STATE OF MICHIGAN
IN THE SUPREME COURT

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellant,

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee

Supreme Court No. 144144
Court of Appeals No. 298984
Lower Court No. 09-035-NF

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

CONSOLIDATED WITH

Supreme Court No. 144145
Court of Appeals No. 298985
Lower Court No. 09-172-NF

AMICUS CURIAE BRIEF OF THE INSURANCE INSTITUTE OF MICHIGAN

WILLINGHAM & COTÉ, P.C.
Attorneys for *Amicus Curiae*
Insurance Institute of Michigan

BY: John A. Yeager (P26756)
Curtis R. Hadley (P32160)

333 Albert Avenue
Suite 500
East Lansing, MI 48823
517-351-6200

DEC 2 - 2012

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* iii

STATEMENT OF FACTS iv

STANDARD OF REVIEW v

STATEMENT OF QUESTIONS INVOLVED vi

LEGAL ARGUMENT 1

I. The "primary purpose/incidental nature" test is in error since not in keeping with the Legislature's choice of language 1

CONCLUSION 5

INDEX OF AUTHORITIES

Cases

Ball v Dewey,
225 Mich App 284; 570 NW2d 481 (1997) 4,5

Continental Auto Club, Inc v Commissioner of Insurance,
337 Mich 434; 60 NW2d 180 (1953) 3

Johnson v Recca,
492 Mich 169; 821 NW2d 520 (2012) 1

Spectrum Health Hospitals v Farm Bureau Mutual Insurance Co,
492 Mich 503; 821 NW2d 117 (2012) 1,5

Statutes

MCL 28.422(7) 2

MCL 257.2a 2

MCL 257.11 2

MCL 257.401(2) 4

MCL 500.106 2

MCL 500.401a 4

MCL 500.402(c)(1), (2)(b) 3

MCL 500.3101(h)(ii) 4

MCL 500.3114(2) vi,5

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Insurance Institute of Michigan ("the Institute") is a non-profit governmental affairs and public information association representing over 90 insurance related organizations operating in Michigan. The Institute's member organizations provide insurance to the automobile, homeowner, worker's compensation, and medical malpractice markets in Michigan. The Institute's purpose is to serve as a focal point for educational, media, legislative, and public information on insurance issues. In this case it has been invited by the Court to submit an *amicus curiae* brief and is honored to submit the within brief.

STATEMENT OF FACTS

The Institute adopts the statements of facts of the principal parties, Farmers Insurance Exchange, Michigan Insurance Company, and State Farm Mutual Automobile Insurance Company. The minor factual differences do not affect the larger issue of principle on which the Court should decide the case.

STANDARD OF REVIEW

The standard of review is *de novo*. The Institute accepts the parties' agreed on standard of review as accurate.

STATEMENT OF THE QUESTIONS INVOLVED

I. Whether the "primary purpose/incidental nature" test for determining whether a commercial vehicle is being used in the business of transporting passengers is consistent with the language of MCL 500.3114(2)?

The Institute answers "No".

II. If so, whether the "primary purpose/incidental nature" test was properly applied to the facts of this case?

The Institute answers "Not applicable" in light of The Institute's answer to Issue I.

LEGAL ARGUMENT

I. The "primary purpose/incidental nature" test is in error since not in keeping with the Legislature's choice of language.

This Court has repeatedly made clear that the "overarching rule of statutory construction is that this Court must enforce clear and unambiguous statutory provisions as written". See, *e.g.*, *Johnson v Recca*, 492 Mich 169, 175; 821 NW2d 520 (2012). In *Johnson*, this Court addressed whether a provision in one portion of the no-fault act would be considered implicitly present in another even though the latter did not mention replacement services that were in the other portion of the act. The Court held the answer was no.

Similarly illustrating the principle that a court cannot change legislation is a recent case ruling out imposing a judicial test not stated by the Legislature. *Spectrum Health Hospitals v Farm Bureau Mutual Insurance Co*, 492 Mich 503, 534; 821 NW2d 117 (2012). There the issue was whether a less restrictive judicial re-formulation of an exclusion from no-fault benefits could be imposed by way of a "family joy riding exception" not stated by the Legislature. This Court held the answer was no, and the fundamental principle applied is equally applicable here:

> No further judicial construction is required or permitted. There is absolutely no textual basis to support a family joy-riding exception to MCL 500.3113(a). [*Id*, 492 Mich 503, 534, emphasis added.]

Similarly here, no further judicial construction is required, and in light of the holding in *Spectrum Health Hospitals*, nor is it permitted. The issue is solely whether appellee's insured was engaged in the business of transporting passengers. The Legislature did not say primarily or incidentally.

The term "in the business" is a term frequently used in legislation (as well as in insurance contracts for optional coverages not mandated by legislation) to refine a risk or limit a statute's application. Where the term "in the business" is desired to be further limited, the Legislature has illustrated its capacity to do so. For example, in the definition of "automotive recycler", the Legislature has qualified the definition with the word "primarily":

> 'Automotive recycler' means a person who engages in business primarily for the purpose of selling at retail salvage vehicle parts and secondarily for the purpose of selling at retail salvage motor vehicles or manufacturing or selling a product of gradable scrap metal. [MCL 257.2a, emphasis added.]

Another example of a legislative qualification of business is found in MCL 28.422(7), where the words "regularly engaged" qualifies the business relation:

> This section does not apply to the purchase of pistols from wholesalers by dealers regularly engaged in the business of selling pistols at retail, or to the sale, barter, or exchange of pistols kept as relics or curios not made for modern ammunition or permanently deactivated. (Emphasis added).

Fundamentally, the central flaw of the primary purpose/incidental effect test is that a person may be engaged in concurrent business activities, one of which is the business governed by the legislation. A legislative example of a statute referring to the regulated entity having multiple activities and using the term "in the business of" is seen in MCL 257.11. It refers to dealers who may be engaged in three different activities and yet still be a dealer whether engaged in one of them or more.

An example under the Insurance Code is the definition of "insurer" in MCL 500.106. It is broad, and includes the words "in the business of", with the operative language being "engaged or attempting to engage in the business of making insurance

or surety contracts". Legislative recognition that an entity may be concurrently in the business of insurance as well another business that may be its primary business is seen in the example of car rental companies. A statutory exemption from insurance regulation is provided even though perhaps primarily, "in the business of providing motor vehicles to the public under a rental agreement for a period not to exceed 90 days". As to these entities, "a certificate of authority to transact insurance in this state is not required for the sale of any travel or auto-related insurance coverages". MCL 500.402(c)(1), (2)(b). If the Legislature wanted a primary purpose/incidental effect test to apply, no exemption would be required. Yet even though primarily in the business of renting cars, a car rental company needs the exemption because it is concurrently in the business of selling insurance coverages to persons renting cars. It actually has two concurrent business activities even if one is primary and the other incidental.

Case law also recognizes that a party may be engaged in concurrent business activity and as a result be regulated without regard for whether the regulated activity is incidental or primary. For example, in *Continental Auto Club, Inc v Commissioner of Insurance*, 337 Mich 434, 436-437; 60 NW2d 180 (1953), an automobile club challenged whether it was subject to regulation by the Commissioner of Insurance. It apparently had a number of member benefits, but the only ones specifically discussed by this Court were the bail bond indemnity up to $5,000 and the attorney services for which the member could be indemnified. The automobile club did not have a certificate of authority to engage in the business of insurance. It had been called on by the Insurance Commissioner to conform to insurance regulations. Notwithstanding the other member benefits, this Court held that it was "engaging in the business of

insurance". While not decided on the basis that the automobile club need not be primarily in the business of insurance to be regulated, still, the case reflects a holding based on the simple inquiry whether the club was in the business of insurance, sans consideration of its other business activities that might be argued to be its primary business.

The Michigan Court of Appeals has also recognized that concurrent business activities, with one of them the subject of the legislation, are indeed regulated without a primary/incidental analysis. Automobile manufacturers in Michigan lease cars to their employees and retirees. In *Ball v Dewey*, 225 Mich App 284, 289; 570 NW2d 481 (1997), the issue was whether Chrysler had owner's liability under MCL 500.401a. The owner's liability statute has language similar to that found in the no-fault act definition of an "owner," which has an exception for "a person engaged in the business of leasing motor vehicles". See, MCL 500.3101(h)(ii). This is similar to the provision defining "owner" for the owner's liability act, since the operative definition also has an exception for those "engaged in the business of leasing motor vehicles" in MCL 257.401(2). Notwithstanding this exception, Chrysler was sued as an owner, perhaps with the express or tacit argument that its primary business was manufacturing and so it remained an owner notwithstanding its incidental leases to retirees. A circuit court denied Chrysler's motion for summary disposition, but the Court of Appeals reversed. Its reasoning rejects a primary purpose test and stands in contrast to the primary/incidental rationale of the Court of Appeals in the instant case. In *Ball*, the Court stated:

> Nothing in the statute requires that the lessor's primary business be retail leasing, or, for that matter, that the lease be profitable. There is no issue of material fact that Chrysler was 'in the business of leasing motor vehicles.'

Ball apparently recognizes that an automobile manufacturer may have a primary business function to manufacture automobiles, but is still engaged in the business of leasing automobiles even if incidental to its primary manufacturing activity. Moreover, *Ball* is consistent with this Court's ruling in *Spectrum v Farm Bureau, supra*, that further judicial construction is not permitted.

The Legislature did not specify primary business or any other limitation of "business of transporting passengers", in MCL 500.3114(2). The primary purpose /incidental nature test is in error and should be overruled.

CONCLUSION

The most important operative language, "in the business of", is commonly used, unambiguous, and, therefore, the "primary purpose/incidental nature" test is in error since no further judicial construction is required or permitted. *Spectrum Health Hospitals v Farm Bureau, supra.*

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for *Amicus Curiae* Insurance Institute of Michigan

BY
John A. Yeager (P26756)
Curtis R. Hadley
333 Albert Avenue
Suite 500
East Lansing, MI 48823
517-351-6200

Dated: December 20, 2012