its supplemental briefing to establish the law is already clear in Michigan. It is not clear how both the majority opinion can be reconciled with those cases. But, what is clear is that if the majority opinion stands, it will be binding precedent as it is published.

Setting aside that paradox, the MACP appears to be more interested in addressing the question of whether it must investigate whether higher priority PIP coverage existed. It is an interesting question given that the MACP is charged with investigating claims for PIP benefits to determine whether a PIP insurer should be assigned responsibility for paying PIP benefits owed because there is no other available PIP coverage for that claim. But, it is a question that this Court has not asked the parties to address in this case. It also is not ripe for determination as Griffin dropped his claim for PIP benefits against the MACP.

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Moreover, the MACP clearly is not similarly situated to Trumbull, because the MACP, unlike Trumbull, was not paid a premium by the PIP claimant in order to ensure that he or she was protected. To the extent that PIP insurers like Trumbull owed a contractual duty to premium-paying insureds like Griffin, the same may not hold true as to the MACP. In other words, the MACP may not owe the same duties as a PIP insurer like Trumbull when it comes to investigating for higher priority PIP coverage. But, that being said, this Court does not need to address any additional questions raised by the MACP's briefing where, as in this case, the lower court's ruling as to the MACP has not been challenged.

CONCLUSION

Plaintiff/Appellant, Willie Griffin, requests that this Honorable Court reverse the lower court's holding that affirmed the dismissal of his claim for PIP benefits against Trumbull as he paid Trumbull premiums to protect him from economic loss due to injuries sustained in a motor vehicle accident and he complied with his common-law duty to diligently pursuing his PIP claim. He also requests that this Court remand this case to the trial court so judgment can be entered for him because he is clearly entitled to recover PIP benefits and Trumbull is the PIP insurer responsible for paying his claims for PIP benefits.

Respectfully submitted,

Dated: November 1, 2021

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