STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Hon. Kelly, P.J., Fitzgerald, and Whitbeck, JJ)

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellee,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellant

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

_____/

Supreme Court No. 144144

Court of Appeals No. 298984

Lower Court Case No. 09-35-NF (Mason County, Hon. Richard I. Cooper)

APPELLANT FARMERS INSURANCE EXCHANGE'S REPLY BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED*****

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

_____/

Supreme Court No. 144145

Court of Appeals No. 298985

Lower Court Case No. 09-172-NF (Mason County, Hon. Richard I. Cooper)

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.,

Supreme Court No. 144159

Court of Appeals No. 298985

Lower Court Case No. 09-172-NF (Mason County, Hon. Richard I. Cooper)

Plaintiff-Appellee

v

MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

_____/

APPELLANT FARMERS INSURANCE EXCHANGE'S
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WORSFOLD MACFARLANE MCDONALD, PLLC
David M. Pierangeli (P55849)
Attorneys for Plaintiff/Appellant Farmers Insurance Exchange

1001 Monroe Ave., NW
Grand Rapids, MI 49503
(616) 977-9200

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Argument

A. Clarification Regarding the Use of the Fifteen Person Passenger Van

In its Brief on Appeal, Defendant Michigan Insurance Company ("MIC") makes several claims that both State Farm Mutual Automobile Insurance Company ("State Farm") and Farmers Insurance Exchange ("Farmers") distorted the facts surrounding the use of the fifteen person passenger van. (MIC Brief on Appeal p. 3). Moreover, Defendant MIC accuses State Farm of "falsely" suggesting that We Want The Music Company ("WWTMC") used its vans to satisfy its contractual obligation to provide transportation to those who purchased it. (MIC Brief on Appeal, p. 3). However, as is clear from the deposition testimony of Lisa Vogel, the president of the WWTMC, both State Farm's and Farmers' representations were accurate.

On page 5 of its Brief on Appeal, MIC argues that WWTMC only used the passenger vans in "rare and unanticipated situations." (MIC Brief on Appeal, p. 5). This is not supported by Ms. Vogel's testimony. During her deposition, Ms. Vogel testified as follows:

Q. There were eleven other persons in that van. Were those persons also Festival participants?

A. Yes.

Q. And had those persons also paid $45 to you or the Festival for transportation?

A. Yes.

Q. And with the exception of the driver, Guenevere Page, every person in that van on August 5, 2008 has paid a fee of $45 for transportation to and from the Festival?

A. Correct.

Q. Did you use that van for the transportation of any other Festival participants, either before or - - obviously before this accident?

A. Yes.

*****

Q. I asked you how many times you've used the van to transport passengers prior to

the accident. You said a couple. It looks as though five vans carried passengers who bought shuttle tickets, on page two of this document?

A. I was asked to assess at what point - - how many trips would have taken anybody who had bought a ticket as opposed to rode on the Great Lakes Motor Coach. So in five instances.

Q. And in those five instances, those passengers were charged the $45 transportation fee?

A. Correct.

(Deposition of Lisa Vogel, pp. 21 and 24, **Farmers' Appendix 038A and 039A**).

It is clear from this testimony the WWTMC transported passengers using its vans more than just rarely. Ms. Vogel testified that the vans were used on five trips prior to the August 5, 2008 accident. According to the 2008 Michigan Womyn's Music Festival Off-Land Shuttle Service schedule, the Great Lakes Motor Coach buses had only made five runs before the accident. **(State Farm's Appendix 36a).** It would appear that the vans were used a bit more regularly that MIC would have this Court believe.

MIC also asserts that WWTMC had no obligation to provide its participants with transportation if they missed their scheduled shuttle. (MIC Brief on Appeal, pp. 5-6). While this may have been stated in the literature, Ms. Vogel's deposition testimony leads to a different conclusion:

Q. A participant such as Ms. Dineen pays a fee?

A. Yes.

Q. She's got an agreement or contract with your Festival for transportation. Despite our best efforts to arrange for motor coach transportation, there are things that are outside of your control, weather. And because of the contract and because of the fact that you've accepted her money, you've got an obligation to get her to the Festival; isn't that correct?

A. I don't know the answer to that. I think if I miss a bus someplace, I miss a bus. **But we had an intention of providing a service.**

Q. Okay. And your intention was you were going to take care of your Festival participants, if at all possible and if reasonable?

A. That's right.

Q. And, in this instance she's traveling with another woman and a couple of young kids, and for whatever reason, a decision was made to send a van down to pick them up and transport them.

A. I don't really think that they were in the equation until they were at the airport. That's my understanding, though. Again, I wasn't there, but that's my understanding.

Q. Well, somebody was in the equation, because 15 participants - -

A. Yes - -

Q. Ended up on that van.

A. Yes.

Q. All of whom paid a fee?

A. Yes.

Q. **And whether it was fortuitous or incidental, you had a contract with them that you were going to provide them with shuttle service, whether it be on this van or on a Great Lakes Motor Coach bus?**

A. Yes.

Q. And, in fact, you were in the process of transporting them to the Festival, as you had on other occasions when the need arose; isn't that correct?

A. Yes.

(Deposition of Lisa Vogel, pp. 54-56, **Farmers Appendix, p. 047A**)(emphasis added).

It is clear from Ms. Vogel's deposition testimony that that it was WWTMC's intention to provide shuttle transportation to those who had contracted for transportation. It is also clear that WWTMC was in the process of providing that transportation when the accident occurred.

B. The "Primary Purpose/ Incidental Nature" Is Contrary to the Plain Meaning of MCL 500.3114(2).

The crux of this case is the interpretation of MCL 500.3114(2), which states:

(2) A person suffering accidental bodily injury **while** an operator or **a passenger of a motor vehicle operated in the business of transporting passengers** shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. This subsection does not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance benefits under any other policy:

(a) A school bus, as defined by the department of education, providing transportation not prohibited by law.

(b) A bus operated by a common carrier of passengers certified by the department of transportation.

(c) A bus operating under a government sponsored transportation program.

(d) A bus operated by or providing service to a nonprofit organization.

(e) A taxicab insured as prescribed in section 3101 or 3102.

(f) A bus operated by a canoe or other watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point.

Id. (emphasis added).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature through reasonable construction, in consideration of the purpose of the statute and the object sought to be accomplished. *Frankenmuth Mut Ins Co v Marlette Homes, Inc.,* 456 Mich. 511, 515, 573 N.W.2d 611 (1998), citing *Witherspoon v Guilford,* 203 Mich App 240, 247, 511 NW2d 720 (1994). "When determining the Legislature's intent, this Court must first look to the statute's specific language. Judicial construction is unnecessary if the meaning of the language is clear." *Frierson v West American Ins Co,* 261 Mich App 732, 734; 683 NW2d 695 (2004). **The fundamental rule of statutory construction is that every word of a statute should be given meaning and no word should be treated as surplusage or rendered**

nugatory if at all possible. *Feld v Robert & Charles Beauty Salon,* 435 Mich 352, 364; 459 NW2d 279 (1990). If the plain and ordinary meaning of a statute is clear and unambiguous, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd.,* 240 Mich App 153, 166, 610 NW2d 613 (2000).

The plain language of MCL 500.3114(2) requires that a Court to look at whether the **vehicle** was operated in the business of transporting passengers at the time of the accident. It is clear that it is how the **vehicle** was operated **at the time of the accident** which controls whether MCL 500.3114(2) applies. Despite this clear and unambiguous statement, the Court of Appeals has adopted the "primary purpose/incidental nature". However, this test, which has been advocated by Defendant MIC and used by the Court of Appeals, is contrary to the plain language of this statute. This point was fully briefed by both State Farm and Farmers in the Briefs on Appeal. Farmers requests that this Court adopt a test which simply analyzes whether the motor vehicle, at the time of the accident, was operated in the business of transporting passengers, as such a test would be supported by the plain language of MCL 500.3114(2).

Defendant MIC's and the Court of Appeals' adherence to the "primary purpose/incidental nature" test produces a far more convoluted test which is not required by the statute. The first problem with this test is that it requires a Court to first determine whether transporting passengers was the primary use of the vehicle. Such a requirement is not support by the statute as nowhere in MCL 500.3114(2) is there "primary use" language. Rather this Court should adopt a test which requires the Court to look at the whether the motor vehicle was operated in the business of transporting passenger, not whether transporting passengers was a primary function.

Second, the "primary purpose/ incidental nature" test expands the scope of the review to more than just the time of the accident. In applying the test, the Courts look at how the motor

vehicle was used before the accident and not at the time of the accident. MIC argues that MCL 500.3114(2) does not contain any temporal element. (MIC's Brief on Appeal, pp. 24-25). However, this argument ignores the language of MCL 500.3114(2) which states "**while** . . . a passenger of a motor vehicle operated in the business of transporting passengers. . . ." *Id.* The Legislature's use of the word "while" specifically defines the time period which is to be looked at by the Courts. MCL 500.3114(2) only applies "**while**" the injured party is a passenger of a motor vehicle operated in the business of passengers. *Id.* Contrary to the unsupported assertions of MIC, the test adopted by the this Court should only focus on the time of accident to determine whether the motor vehicle is operated in the business of transporting passengers.

Adopting a test which is truer to the language contained in MCL 500.3114(2), rids the Court of unnecessary determinations which are required under the "primary purpose/incidental nature" test. For example, under the current test, a Court is forced to determine what "business" the owner of the vehicle is involved and whether transporting passengers is an integral part of the vehicle owner's overall business. In so doing, information pertaining profits derived from transportation and overall value to the transportation function to the business must be assessed. Under this model, the gathering of all of this information would be necessary before it could be determined whether MCL 500.3114(2) applied. This type of analysis is not supported by the plain language of MCL 500.3114(2).

Simply put, the plain language of MCL 500.3114(2) does not mandate of review of the business and a determination as to whether transporting passengers is integral to that business. The plain language does not require a review of the profit and losses of a company. Rather, MCL 500.3114(2) simply requires a determination as to whether at the time of the accident the motor vehicle was "operated in the business of transporting passengers." Therefore, rather than

applying a "primary purpose/incidental nature" test which requires an analysis not called for in the statute, the Court should adopt a test which reviews whether at the time the accident the vehicle was operated in the business of transporting passengers. Such a test would focus solely on the vehicle involved in the accident and whether that vehicle was, at that time, in the business of transporting passengers.

Not only would this test conform with the plain language of MCL 500.3114(2), but allows for a rational explanation behind the exceptions set forth in MCL 500.3114(2)(a-f). For example, if a school bus was involved in an accident while transporting students, the school bus would be considered to be in the business of transporting passengers to school. Therefore, under the plain language of MCL 500.3114(2) the school bus would ordinarily be required to provide PIP benefits to its operator and passengers. However, the Legislature saw fit in MCL 500.3114(2)(a) to exempt school buses from this requirement, thus exempting school buses from MCL 500.3114(2) priority.

By reviewing how the vehicle was operated at the time of the accident, the courts would not have engage in speculation. The courts would not have to determine whether transporting passengers was the primary function of that vehicle. The courts would not have to determine if transporting passengers was an integral part of the business of the owner of the vehicle. The courts would not have to determine the percentage of profits (if any) derived from transporting passengers to the overall profits of the business. Instead, the courts would simply analyze how the vehicle was operated at the time of the accident. Looking at the use of the motor at the time of the accident allows all portions of MCL 500.3114(2) to be given weight without going through a series of legal gymnastics to explain that a school bus is "in the business of transporting passenger" because transporting students is integral to a school district's true purpose. This new

test would not render the MCL 500.3114(2) exceptions superfluous.

When applied to this case, there would be no question that MIC would be in the priority position to provide Ms. Dineen her PIP benefits. At the time of the accident, the fifteen person passenger van was operated in the business of transporting passengers. It was admitted that all passengers in the van had paid for transportation from the airport to the festival. As stated by Ms. Vogel it was the WWTMC's intention to provide transportation to those participants who had paid for it. (Deposition of Lisa Vogel, pp. 54-56, **Farmers Appendix, p. 047A**). This intention was fulfilled by the use of the fifteen person passenger van.

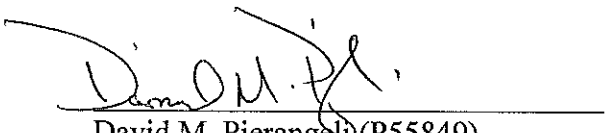
Under these facts, MCL 500.3114(2) would clearly apply. While Ms. Dineen was a passenger of a van which was transporting passengers who had paid for this transportation, she sustained bodily injury. Plain and simple, the language of MCL 500.3114(2) applies. Defendant Farmers is entitled to a reversal of the Court of Appeals holding and a determination that Defendant MIC is responsible for Ms. Dineen's PIP benefits.

RELIEF REQUESTED

For the reasons stated in this Brief on Appeal, Defendant-Appellant Farmers Insurance Exchange asks this Honorable Court determine that the "primary purpose/incidental nature test" is not consistent with the language of MCL 500.3114(2), reverse the Court of Appeals' ruling, and reinstate the rulings of the Mason County Circuit Court.

Dated: 10-22-12

Worsfold Macfarlane McDonald, P.L.L.C.



David M. Pierangeli (P55849)
Attorneys for Defendant-Appellant Farmers Insurance Exchange