

STATE OF MICHIGAN
SUPREME COURT

Plaintiff-Appellant's appeal from the Michigan Court of Appeals
Hon. E. Thomas Fitzgerald and Michael Talbot (the majority)
and Hon. Douglas B. Shapiro (dissenting)

ESTATE OF MIRA E. ABAY, deceased by its
Personal Representative, Maria C. Abay,

Plaintiff/Counter-Defendant-Appellant,

-vs-

DAIMLERCHRYSLER INSURANCE COMPANY
(n/k/a CHRYSLER INSURANCE COMPANY),

Defendant/Counter-Plaintiff-Appellee,

and

DAIMLERCHRYSLER CORPORATION (n/k/a
CHRYSLER, LLC)

Defendant,

And

JAMES E. TRENT, an individual, and KELLY
ROSE BROOKS, an individual,

Defendants/Cross-Defendants,

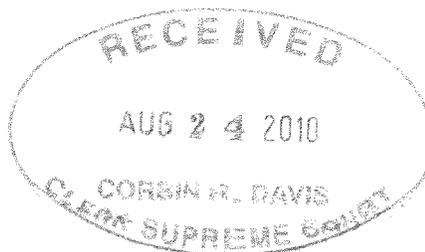
and

AUTO CLUB GROUP INSURANCE COMPANY,
d/b/a AAA of MICHIGAN, an insurance company,
and ALVIN JEROME TAYLOR, an individual,

Third Party Defendants.

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Supreme Court No. 139725

Court of Appeals No. 283624

Oakland County Circuit Court
Case No. 06 075016 CK

PLAINTIFF-APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This is Plaintiff-Appellant's reply brief. Aside from a factual misrepresentation by omission (Appellee's inference that Ms. Brooks never drove her father's car)¹ and Appellee's belated embrace of the majority opinion's "permissive user" reasoning, Appellee's brief on appeal merely rehashes its earlier arguments. These arguments disregard unrebutted and, for Appellee, intolerable facts and are legally flawed.

I. THE ILLEGAL SHIFTING OF PIP BENEFITS IS NOT HYPOTHETICAL

Despite stubborn evidence to the contrary, DCIC simply characterizes its PIP-shifting as a "hypothetical issue" unrelated to this lawsuit. DCIC's brief at 34. As such, DCIC urges, the Court should not decide this issue.

DCC/DCIC's PIP-shifting is hardly hypothetical. DCC/DCIC successfully shifted approximately **\$1.3 million** in PIP benefits obligation to Allstate in one case alone. *DCIC v Allstate (Bluhm), et al*, OCCC Case No 02 041634 NF. Allstate – *not DCIC* – paid PIP benefits sustained by Car Program lessee Richard Bluhm and his wife in their Car Program vehicle. (1813a-1818a)

In other cases, DCC/DCIC similarly shifted PIP benefit obligations to other state auto insurers. Plaintiff's brief at 24. As recently as July 1, 2010, DCIC successfully relied on its illegal PIP-shifting scheme. *Corwin, et al v DCIC, et al*, OCCC Case No. 08 093529 CK. The Corwins sustained horrific injuries as they occupied a Car Program leased vehicle. (Ex A, p 3of Opinion and Order)

The Corwins received real, not hypothetical, "**hundreds of thousands of dollars in PIP benefits**". (Ex A, p 4 of the Opinion and Order, emphasis added). They continue to receive such benefits. Based on DCIC's "named insured" artifice, *and the majority opinion in the case*

¹ Ms. Brooks specifically testified that she periodically drove the cars "provided" by her "parents", James and Rosalie Trent, while she lived in their home. Brooks 9/28/06 trans at p 185.

sub judice, the trial court required ACIA and Foremost – the Corwins’ other household auto policies – to pay these PIP benefits. (On July 16, 2010, ACIA filed a motion for reconsideration. (Ex A)

So, two state auto insurers (Allstate and ACIA), victimized by DCC/DCIC’s illegal PIP-shifting scheme, have paid at least \$2 million in the *Bluhm* and *Corwin* cases alone. Surely these state auto insurers find nothing hypothetical in their “cash on the barrel-head” payment of these PIP benefits.

The illegal PIP-shifting scheme is not only real, it is directly probative to the proper interpretation of the policy. The majority’s policy interpretation, *i.e.*, its approval of DCIC’s “named insured” artifice, sanctions this illegal PIP-shifting. As such, it violates the cardinal contract-interpretation rule that disfavors an interpretation that renders a contract illegal. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 497 (2001).

II. DCC/DCIC’S PIP-SHIFTING SCHEME IS ILLEGAL

DCIC concedes that, as “owners” of their Car Program vehicles, individual lessees must “maintain security for payment of benefits for personal protection insurance, property insurance, and residual liability insurance.”² DCIC’s brief at 36. As DCIC also admits, this Court has found that these “required coverages are the bedrock of the no fault system and . . . are not subject to removal by policy language that conflicts with the statute.” *Cohen v Auto Club Insurance Ass’n*, 463 Mich 525, 531 (2001).

Cornered by its own admissions, DCIC resorts to “double speak” and non-sequiturs in “defense” of its PIP-shifting scheme -- a profitable scheme that makes DCIC only a “contingent” provider of PIP benefits. Mr. Trent paid monthly premiums for Car Program policy coverage,

² This admission cannot be squared with the court of appeals majority’s “permissive user” formulation belatedly embraced by DCIC. See p 7, *infra*.

DCIC notes, and that policy *provides* for PIP benefits. So, DCIC scoffs, “[t]he claim that Mr. Trent was forced to violate the no fault act simply lacks any basis”. DCIC’s brief at 37.

Of course, this facile argument disregards the facts and dodges the real issue: Does Mr. Trent meet his statutory obligation to secure mandatory no-fault benefits with a policy that provides only *contingent* PIP benefits, *i.e.*, where PIP benefits are paid *only* in the absence of another household auto policy that identifies him as a named insured? The answer to this question is *no*. Neither the statute nor case law envisions contingent or conditional “required coverages”.

In *State Farm Mutual Automobile Ins Co v Enterprise Leasing Co*, 452 Mich. 25, 27 (1996), this Court held that “[v]ehicle owners ... are required to provide *primary* coverage for their vehicles and all permissive users of their vehicles.” Emphasis added. Thus, Car Program lessees (including Mr. Trent) must maintain a policy with PIP and residual liability coverage which is *primary* and unconditional. Yet, under DCIC’s and the majority’s read, Car Program lessees are freed from this Michigan Supreme Court-identified duty to maintain a policy with *primary* no-fault coverage.

From one facile argument DCIC slips to another. “[T]here is no requirement . . . in the no fault act”, DCIC asserts, “as to the required identity of the ‘person named in the policy,’ or the ‘named insured.’ *The ‘person named in the policy’ is wholly a matter of contract.*” DCIC’s brief at 39, emphasis added.

True enough. The person named in the contract is “wholly a matter of contract”. But, the parties’ freedom of contract is not a license to violate the no-fault act requirements. *Cohen, supra*. So, “negotiated” policy language cannot diminish the no-fault act’s “required coverages”.

Moreover, whatever its contractual liberties, DCC/DCIC cannot force Car Program lessees to buy policy coverage that makes required PIP coverage *contingent*. Similarly, DCIC

has no “freedom-of-contract” right to gerrymander the statutory PIP priority provisions by excluding the vehicle owner from the “named insured” designation.

Finally, DCIC has no contractual right to shift PIP benefit obligations on Car Program vehicles to other unsuspecting state auto insurers through contract language it drafted and that violates the no-fault act.

III. THIS IS NOT A TYPICAL FRONTING POLICY

DCIC claims that its fronting policy is unremarkable – “[t]here is nothing at all unusual about the policy at issue here.” DCIC’s brief at 6 and 22. DCIC claims that General Motors and Delphi use similar fronting policies. To support its claims, it cites *Redd v National Union Fire Ins Co of Pittsburgh*, 241 FSupp2d 819 (SD Ohio 2003) and *Delphi Automotive Systems, LLC v Slaughter*, 261 FSupp2d 950 (SD Ohio 2003). DCIC’s brief at 27.

DCIC misrepresents the policies involved in *Redd* and *Slaughter*. In 1999, the Ohio Supreme Court held that the term “you”, as used in employer auto policy provisions concerning UIM or UM coverage, encompasses the employer’s employees.³ *Scott-Pontzer v Liberty Mutual Fire Ins Co*, 710 NE2d 1116 (1999). This decision spawned Ohio litigation brought by individuals who, although injured while operating their personal vehicles outside of working hours, made UIM or UM claims on their employers’ auto policies. *Redd* and *Slaughter* are two such cases.

Neither *Redd* nor *Slaughter* involved a fronting policy or self-insurance similar to the DCIC policy involved here. Neither *Redd* nor *Slaughter* involved a lease program, as here, where the company leased vehicles to employees/retirees *exclusively for their personal use* and then collected premiums. DCIC cites no case involving such an unusual arrangement.

³ *Scott-Pontzer* has been effectively overruled by Ohio legislation and later precedent.

Fronting policies usually involve a company's *own* business vehicles and losses. So, DCC's use of "self-insurance" in connection with vehicles that it does *not* own (see MCL 257.531(a)) and for losses it does not suffer is odd. Indeed, its use of "self-insurance" to exclusively cover others' losses (Car Program lessees and family members) rather than its own losses (see MCL 257.531(b)) defies the very concept of *self*-insurance. And, the collection of premiums (from individual Car Program lessees) in the context of self-insurance is simply oxymoronic. DCIC cannot cite a single case involving such a peculiar, non-traditional use of a fronting policy/self-insurance.

Finally, Plaintiff does not claim that fronting policies are sinister or that the policy is ambiguous merely because it is a fronting policy, as DCIC claims. DCIC's brief at 26. Rather, the ambiguity arises from this case's unique facts and DCIC's awkward application of a so-called "self-insured", fronted "commercial" policy to individually-owned, private passenger (read: non-commercial) vehicles upon which DCIC collects premiums. Under these highly unusual circumstances, as the dissent noted, "[t]he anomaly of the insured and insurer being the same wreaks havoc with the entire policy and belies any notion that the policy can simply be read as 'plain language'." (Appendix 2017a)

IV. DCIC FAILS TO CITE APPLICABLE PRECEDENT

At every step of this litigation, DCIC has relied on *Pavolich*. *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378 (1998).

But, *Pavolich* is inapplicable. *Pavolich* makes perfect sense -- is indeed pragmatically compelling -- where the business entity identified as the DEC Sheet "named insured" is the premium-paying owner of the insured vehicles. But, the forced application of *Pavolich* to a policy that contains a named insured artificer, as it does here, sows merely confusion and ambiguity.

Indisputably, this policy covers *individuals*, viz., premium-paying Car Program lessees. Large portions of the policy (*e.g.*, the obligation to report accidents, submit to medical exams, refrain from settlements without approval from the insurer, etc.) unmistakably identify individuals' rights and responsibilities. These policy provisions make sense when the terms "you" and "your" are synonyms for premium-paying individuals. They are unintelligible when applied to DCC. As a practical matter, these policy provisions are actually applied in a manner that equates individual Car Program lessees with "you" and "your". (Appendix 1755a-1757a)

This ambiguity did not exist in *Pavolich* because the "you" and "your" was the premium-paying owner of the insured vehicles -- the Village. And, unlike the case *sub judice*, the *Pavolich* Court could apply the terms "you" and "your" to the Village only, without causing an illegal avoidance of mandatory PIP and residual liability coverage.

Plaintiff cites numerous cases that hold that the very inclusion of an Individual Named Insured endorsement in a business policy creates an ambiguity. As shown by these cases, an insurer that appends such an endorsement to a policy cannot later avoid coverage by claiming that the endorsement is meaningless. *See Home Folks Mobile Homes, Ins v Meridian Mutual Ins Co*, 744 SW2d 749 (Ky App 1988); *Kissondath v Safeco Ins Co*, 1996 WL 665906 (Minn App); *Greenbaum v Travelers Ins Co*, 705 F Supp 1138 (ED Va 1989).

In contrast, DCIC fails to cite a single case which reaches a contrary result. Notably, *Pavolich* did not involve an Individual Named Insured endorsement.

DCIC cites no case which reads an entire endorsement out of a policy. *Pavolich* and similar cases decided by other states carefully noted that only a phrase within the UM or UIM coverage provision was being deemed surplusage. DCIC cites no law for its claim that an entire endorsement-- specifically selected by the de facto insurer/self-insurer (here DCIC) for inclusion in the policy-- should simply be read out of existence.

V. DCC's EXPLANATION OF EXTRINSIC EVIDENCE LACKS MERIT

Although admitting that certain policy provisions (*e.g.*, the obligation to report accidents, submit to medical examinations, refrain from settlements not approved by the insurer, etc.) are applied so that the “*you*” is the individual Car Program lessee, DCIC offers a new explanation for why this is so. According to DCIC, DCC (through the Car Program Manual) “delegates certain of its contractual responsibilities, in particular the requirement of reporting in the event of an accident to the vehicle lessee.” DCIC’s brief at 20-21. But, this explanation does not comport with the majority’s “plain meaning” approach.

Under DCIC’s “plain meaning” approach, the policy requires DCC to report accidents to DCIC. If DCC merely delegated its reporting obligation to Car Program lessees, then those lessees would report accidents to DCIC. But, this is not what the Car Program Manual requires. Instead, the Car Program Manual requires lessees to report accidents to *DCC* (the real insurer or “self-insurer”; the real “us” and “our”) through its third-party administrator. Appendix 551a-552a. DCIC is never informed of accidents. (Appendix 907a-908a; 918a)

DCIC’s “delegation” theory fails as to other policy terms. For example, DCC never explains how it can delegate its obligation to submit to a medical exam.

VI. THE MAJORITY OPINION'S “PERMISSIVE USER” FORMULATION FLIES IN THE FACE OF THE MICHIGAN NO-FAULT STATUTE

This suit was filed in 2006. During that time, in all their pleadings and briefs to the trial court and Court of Appeals, DCIC never once argued that Car Program lessees had policy coverage merely because they were “permissive users” of Car Program vehicles.

But, *sua sponte*, the Court of Appeals majority declared that Mr. Trent had coverage only as a “permissive user”. DCIC now belatedly embraces this “permissive user” formulation. DCIC’s brief at 41.

DCIC should have followed its original defense theories, however flawed. The majority's "permissive user" rationale actually undermines the majority's "plain meaning" analysis and provides yet another example of how the policy violates the no-fault act..

Section II of the policy is *not* a general definition of "who is an insured", as the majority opinion insinuates. Instead, Section II addresses mandatory liability coverage and is appropriately "LIABILITY COVERAGE". Section II – A.1 defines "who is an insured" for purposes of *liability coverage*. (Appendix 1247a.)

Section II – A.1 states in pertinent part:

The following are "insureds" [for liability coverage]:

- a. You for any covered "auto".
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except: ...

Section II – A.1a extends liability coverage only to "you". Under the majority's "plain meaning" approach, only DCC ("you") then would have liability coverage under subsection a, leaving Car Program lessees (the vehicle owners) and their family without required coverage.

Section II – A.1b extends liability coverage only to permissive users of covered autos "you" (DCC) own (or hire or borrow). Under the majority's "plain meaning" approach, this provision would apply exclusively to permissive users of vehicles which DCC (the "you") owns (or hires or borrows).

But, Car Program lessees – *not* DCC – own their Car Program vehicles. MCL 500.3101(2). DCIC admits that DCC is *not* the title owner, statutory owner or registrant. (Appendix 1229a-1231a) So, if *you* is only DCC, as DCC and the majority argue, then subsection b provides no liability coverage to Michigan lessees and premium payers for their operation of Car Program vehicles.

This “permissive user” reasoning only gets worse when examined in the context of the mandatory and exclusive nature of the DCC insurance. Car Program lessees cannot obtain alternative or supplemental coverage in connection with their leased vehicles. (Appendix 914a-915a) So, under the “permissive user” rationale, Car Program lessees not only lack required liability coverage (they’re not the “you”), they cannot buy any coverage elsewhere.

The dissent recognized the problems with liability coverage created by DCIC’s “plain meaning” approach. The dissent correctly observed that the policy “may similarly run afoul of the act’s requirement of primary residual liability coverage since the policy provides that DCC’s employees are excluded from such coverage if they ‘own’ the vehicle which *Ball, supra*, holds that they do.”⁴ (Appendix 2016a)

The majority’s finding that Trent had policy coverage because he was permitted to use “a covered vehicle *DaimlerChrysler owned*” is directly contrary to *Ball v Chrysler Corp.*, 225 Mich App 284 (1997). (Appendix 2007a, emphasis added)

The *Ball* court held that the Car Program lessee – not Chrysler – was the owner with liability under MCL 257.401(1). If the Car Program lessee in *Ball* had been merely a “permissive user”, then Chrysler would have been liable under the owner’s liability statute MCL 257.401(1). See *Cowan v Strecker*, 394 Mich. 110 (1975) (interpreting MCL 257.401 so that an owner remains liable if a permissive user allows yet another person to use the vehicle). Not only does the majority opinion defy *Ball*, it does so without even mentioning *Ball*. Yet, Plaintiff specifically cited *Ball* in its briefs to the appellate court.

The “permissive user” formulation is both legally and factually erroneous. As both a legal and factual matter, Car Program lessees have a contractual right to possession and use of

⁴ See *Ball v Chrysler Corp.*, 225 Mich App 284, 290 (1997).

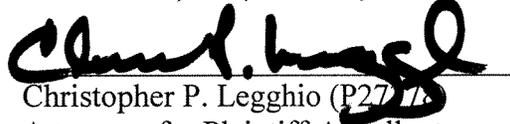
their vehicles through long-term lease agreements. They do not seek or need DCC's permission to use their personally-owned vehicles.

Finally, Appellee's reliance on *Titan Insurance Co v Cincinnati Ins Co*, a 2004 unpublished decision of the Michigan Court of Appeals (Docket No. 245940) is misplaced. *Titan* is inapposite and factually distinguishable.

CONCLUSION

This Court should reverse the majority decision of the Court of Appeals and find policy coverage for the reasons stated by the dissent, the trial court and as argued by Plaintiff.

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Dated: August 24, 2010

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOHN M. CORWIN, an individual, VERA-
ANNE V. CORWIN, an individual, and
AUTO CLUB INSURANCE
ASSOCIATION, an inter-insurance
exchange,

CT NO: 08 093529 CK
HON. Martha D. Anderson

Plaintiff,

-vs-

DAMILERCHRYSLER INSURANCE
COMPANY, and insurance company,
CHRYSLER LLC (f/k/a DAIMLER
CHRYSLER CORPORATION), a limited
liability company, FOREMOST
INSURANCE COMPANY GRAND
RAPIDS, MICHIGAN, an insurance
company, and LESLIE ANN JACKSON, an
individual,

Defendant.

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THOMAS R. BIEGLECKI (P34135)
Attorney for Defendant, Daimler Chrysler &
Chrysler, LLC

PLAINTIFF AUTO CLUB'S MOTION FOR RECONSIDERATION

NOW COMES Plaintiff Auto Club Insurance Association (“Auto Club”), through its attorneys, and, pursuant to MCR 2.119(F), brings this Motion for Reconsideration of this Court's July 1, 2010, summary disposition “Opinion and Order”:

1. There are 3 no-fault auto insurers which are parties to this action: Plaintiff Auto Club, Defendant Foremost Insurance Company (“Foremost”), and Defendant DaimlerChrysler Insurance Company (“DCIC”).

2. The issue of which of these 3 insurers is/are responsible for furnishing no-fault PIP benefits in this matter to the Corwin Co-Plaintiffs was presented to this Court for decision by the MCR 2.116(C)(10) cross-motions for summary disposition of all 3 insurers.

3. This Court decided the issue and the motions, on the briefs and without oral argument, in a 9-page Opinion and Order dated July 1, 2010 (see attached copy).

4. Plaintiff Auto Club respectfully submits that this Court's Opinion and Order is erroneous on its face and that it contains outcome-determinative errors that, for the reasons stated infra, should be reconsidered and corrected by this Court. For brevity, the Auto Club incorporates by reference and will not repeat herein all of its previous summary disposition filings in this matter.

WHEREFORE, for all of the foregoing reasons more fully explained in the attached Brief in Support, Plaintiff Auto Club requests that this Honorable Court grant this motion, reconsider the parties' cross-motions for summary disposition and this

Court's Opinion and Order of July 1, 2010, vacate the July 1, 2010, Opinion and Order, and replace it with an opinion and order that, as requested by Plaintiff Auto Club's Motion for Partial Summary Disposition, grants the Auto Club's motion, declares both Defendant DCIC and Defendant Foremost to be co-liable with Plaintiff Auto Club for the Corwin Plaintiffs' no-fault PIP benefits in this matter, and orders both Defendant DCIC and Defendant Foremost to reimburse Plaintiff Auto Club for their respective pro rata shares of both the PIP benefits paid to date solely by the Auto Club and the Auto Club's claim-handling expenses.

RESPECTFULLY SUBMITTED,

HOM, KILLEEN, SIEFER
ARENE & HOEHN

BY: /s/ Elaine Harding
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DATED: July 15, 2010

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOHN M. CORWIN, an individual, VERA-
ANNE V. CORWIN, an individual, and
AUTO CLUB INSURANCE
ASSOCIATION, an inter-insurance
exchange,

CT NO: 08 093529 CK
HON. Martha D. Anderson

Plaintiff,

-vs-

DAMILERCHRYSLER INSURANCE
COMPANY, and insurance company,
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Chrysler, LLC

**PLAINTIFF AUTO CLUB'S BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION**

The Facts

The Auto Club relies on the undisputed facts recited in the parties' cross-motions for summary disposition and this Court's attached Opinion and Order and especially on the facts highlighted infra.

ARGUMENTS

- I. **THIS COURT'S ORDER DENIES PLAINTIFF AUTO CLUB'S SUMMARY DISPOSITION MOTION WHILE THIS COURT'S OPINION CONTRADICTORILY AGREES WITH THE AUTO CLUB'S MOTION THAT DEFENDANT FOREMOST IS CO-LIABLE WITH THE AUTO CLUB.**

There is no dispute that Plaintiff Auto Club, alone, stepped up and paid all of the no-fault PIP benefits to which the Corwin Plaintiffs are entitled in this matter (Opinion and Order, pp. 4, 5).

Plaintiff Auto Club joined in bringing this action in order to obtain a declaratory judgment that, inter alia, Defendants Foremost and DCIC equally share, pro rata, with the Auto Club, the PIP responsibility currently borne by the Auto Club alone.

Plaintiff Auto Club filed with this Court a motion for partial summary disposition. That motion raised and briefed 2 issues. The 1st issue/argument demonstrated the PIP co-priority/liability of Defendant Foremost. The 2nd issue did the same with regard to Defendant DCIC.

The response from Defendant Foremost was an answer and motion for summary disposition that completely concurred with the Auto Club's motion.

The response from Defendant DCIC was an answer and motion for summary disposition that partially agreed with the Auto Club's motion. DCIC agreed that the Auto Club and Foremost were co-liable but disagreed with the Auto Club and Foremost that DCIC also shared in that liability.

In deciding the no-fault PIP priority/liability issue, this Court's Opinion rejected the Auto Club and Foremost contention that DCIC shares the PIP liability, but this Court also expressly held that:

“Based on the principles of statutory interpretation discussed supra, this Court finds that ACIA and Foremost are co-equals in the highest order of priority.”

(Opinion and Order, p. 8).

This holding means that this Court agreed with, and was presumably granting, the first half of the Auto Club's (and Foremost's) summary disposition motion. Accordingly, the Auto Club's (and Foremost's) motion for summary disposition should have been granted in part and denied in part.

But instead, this Court's Order denied the Auto Club (and Foremost) motion in its entirety:

“Accordingly, DCIC's Motion for Summary Disposition is **GRANTED**; ACIA and Foremost's Motions for Summary Disposition are **DENIED**.”

Trial on the remaining issues is set for September 14, 2010 at 8:30 a.m.

IT IS SO ORDERED.”

(Opinion and Order, p. 9; footnote omitted).

This contradiction between this Court's Opinion and Order needs to be corrected. The Auto Club's claim in this matter for shared PIP liability and pro rata indemnity has apparently unanimously won by half. Yet, because courts speak through their orders and not their opinions,¹ this Court's Order denying the entirety of the Auto Club's motion will make it difficult for the Auto Club to enjoy/enforce the half a loaf that it appears to have won.

II. THIS COURT'S HOLDING – THAT THERE IS NO CURRENT LEGAL SUPPORT BEYOND AN UNPUBLISHED COURT OF APPEALS DISSENTING OPINION FOR THE AUTO CLUB'S (AND FOREMOST'S) CLAIM THAT THE DCIC POLICY IS ILLEGAL AND MUST BE REFORMED TO RENDER DCIC CO-LIABLE HERE – IS SIMPLY WRONG.

The 2nd issue/argument in the Auto Club (and Foremost) motion for summary disposition that this Court's Opinion addressed was the claim that the DCIC policy as issued was illegal; that it needed to be reformed so as to comply with the law – i.e., to name the Corwins as the “named insureds” on their own DCIC policy; and that when properly reformed, the DCIC policy would render DCIC equally co-liable with the Auto Club and Foremost for the Corwins' PIP benefits.

This Court's Opinion rejected the Auto Club (and Foremost) contention with the following analysis:

¹ Tiedman v Tiedman, 400 Mich 571, 576; 255 NW2d 632 (1977).

“ACIA and Foremost find themselves in a legal quandary in that the fundamental reality is that DCIC is the 'named insured' on its own policy. This Court believes the law does not permit the interpretation of the No-Fault Act proposed by ACIA and Foremost. The DCIC policy is a 'fronting policy' which ACIA and Foremost ask this Court to declare illegal by adopting the dissenting opinion of Judge Shapiro in *Abay v. DaimlerChrysler Insurance Co*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 2009 (No. 283624). This Court is asked to 'close the loophole' created by the DCIC policy; this is something that this Court cannot do. Absent a directive from a higher authority, this Court cannot find the DCIC policy is illegal or should be interpreted a different way. This Court cannot engage in legislative functions as the proper role of the judiciary is to interpret and not write the law. *State Farm and Cas Co v. Old Republic Ins. Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).”

(Opinion and Order, p. 7; footnote omitted).

With all due respect, the above-quoted paragraph is wrong for multiple reasons, factual and legal.

First, DaimlerChrysler (DC), not DCIC, is the named insured on the DCIC policy.

Second, the Auto Club is not arguing that the DCIC policy is illegal because it is a “fronting” policy. The Auto Club has no problem with DCIC renting its insurance license out to, and fronting for, DC. The Auto Club's problem is with DCIC placing DC (the real insurer) on the Corwins' DCIC policy as the named insured and deliberately excluding the Corwins from being the named insureds on their own policy. One insurer (DCIC) can front for another (DC), but the insurer (whether DCIC or DC) can't substitute itself for its insureds as the named insured on the policy.

Third, there is no “loophole” to be legislatively or judicially closed. The DCIC policy is illegal and must be reformed to comply with the law. *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 417-418; 668 NW2d 199 (2003). If the DCIC named insured PIP-shifting scheme were a legal loophole, all insurance companies would be taking advantage of it so that all insurers would be on equal footing. Only DCIC utilizes this scheme.

Fourth, this Court erroneously concludes that there is no law supporting the Auto Club (and Foremost) except an unpublished Court of Appeals dissenting opinion. That is absolutely wrong, and the Auto Club will reiterate and summarize the law on which it relies, infra. Judge Shapiro's dissenting opinion in *Abay v DaimlerChrysler Ins Co* (CA No. 283624; rel'd 8/13/09), ly gtd 485 Mich 1118; 779 NW2d 499 (2010), was cited because that case dealt with the identical DCIC policy and because the legal analysis in that opinion was so clear, applicable, and compelling. Judge Shapiro's opinion is apparently even more applicable to the instant PIP case than it was to Abay which involved a non-mandatory type of insurance coverage (portable liability coverage), which is the point on which the majority disagreed with and distinguished away Judge Shapiro's analysis. Citation to Judge Shapiro's opinion is not merely reliance on an unpublished dissent, it is reliance on all of the statutory and case law cited therein.

The Auto Club urges this Court to take another look at the “loophole” that this Court believes DCIC has legally tapped into.

DCIC sold a Michigan no-fault insurance policy on the accident vehicle to the Corwins. The Corwins are the accident vehicle's owners, users, and insurance

purchasers, yet they are not the named insureds on their own DCIC policy. Instead, DCIC placed DC, the entity it is “fronting” for, as the named insured on the Corwins' policy, thereby making DC both the real insurer and the named insured on the Corwins' policy. DCIC did this even though DC is not an owner, user, or insurance purchaser of the accident vehicle. DCIC is unashamed and does not dispute that this manipulation of the policy's named insured line was a deliberate PIP-priority-shifting device that DCIC claims is legal.

Just as a matter of common sense, does this Court really believe that, in the statutorily-controlled world of Michigan no-fault insurance, it is legal for a no-fault insurer to sell a no-fault policy to a vehicle's lessee-owner-user but, instead of putting that insurance purchaser's name on the policy as the named insured, the insurance company can unilaterally and deliberately substitute, for insurance-avoidance purposes, the name of an entity it is shilling for? Does that even sound legal? Does anyone really buy an insurance policy that has someone else's name on it instead of their own?

As it happens, this named insured switch scheme employed by DCIC is not legal.

Every motor vehicle required to be registered in this State must be insured by a Michigan no-fault policy that provides at least PIP, PPI, and liability coverages. MCL 500.3101(1). The duty to procure that insurance policy is expressly placed by statute on the “owner or registrant” of the vehicle. MCL 500.3101(1). That compulsory insurance duty does not have to be carried out separately by each and every owner or registrant of a vehicle, but that duty must be carried out by at least 1 such owner/registant. Iqbal v Bristol West Ins Group, 278 Mich App 31; 748 NW2d 574 (2008). Not just anybody can

procure a vehicle's mandatory insurance policy. The procurer must be an owner or registrant – i.e., “the insurable interest must belong to a 'named insured.’” Smith v Allstate Ins Co, 230 Mich App 434, 437-438, 439-440; 584 NW2d 355 (1998), lv den 459 Mich 951; 616 NW2d 169 (1999). By statute, a properly obtained no-fault policy, supra, is then applicable, on a household basis, to the named insured, the named insured's spouse, and a household resident relative of either – i.e., all of the persons who would be the likely or intended users of the vehicle. MCL 500.3114(1).

The Corwins are the long-term lessee “owners” of the DCIC-insured accident vehicle. MCL 500.3101(2)(h)(i). DaimlerChrysler, the lessor, is expressly statutorily excluded from being either an owner or registrant of the Corwins' vehicle. MCL 500.3101(2)(h)(ii) and (2)(i). It was the Corwins, not DaimlerChrysler, who were the intended users and who had the named-insured owner interest and the statutory duty to procure the insurance on the vehicle. The Corwins intended to carry out their duty, as they paid for the DCIC policy on their vehicle. But instead of the Corwins (as the vehicle lessee-owners, intended users, and insurance purchasers) obtaining their names on their insurance policy, they were deliberately excluded by DCIC from the named insured line and, in their place, DaimlerChrysler (the real insurer for which DCIC was fronting, and the non-owner, non-registrant, non-user, and non-insurance purchaser of the vehicle) was inserted as the named insured on the Corwins' DCIC policy, in effect substituting or fronting for them as the named insured.

With DaimlerChrysler as the named insured instead of the Corwins, the DCIC policy does not comply with Michigan law, supra, thereby placing the Corwins in

technical violation of MCL 500.3101(1), supra, and in danger of being excluded by MCL 500.3113(b) from entitlement to the PIP benefits they paid for.

The obvious solution is to reform the Corwins' policy to comply with both Michigan law and the "intent" of the parties by making the Corwins the policy's "named insured."

As indicated supra, the DCIC manipulation of the named insured line of the Corwins' policy is not a mistake but rather a deliberate scheme to avoid coverage by shifting the statutory priority to another household insurer or insurers. This contractual shifting of the statutory priorities has been emphatically prohibited by the Michigan Supreme Court in *State Farm Mut Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 27-28, 40; 549 NW2d 345 (1996). Without any authority, DCIC argues that its PIP priority shifting scheme is legal because the Supreme Court authority, supra, did not specifically address PIP coverage.

RELIEF

For all of the foregoing reasons, Plaintiff Auto Club requests that this Honorable Court grant this motion, reconsider the parties' cross-motions for summary disposition and this Court's Opinion and Order of July 1, 2010, vacate the July 1, 2010, Opinion and Order, and replace it with an opinion and order that, as requested by Plaintiff Auto Club's Motion for Partial Summary Disposition, grants the Auto Club's motion, declares both Defendant DCIC and Defendant Foremost to be co-liable with Plaintiff Auto Club for the Corwin Plaintiffs' no-fault PIP benefits in this matter, and orders both Defendant DCIC and Defendant Foremost to reimburse Plaintiff Auto Club for their respective pro rata

shares of both the PIP benefits paid to date solely by the Auto Club and the Auto Club's claim-handling expenses.

Respectfully submitted,

HOM, KILLEEN, SIEFER,
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DATED: July 15, 2010

I, Linda Burrage, hereby certify that I electronically filed the foregoing papers with the court, clerk of the court, using the ECF system, which will send notification of said filings to the following:

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOHN CORWIN, an individual, VERA-ANNE
V. CORWIN, an individual, and AUTO CLUB
INSURANCE ASSOCIATION, an
Inter-insurance exchange,

08-093529-CK
Hon. Martha D. Anderson

Plaintiffs,

v.

DAIMLERCHRYSLER INSURANCE
COMPANY, an insurance company,
CHRYSLER LLC (f/k/a DAIMLER
CHRYSLER CORPORATION) a limited liability company,
FOREMOST INSURANCE COMPANY
GRAND RAPIDS, MICHIGAN, an insurance company, and
LESLIE ANN JACKSON, an individual,

Defendants,

and

DAIMLERCHRYSLER INSURANCE
COMPANY, an insurance company, and
CHRYSLER LLC (f/k/a DAIMLER
CHRYSLER CORPORATION), a limited
liability company,

Counter-Plaintiffs,

v.

JOHN M. CORWIN, an individual, VERA-ANNE
V. CORWIN, an individual, and AUTO CLUB
INSURANCE ASSOCIATION, an
Inter-insurance exchange,

Counter Defendants.

GAIL BAYNE, an individual,

Plaintiff,

08-093530-CK
Hon. Martha D. Anderson

v.

DAIMLERCHRYSLER INSURANCE
COMPANY, an insurance company,
CHRYSLER LLC (f/k/a DAIMLER
CHRYSLER CORPORATION) a limited liability company,
FOREMOST INSURANCE COMPANY
GRAND RAPIDS, MICHIGAN, an insurance company, and
LESLIE ANN JACKSON, an individual,

Defendants.

OPINION AND ORDER

This matter is before the Court on cross motions for summary disposition pursuant to MCR 2.116(C)(10). These motions were originally scheduled before this Court's predecessor, but were not heard.¹ After two pre-trials before this Court, one on February 23, 2010 and the other on May 25, 2010, the pending motions are being decided without oral argument. At issue in this case is which of three no-fault policies, is primary for purposes of providing personal injury protection benefits to John and Vera-Ann Corwin, as well the availability of uninsured/underinsured motorist coverage under the DaimlerChrysler Insurance Company (DCIC)² for vehicles leased under the Chrysler Company Car Program in the state of Michigan.

Background

On August 5, 2007, John Corwin and his wife Vera-Anne Corwin, along with their daughter, Gail Bayne, were involved in a motor vehicle accident. John Corwin was driving his 2007 Jeep Compass, with his above-mentioned family members as passengers, while proceeding through the intersection at 13 Mile and Telegraph Roads

¹ These matters were originally assigned to Judge Mester and upon his retirement at the end of 2008, the matters were reassigned to Judge Gorcyca. These matters were again reassigned to this Court upon this Court's assignment to the civil/criminal division.

² It should be noted that DCIC is a company separate from DaimlerChrysler, LLC; this distinction is relevant due to the fact that DaimlerChrysler, LLC is in bankruptcy.

in Franklin, Michigan, when his vehicle was struck on the driver's side by a Cadillac traveling at a high rate of speed southbound on Telegraph Road. Ms. Corwin was located in the front passenger seat of the vehicle and Ms. Bayne was located in the backseat of the vehicle behind her mother. The Cadillac was driven by Defendant, Leslie Jackson, who ran a red light, causing the accident. Ms. Jackson, an uninsured motorist, received a ticket for careless driving and driving without insurance.

Mr. and Mrs. Corwin as well as Ms. Bayne all suffered serious injuries as a result of this accident. Mr. Corwin suffered a ruptured spleen, a fracture at the base of the spine and pelvis, an L4 fracture in the vertebrae, fractures of the left leg tibia/fibula, a punctured left lung, comminuted pelvic fractures, seven (7) left-side rib fractures, two (2) right-side rib fractures, a bruised heart resulting in atrial fibrillation, extensive tearing of the left shoulder ligaments and fracture of a hip joint socket. Said injuries resulted in multiple surgeries, a lengthy hospitalization, medication and physical therapy. Ms. Corwin sustained traumatic brain injury, as well as injuries to her neck, shoulders, hip and legs as well as three cracked teeth and hearing loss. Ms. Bayne sustained a ruptured spleen and bowels and other injuries, resulting in emergency surgery and subsequent rehabilitation.

At the time of the accident, the Corwins had three auto insurance policies: 1) a Chrysler, LLC/DCIC policy that was issued in connection with the 2007 Jeep Compass involved in the accident; 2) an Auto Club Insurance Association(ACIA) policy issued in connection with another household vehicle, a Jeep Liberty; and 3) a Foremost policy issued in connection with their motor home. With regard to the Jeep Compass, Chrysler, LLC functions as the insurer and pays claims even though the policy is issued by DCIC.

Mr. Corwin was leasing the 2007 Compass through the DaimlerChrysler Corporation Car Company Program. He was able to participate in this program as a retiree. Mr. Corwin has been retired from Chrysler since June of 1991. It is not disputed that Plaintiff John Corwin was the named insured on the ACIA and Foremost policies, but not on the DCIC policy.

The Corwins state that following the collision, they received hundreds of thousands of dollars in PIP benefits, and they continue to receive such benefits as of the date of the Complaint. All PIP benefits had been paid by Plaintiff ACIA. Plaintiff ACIA claims it should not be the sole payer of PIP benefits for the Corwins. The Corwins' vehicle was leased through Chrysler and insured by a Chrysler, LLC/DCIC policy, but Chrysler LLC/DCIC has refused to pay any PIP benefits. Foremost has refused to pay any PIP benefits as well even though Plaintiff John Corwin is a named insured on its policy. The instant motions followed as a result.

STANDARD OF REVIEW

The instant Motions are brought pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Campbell v. Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). The moving party has the initial burden to support its position with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Quinto v. Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to show a genuine issue of material fact. *Id.* at 362. "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing there is a genuine

issue of fact for trial." *Campbell, supra* at 229. The motions should only be granted if proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

DISCUSSION

At issue before the Court in this declaratory action,³ is the co-liability of the Corwins' no-fault insurers for the PIP benefits paid to the Corwins as well as reimbursement from the insurers with regard to any respective pro rata shares of PIP liability. To date, all PIP benefits on behalf of the Corwins have been paid fully by ACIA.

MCL 500.3114(1) determines which insurance company must pay PIP benefits: a personal protection policy "applies to accidental bodily injury to the *person named in the policy*, the person's spouse, a relative of either domiciled in the same household if the injury arises from a motor vehicle accident." *Id.* (Emphasis added). Generally, a person seeking first-party no-fault benefits must look to his or her own insurance carrier. MCL 3.114(4) provides:

Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

- (a) The insurer of the owner or registrant of the vehicle occupied.
- (b) The insurer of the operator of the vehicle occupied.

Although the vehicle involved in the accident was leased by Mr. Corwin, Mr. Corwin was the "owner" of the vehicle for purposes of the no fault insurance act. As

³ A negligence claim has been pled in both actions as to Defendant Leslie Jackson, however only the issues relative to declaratory relief are currently before the Court.

discussed *supra*, Mr. Corwin was retired at the time of the accident, but as a retiree, he still qualified under the DaimlerChrysler leasing program. At the time of the accident, Mr. Corwin only had the vehicle for 1 ½ months.⁴ These facts are not in dispute. MCL 500.3101(h) provides:

(h) "Owner" means any of the following:

(i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.

(ii) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract. *Twichel v. MIC General Insurance Corp*, 469 Mich 524, 527-528; 676 NW2d 616 (2004).

It is also undisputed that at the time of the accident, the Corwins were the "named insured" on the ACIA and Foremost policies, but they were not the "named insured" on the DCIC policy. Moreover, it is undisputed that the vehicle involved in the accident was covered by the DCIC policy on which the "named insured" listed on said policy were "DaimlerChrysler Corporation and its US Subsidiaries."

ACIA and Foremost ask this Court to find that DCIC is co-primary and equally liable for any and all first-party benefits. Conversely, DCIC asks this Court to find that ACIA and/or Foremost are the insurers responsible for paying any PIP benefits that may be owed to the Corwins.

⁴ Deposition, Tr. pp 15-16.

The goal of statutory interpretation is to give effect to the intent of the Legislature from the plain language of the statute. *Priority Health v. Commissioner of Office of Financial and Ins Services*, 284 Mich App 40, 43; 770 NW2d 457 (2009). "If the meaning of a statute is clear and unambiguous, then judicial construction to vary the statute's plain meaning is not permitted." *Id.* It is presumed the Legislature intended the meaning plainly expressed and unless explicitly defined in a statute, "every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Id.*

ACIA and Foremost find themselves in a legal quandary in that the fundamental reality is that DCIC is the "named insured" on its own policy. This Court believes the law does not permit the interpretation of the No-Fault Act proposed by ACIA and Foremost. The DCIC policy is a "fronting policy" which ACIA and Foremost ask this Court to declare illegal by adopting the dissenting opinion of Judge Shapiro in *Abay v. DaimlerChrysler Insurance Co*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 2009 (No. 283624).⁵ This Court is asked to "close the loophole" created by the DCIC policy; this is something that this Court cannot do. Absent a directive from a higher authority, this Court cannot find the DCIC policy is illegal or should be interpreted a different way. This Court cannot engage in legislative functions as the proper role of the judiciary is to interpret and not write the law. *State Farm and Cas Co v. Old Republic Ins. Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

As discussed *supra*, the Corwins were not the "named insured" on DCIC policy, but they were the "named insured" on the ACIA and Foremost policies. MCL 500.3114

⁵ *lv grtd* 485 Mich 1118; 779 NW2d 499 (2010).

specifically refers to the person named in the policy. It has been held that “the person named in the policy” as used in the No Fault Act, is synonymous with the term “named insured.” *Cvengros v. Farm Bureau Ins*, 216 Mich App 261, 264; 548 NW2d 698 (1996). Based on the principles of statutory interpretation discussed *supra*, this Court finds that ACIA and Foremost are co-equals in the highest order of priority.

As a final matter, addressing the matter of *Gail Bayne v. DaimlerChrysler, et al.* 08-093530-CK, Defendant Chrysler Insurance Company seeks summary disposition as it relates to Ms. Bayne’s Uninsured/Underinsured Motorist Benefits against Chrysler LLC/DCIC as no such coverage was provided under the Corwins’ policy nor is same mandated under Michigan’s No Fault Act. Plaintiff Bayne does not oppose Chrysler LLC/DCIC’s Motion as it relates to this issue. Accordingly, the Court will **GRANT** Chrysler LLC/DCIC’s Motion for Summary Disposition on case number 08-093530-CK. As it relates to the Uninsured/Underinsured Motorist Benefits claims relative to the Corwins, this Court finds there is no genuine issue of fact that the DCIC policy provided no such coverage under the policy for Michigan vehicles at the time of the accident.⁶

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⁶ DCIC’s Exhibit F.

Accordingly, DCIC's Motion for Summary Disposition is **GRANTED**; ACIA and Foremost's Motions for Summary Disposition are **DENIED**.⁷

Trial on the remaining issues is set for September 14, 2010 at 8:30 a.m.

IT IS SO ORDERED.

DATED: JUL 01 2010


Hon. Martha D. Anderson-Circuit Judge

⁷ ACIA makes reference to a dispositive motion filed by the Corwins' in its pleadings; however the Corwins have not filed a dispositive motion with this Court.