

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN INSURANCE COMPANY,
a Michigan Insurance Company,

Supreme Court Nos. 144771 & 144792
Court of Appeals No. 301980
Lower Court No. 09-104725-NF

Plaintiff-Appellant/Cross-Appellee,

-vs-

NATIONAL LIABILITY & FIRE INSURANCE
COMPANY, a foreign corporation, licensed to
do business in the State of Michigan,

Defendant-Appellee/Cross-Appellant.

KENNETH S. DOMBROWSKI (P55596)
kallas & henk pc
Attorney for Plaintiff-Appellant
43902 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48302
kdombrowski@kallashenk.com
(248) 335-5450, Ext. 210 / (248) 335-9889- Fax

RONALD M. SANGSTER, JR. (P39253)
Law Offices of Ronald M. Sangster, PLLC
Attorney for Defendant-Appellee
901 Wilshire Dr., Ste. 495
Troy, MI 48084
rsangster@sangster-law.com
(248) 269-7040 / (248) 269-7050 - Fax

JAMES G. GROSS (P28268)
Gross & Nemeth, P.L.C.
Attorney for Defendant-Appellee
615 Griswold, Ste. 1305
Detroit, MI 48226
jgross@gnsappeals.com
(313) 963-8200 / (313) 963-9169 - Fax

SUPPLEMENTAL BRIEF

PROOF OF SERVICE

FILED

OCT 19 2012

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

144771 /
PLAT'S 5008

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ARGUMENT 1

 I. A RESIDENT OF AN ADULT FOSTER CARE FACILITY WHO WAS INJURED AS A PEDESTRIAN IN A MOTOR VEHICLE ACCIDENT CAN BE DEEMED A "FAMILY MEMBER" UNDER THE NO-FAULT POLICY ISSUED BY NATIONAL LIABILITY & FIRE INSURANCE COMPANY IN THIS CASE 1

 II. SINCE STUBBE WAS A "FAMILY MEMBER" UNDER THE POLICY ISSUED TO QUALITY AFC HOME, INC., NATIONAL LIABILITY & FIRE INSURANCE COMPANY IS THE INSURANCE CARRIER HIGHEST IN PRIORITY, PURSUANT TO MCL 500.3114(1) AND MCL 500.3115(1) 10

 III. THE CASE OF *UNITED STATES FIDELITY & GUARANTY CO. v. CITIZENS INS. CO.*, 241 MICH APP 83; 613 NW2d 740 (2000) WAS CORRECTLY DECIDED 11

CONCLUSION 16

RELIEF GRANTED 16

INDEX OF AUTHORITY

<u>CASES</u>	<u>PAGE NO.</u>
<i>Amerisure Ins. Co. v. Coleman</i> , 274 Mich App 432; 733 NW2d 93 (2007); [Appeal Denied by 478 Mich 931; 732 NW2d 893 (2007)]	4, 5
<i>Auto Club Insurance Association v. Scott</i> , an unpublished Court of Appeals decision, Docket No. 291911, 2010 WL 3815395 (Mich.App.) (Sept. 30, 2010), Appeal Denied by 488 Mich 1049; 794 NW2d 342 (2011)	iii, 10, 11
<i>Belcher v. Aetna Cas. & Surety Co.</i> , 409 Mich 231; 293 NW2d 594 (1980)	2
<i>Dobbelaere II v. Auto Owners</i> , 275 Mich App 527; 740 NW2d 503 (2007); Appeal Denied by 480 Mich 1169; 747 NW2d 225 (2008); Reconsideration Denied by 482 Mich 899; 753 NW2d 159 (2008)	3, 4
<i>Doss v. Citizens Insurance Company of America</i> , 146 Mich App 510; 381 NW2d 409 (1986)	10
<i>Esquivel v. American Fidelity Fire Insurance Company</i> , 90 Mich App 56; 282 NW2d 240 (1979)	2, 3, 11
<i>Hartman v. Ins. Co. of North America</i> , 106 Mich App 731; 308 NW2d 625 (1981)	12
<i>Jeffrey v. Titan Ins. Co.</i> , 252 Mich App 330; 652 NW2d 469 (2002)	11
<i>Krohn v. Home-Owners Insurance Company</i> , 490 Mich 145; 802 NW2d 281 (2011)	13
<i>Madar v. League Gen. Ins. Co.</i> , 152 Mich App 734; 394 NW2d 90 (1986)	2
<i>Raska v. Farm Bureau Mut. Ins. Co. of Michigan</i> , 412 Mich 355; 314 NW2d 440 (1982)	15
<i>Rory v. Continental Insurance Company</i> , 473 Mich 457; 703 NW2d 23 (2005)	3, 14, 15
<i>Terrien v. Zwit</i> , 467 Mich 56; 648 NW2d 602 (2002)	14

Twin City Pipe Line Co. v. Harding Glass Co.,
283 U.S. 353; 51 S.Ct. 476; 75 L.Ed. 1112 (1931) 14

Underhill v. Safeco Ins. Co.,
407 Mich 175; 284 NW2d 463 (1979) 11

United States Fidelity & Guaranty Company v. Citizens Insurance Company,
241 Mich App 83; 613 NW2d 740 (2000) 7, 11, 12, 13, 14, 15

Wilkie v. Auto-Owners Ins. Co.,
469 Mich 41; 664 NW2d 776 (2003) 9, 16

STATUTES

MCL 330.1628 14

MCL 330.1628(1) 1

MCL 400.703 14

MCL 400.703(4) 2

MCL 400.705 14

MCL 400.705(3) 2

MCL 500.3101(1) 2

MCL 500.3105(1) 2

MCL 500.3114 2, 3, 5, 10

MCL 500.3114(1) 2, 3, 4, 9, 10, 11

MCL 500.3114(4) 4, 5

MCL 500.3114(4)(a) 3

MCL 500.3114(4)(b) 3, 5

MCL 500.3115 2, 10

MCL 500.3115(1) 10, 11

APPENDIX

Auto Club Insurance Association v. Scott,
an unpublished Court of Appeals decision,
Docket No. 291911, 2010 WL 3815395 (Mich.App.) (Sept. 30, 2010),
Appeal Denied by 488 Mich 1049; 794 NW2d 342 (2011) APPENDIX 1

**EXHIBITS ATTACHED TO PLAINTIFF'S-APPELLANT'S
BRIEF FILED IN THE COURT OF APPEALS**

(All exhibits referenced below, but not attached to this brief, are part of the Court record as attached to Plaintiff's-Appellant's brief filed in the Court of Appeals).

Deposition Transcript of Begashaw Deneke	C
Michigan Department of Energy, Labor & Economic Growth Bureau of Commercial Services, Corporation Division Nonprofit Corporation Information Update	D
Michigan Department of Human Services Bureau of Children and Adult Licensing Renewal Inspection Report	F
AFC - Resident Care Agreement	G
Assessment Plan for AFC Residents Michigan Department of Human Services Office of Children and Adult Licensing	H
Quality AFC Home, Inc. House Rules	I
Admission Policy	J
Insurance Policy Issued by Defendant-Appellee to Quality AFC Home, Inc.	K
Business Auto Coverage Declarations Sheet for Insurance Policy Issued by Defendant-Appellee to Quality AFC Home, Inc	L
Notice of Violation of House Rules	U

ARGUMENT

I. A RESIDENT OF AN ADULT FOSTER CARE FACILITY WHO WAS INJURED AS A PEDESTRIAN IN A MOTOR VEHICLE ACCIDENT CAN BE DEEMED A "FAMILY MEMBER" UNDER THE NO-FAULT POLICY ISSUED BY NATIONAL LIABILITY & FIRE INSURANCE COMPANY IN THIS CASE.

A review of the uncontested facts and established Michigan law strongly supports reinstatement of the trial court's opinion and order granting summary disposition in favor of Michigan Insurance Company. There is no dispute that National Liability & Fire Insurance Company issued a No-Fault insurance policy to Quality AFC Home, Inc., an adult foster care facility.¹ There is no dispute that when this policy was issued, National Liability & Fire Insurance Company knew that the nature of Quality AFC Home, Inc.'s business was "ADULT FOSTER CARE."² Thus, the general nature of the risk was known.

A corporation is "[a]n artificial person or legal entity created by or under the authority of the laws of a state or nation."³ In Michigan, corporations are empowered to do many things, including being eligible to serve as guardians for disabled people. MCL 330.1628(1) provides: "The court may appoint as guardian of an individual with a developmental disability any suitable individual or agency, public or private, including a private association capable of conducting an active guardianship program for an individual with a developmental disability." Indeed, there are many corporate agencies in Michigan that serve as guardians for individuals.⁴ Thus, Michigan law recognizes that corporations may serve as protectors for disabled people and have wards.

¹ See *Exhibit K* to Michigan Insurance Company's application for leave to appeal, insurance policy issued by National Liability & Fire Insurance Company to Quality AFC Home, Inc..

² See *Exhibit L* to Michigan Insurance Company's application for leave to appeal, business auto coverage declarations for insurance policy issued by National Liability & Fire Insurance Company to Quality AFC Home, Inc..

³ *Black's Law Dictionary Revised Fourth Edition* (1968), p. 409.

⁴ For example, Family Service Agency of Mid Michigan (1422 W. Court St., Flint, MI 48505) [www.fsamich.org] and Adult Well Being Services (1423 Field, Detroit, MI 48214) [www.awbs.org] are Michigan corporations that serve as guardians for people and have wards.

In Michigan, an adult foster care facility "means a governmental or nongovernmental establishment that provides foster care to adults. Subject to section 26a(1), adult foster care facility includes facilities and foster care homes for adults who are aged, mentally ill, developmentally disabled, or physically disabled who require supervision on an ongoing basis but who do not require continuous nursing care." MCL 400.703(4). A licensee of an adult foster care facility "means the agency, association, corporation, organization, person, or department or agency of the state, county, city, or other political subdivision, that has been issued a license to operate an adult foster care facility." MCL 400.705(3). Thus, Michigan law provides that corporations may operate adult foster care facilities, providing care and protection to disabled individuals.

Under Michigan's no-fault statute, every "owner or registrant of a motor vehicle required to be registered in this state" must have personal protection insurance. MCL 500.3101(1). An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the statute. See MCL 500.3105(1). Pursuant to MCL 500.3114(1), "a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident."

In Michigan, it has long been stated and understood, "PIP coverage applies to the injured person, and not the motor vehicle." *Madar v. League Gen. Ins. Co.*, 152 Mich App 734, 742-743; 394 NW2d 90 (1986). A no-fault policy for an injured person's household is first in order of priority of responsibility for payment of no-fault benefits, and, therefore, a person who sustains accidental bodily injury, whether an occupant or pedestrian, must first look within his or her household for no-fault PIP benefits. MCL 500.3114; MCL 500.3115; *Esquivel v. American Fidelity Fire Insurance Company*, 90 Mich App 56; 282 NW2d 240 (1979). See also *Belcher v. Aetna Cas. & Surety Co.*, 409 Mich 231, 253-253; 293 NW2d 594 (1980). As the Court of Appeals determined in *Esquivel*:

"Where the nonoccupant is covered either as an owner or registrant of an insured motor vehicle or as a member of the same household as an owner or registrant, section 3114 provides that his own his insurer must pay him personal protection benefits." *Esquivel*, 90 Mich App at 59-60.

With regard to auto insurance in Michigan, this Court stated: "insurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory v. Continental Insurance Company*, 473 Mich 457; 703 NW2d 23 (2005). Further, "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory*, 473 Mich at 461. This Court further stressed: "We reiterate that the judiciary is without authority to modify unambiguous contracts or re-balance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory*, 473 Mich at 461.

The Court of Appeals has determined that the specific language of the relevant auto insurance policy determines who is or who is not insured under that policy. In *Dobbelaere II v. Auto Owners*, 275 Mich App 527; 740 NW2d 503 (2007); *Appeal Denied by* 480 Mich 1169; 747 NW2d 225 (2008); *Reconsideration Denied by* 482 Mich 899; 753 NW2d 159 (2008), the plaintiff's decedent was ejected from an uninsured vehicle that was owned by David Jones and operated by Jones's son, David Jones, Jr.. The plaintiff's decedent did not have PIP coverage under any policy. Randie Jones, the wife of the vehicle owner (David Jones) and the mother of the vehicle operator (David Jones, Jr.), had her own no-fault policy through Auto-Owners. Randie was the only named insured under the Auto-Owners policy. David Jones, Randie, and David Jones, Jr. all lived in the same household, and David Jones and David Jones, Jr. had PIP coverage under the Auto-Owners policy, pursuant to MCL 500.3114(1), as "spouse" and "resident relative" in relationship to the

named insured. The question that arose was whether Auto-Owners was the “insurer” of the vehicle’s owner and operator, David Jones and David Jones, Jr. respectively, such that Auto-Owners owed PIP benefits to the plaintiff’s decedent, pursuant to MCL 500.3114(4). Under MCL 500.3114(4)(a) and (b), PIP coverage for a person injured as an occupant of a vehicle, unless otherwise indicated, is to be provided first by the “insurer of the owner or registrant of the vehicle occupied” and then second in priority is the “insurer of the operator of the vehicle occupied.” The case did not actually involve a priority dispute, but the plaintiff did attempt to use the priority provision to establish that Auto-Owners was liable for PIP benefits and that plaintiff was entitled to those benefits, contending that Auto-Owners was the “insurer” of both the operator and the owner. The *Dobbelaere* Court rejected the argument that Auto-Owners was David Jones’s and David Jones Jr.’s “insurer” simply because they would be entitled to PIP benefits pursuant to Randie’s policy under MCL 500.3114(1). However, the *Dobbelaere* Court stated:

[T]his Court has held that whether the insurer of a no-fault insurance policy is the “insurer” of a household member or family member for purposes of MCL 500.3114(4) “depends on the language of the relevant insurance policy.” *Dobbelaere*, 275 Mich App at 532-533, citing *Amerisure Ins. Co. v. Coleman*, 274 Mich App 432, 436 n. 1; 733 NW2d 93 (2007); [*Appeal Denied by* 478 Mich 931; 732 NW2d 893 (2007)].

Since the policy at issue in *Dobbelaere* did not define who was an insured for purposes of the no-fault endorsement, the Court reversed that portion of the trial court’s order denying Auto-Owners’s motion for summary disposition.

In *Amerisure Ins. Co.*, 274 Mich App at 432, a husband and his wife, along with the husband’s nephew, were involved in an accident. The husband and wife resided together, but the nephew did not live with them. The husband was driving the vehicle, which was actually owned and registered in the name of his wife’s mother, who never purchased insurance for the vehicle, nor did the mother-in-law have any other no-fault insurance policy. The wife had a no-fault policy with

Titan, which denied the claim. The nephew, who had no available insurance of his own, then submitted a claim to the Michigan Assigned Claims Facility, which assigned the claim to Amerisure. Amerisure sued Titan, asserting that Titan had priority as the insurer under MCL 500.3114(4). Summary disposition was granted in favor of Amerisure, and Titan appealed. The case boiled down to whether under MCL 500.3114(4)(b), Titan was the "insurer" of the operator of the vehicle (the husband). The Court of Appeals, using a dictionary definition, determined that an "insurer" was one who agreed by contract to assume the risk of another's loss and to compensate that loss. *Amerisure Ins. Co.*, 274 Mich App at 435. The panel then reviewed the Titan policy, which solely listed the wife as the named insured. However, the policy defined an "insured" as "you or any family member" and "you" was further defined as including a resident spouse. Therefore, the husband (the vehicle operator) qualified as an "insured" under his wife's Titan policy, either as a spouse or as a family member. As a result, Titan was the "insurer" of the operator of the motor vehicle for purposes of MCL 500.3114(4)(b). *Amerisure Ins. Co.*, 274 Mich App at 436-437. The Court of Appeals specifically rejected the argument that an owner, registrant, or operator must be a named insured on a policy before he or she can be deemed an "insured" under the policy for purposes of MCL 500.3114.

Turning to the policy at issue, it is uncontested that National Liability & Fire Insurance Company issued a commercial auto policy to Quality AFC Home, Inc..⁵ On the first page of the dec sheet, it was expressly stated that the nature of business of Quality AFC Home, Inc. was "Adult Foster Care."⁶ The PIP endorsement in National Liability & Fire Insurance Company's policy provided as follows:

⁵ See *Exhibit K* to Michigan Insurance Company's application for leave to appeal.

⁶ See *Exhibit L* to Michigan Insurance Company's application for leave to appeal.

A. Coverage

We will pay personal injury protection benefits to or for an "insured" who sustains "bodily injury" caused by an "accident" and resulting from the ownership, maintenance or use of an "auto" as an "auto." These benefits are subject to the provisions of Chapter 31 of the Michigan Insurance Code. Personal Injury Protection benefits consist of the following benefits:

1. Medical Expenses

Reasonable and necessary medical expenses for an "insured's" care, recovery, or rehabilitation. Charges for a hospital room are limited to those customary for a semi-private room, unless special or intensive care is required.

B. Who is An Insured

1. You or any "family member".⁷

In addition, "family member" was defined as follows:

F. Additional Definitions

As used in this endorsement:

2. "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.⁸

Based on the broad definition provided in the policy at issue, Lawrence Stubbe can be deemed a "family member." There is no dispute that Stubbe was a resident of Quality AFC Home, Inc. at the time of the motor vehicle accident. The common definition of "including" is "to have as a part or member: contain."⁹ Further, the common definition of "household" is "[a] unit comprising a family and others who share the same living space."¹⁰ Moreover, pursuant to the policy, an insured "family member" includes a resident ward. The term "ward" was not defined in the policy issued by National Liability & Fire Insurance Company. The dictionary definitions of "ward" include

⁷ See Exhibit K to Michigan Insurance Company's application for leave to appeal.

⁸ See Exhibit K to Michigan Insurance Company's application for leave to appeal.

⁹ Webster's II New Riverside Dictionary (1996), p. 350.

¹⁰ Webster's II New Riverside Dictionary (1996), p. 335. [Emphasis supplied.]

the following:

ward: "a person ... under the protection or tutelage of a person."
United States Fidelity & Guaranty Company v. Citizens Insurance Company, 241 Mich App 83; 613 NW2d 740 (2000), quoting *Webster's Third New International Dictionary* (1965), p. 2575.

ward: "any person under another's care."
Webster's New World Dictionary (1982), p. 844.

ward: "A person under the protection or care of another."
The American Heritage Dictionary, Second College Edition (1982), p. 1363.

ward: "a person under another's protection or care."
Webster's New Universal Unabridged Dictionary (1983), p. 2060.

As a resident of an adult foster care facility, Stubbe was certainly under the protection and care of Quality AFC Home, Inc. when the accident occurred. There is no dispute that Quality AFC Home, Inc. was an adult foster care home, licensed by the State of Michigan.¹¹ There is no dispute that Quality AFC Home, Inc. and Stubbe entered into an "AFC - Resident Care Agreement" through which Quality AFC Home, Inc. agreed "to provide personal care, supervision and protection in addition to room and board for 24 hours of day for this resident."¹² There is no dispute that the resident care agreement was "based upon the licensee's written assessment of the amount of personal care, supervision, and protection required by the resident."¹³ There is no dispute that Quality AFC Home, Inc. agreed to provide transportation services to Stubbe for medical and dental appointments.¹⁴ There is no dispute that Quality AFC Home, Inc. agreed to "accept responsibility

¹¹ See *Exhibit D* to Michigan Insurance Company's application for leave to appeal, records from Michigan Department of Energy, Labor & Economic Growth; See *Exhibit F* Michigan Insurance Company's application for leave to appeal, records from Michigan Department of Human Services.

¹² See *Exhibit G* to Michigan Insurance Company's application for leave to appeal, AFC - Resident Care Agreement.

¹³ See *Exhibit G* to Michigan Insurance Company's application for leave to appeal.

¹⁴ See *Exhibit G* to Michigan Insurance Company's application for leave to appeal.

for the management and accounting of this resident's financial transactions."¹⁵

There is no dispute that an Assessment Plan for AFC Resident was completed, as required by State of Michigan due to Quality AFC Home, Inc. being a licensee.¹⁶ In that assessment plan, there is no dispute that Quality AFC Home, Inc. agreed to provide reminders to Stubbe regarding grooming and personal hygiene.¹⁷ There is no dispute that Quality AFC Home, Inc. agreed to dispense medication to Stubbe.¹⁸

There is no dispute that Quality AFC Home, Inc. had specific House Rules while Stubbe lived in the adult foster care home.¹⁹ There is no dispute that the house rules required that Stubbe "sign out" when leaving and provide specific information regarding where he was going, with whom, and when he was expected to return.²⁰ There is no dispute that Stubbe was required to "get permission from the person in charge when leaving the home."²¹ There is no dispute that Stubbe was required to be "dressed and properly groomed at all meals."²² There is no dispute that Stubbe was required to bathe, shampoo, shave, brush his teeth, and change his clothes daily.²³ There is no dispute that Stubbe was not allowed to visit another resident's room, and that bedtime was "no later than 10:00 pm."²⁴ There is no dispute that Stubbe was not permitted to smoke cigarettes inside the adult foster care home, and that alcoholic beverages were "absolutely prohibited."²⁵ Indeed, there is no dispute that Stubbe was disciplined for violating the House Rules.²⁶

¹⁵ See *Exhibit G* to Michigan Insurance Company's application for leave to appeal.

¹⁶ See *Exhibit H* to Michigan Insurance Company's application for leave to appeal, Assessment Plan for AFC Resident.

¹⁷ See *Exhibit H* to Michigan Insurance Company's application for leave to appeal.

¹⁸ See *Exhibit H* to Michigan Insurance Company's application for leave to appeal.

¹⁹ See *Exhibit I* to Michigan Insurance Company's application for leave to appeal, House Rules.

²⁰ See *Exhibit I* to Michigan Insurance Company's application for leave to appeal.

²¹ See *Exhibit I* to Michigan Insurance Company's application for leave to appeal.

²² See *Exhibit I* to Michigan Insurance Company's application for leave to appeal.

²³ See *Exhibit I* to Michigan Insurance Company's application for leave to appeal.

²⁴ See *Exhibit I* to Michigan Insurance Company's application for leave to appeal.

²⁵ See *Exhibit I* to Michigan Insurance Company's application for leave to appeal.

²⁶ See *Exhibit U* to Michigan Insurance Company's application for leave to appeal, Violation of House Rules

There is no dispute that Stubbe signed an Admission Policy when moving into Quality AFC Home, Inc..²⁷ There is no dispute that for the protection of Stubbe and other residents, Quality AFC Home, Inc. made clear that it “shall not accept or keep a person whose behavior requires isolation or restraint, nor admit a person whose present care requirements and service needs are incompatible with those other residents in the group home.”²⁸ There is no dispute that the Admission Policy provided that Quality AFC Home, Inc. “shall strive to provide each of the residents with an atmosphere that is similar to that of a family” and that “interpersonal relationships between the residents and staff are parallel to those of family members.”²⁹

Because Stubbe clearly was a resident and under the protection and care of Quality AFC Home, Inc., he can certainly be deemed a “ward,” and therefore, an insured “family member” under the insurance policy issued by National Liability & Fire Insurance Company. To be clear, National Liability & Fire Insurance Company could have defined “family member” in another way, but chose not to do so. As this Court observed: “where judges ... rewrite the contract ... is contrary to the bedrock principle of American contract law that parties are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy.” *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich 41, 51; 664 NW2d 776 (2003). The policy issued by National Liability & Fire Insurance Company does not violate the no-fault statute or Michigan public policy, and therefore, should be enforced as written.

Based on the policy language at issue, Stubbe was an insured “family member” under the National Liability & Fire Insurance Company policy, and thus qualifies for PIP coverage under MCL 500.3114(1).

²⁷ See *Exhibit J* to Michigan Insurance Company's application for leave to appeal, Admission Policy.

²⁸ See *Exhibit J* to Michigan Insurance Company's application for leave to appeal.

²⁹ See *Exhibit J* to Michigan Insurance Company's application for leave to appeal.

II. SINCE STUBBE WAS A "FAMILY MEMBER" UNDER THE POLICY ISSUED TO QUALITY AFC HOME, INC., NATIONAL LIABILITY & FIRE INSURANCE COMPANY IS THE INSURANCE CARRIER HIGHEST IN PRIORITY, PURSUANT TO MCL 500.3114(1) AND MCL 500.3115(1).

MCL 500.3115 states in relevant part:

- (1) *Except as provided in subsection (1) of section 3114, a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:*
 - (a) Insurers of owners or registrants of motor vehicles involved in the accident.
 - (b) Insurers of operators of motor vehicles involved in the accident.
[Emphasis supplied.]

MCL 500.3115(1) is only applicable if MCL 500.3114(1) does not apply. MCL 500.3114 provides in relevant part:

- (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101 applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident.

The Court of Appeals has determined that a PIP carrier which expressly contracts to provide primary no-fault coverage cannot avoid that liability by arguing that the priority scheme of the no-fault statute renders another carrier responsible for payment of no-fault benefits. *Doss v. Citizens Insurance Company of America*, 146 Mich App 510; 381 NW2d 409 (1986). In particular, the Court of Appeals in *Doss* held that a no-fault carrier's "assumption of primary responsibility to provide the benefits in question does not directly conflict with the statute" and that "[t]he goal of the [no-fault statute], to provide accident victims with prompt and adequate compensation, is accomplished no matter which insurer pays the claim" for benefits." *Doss*, 146 Mich App at 513-514. Thus, "policy provisions that do not directly conflict with the no-fault act are permitted." *Auto*

Club Insurance Association v. Scott, an unpublished Court of Appeals decision, Docket No. 291911, 2010 WL 3815395 (Mich.App.) (Sept. 30, 2010), *Appeal Denied by* 488 Mich 1049; 794 NW2d 342 (2011).³⁰

Due to the policy definition of "family member" that includes a ward, Stubbe qualifies as a "relative" of Quality AFC Home, Inc. for purposes of MCL 500.3114(1). As this Court noted: "[i]t is our understanding of the legislative purpose that it was intended that injured persons who are insured or whose family member is insured for no-fault benefits would have primary resort to their own insurer." *Underhill v. Safeco Ins. Co.*, 407 Mich 175, 191-192; 284 NW2d 463 (1979). Further, there is no dispute that at the time of the motor vehicle accident Stubbe was living at the adult foster care facility located at 523 Orchard Lake Road in Pontiac, MI.³¹ There is no dispute that this is the address for Quality AFC Home, Inc..³² Thus, Stubbe was "domiciled in the same household" as Quality AFC Home, Inc. for purposes of MCL 500.3114(1). As a result, MCL 500.3114(1) is the applicable priority statute, not MCL 500.3115(1); *Esquivel*, 90 Mich App at 59-60. See also *Jeffrey v. Titan Ins. Co.*, 252 Mich App 330, 335-336; 652 NW2d 469 (2002). As a consequence, National Liability & Fire Insurance Company is the carrier in highest order of priority, pursuant to MCL 500.3114(1).

III. THE CASE OF UNITED STATES FIDELITY & GUARANTY CO. v. CITIZENS INS. CO., 241 MICH APP 83; 613 NW2d 740 (2000) WAS CORRECTLY DECIDED.

The Court of Appeals in *United States Fidelity & Guaranty Company, supra*, correctly interpreted the Michigan no-fault statute and the insurance policy at issue. In the case, there was a priority dispute between two no-fault auto insurance carriers regarding payment of benefits to

³⁰ **Appendix 1**, *Auto Club Insurance Association v. Scott*, an unpublished Court of Appeals decision, Docket No. 291911, 2010 WL 3815395 (Mich.App.) (Sept. 30, 2010); *Appeal Denied by* 488 Mich 1049; 794 NW2d 342 (2011).

³¹ See *Exhibit C* to Michigan Insurance Company's application for leave to appeal, deposition transcript of Begashaw Deneke, p. 8.

³² See *Exhibit D* to Michigan Insurance Company's application for leave to appeal.

claimant, a resident of an adult foster care home. The plaintiff insured the adult foster care home (Paragon Non-Profit Corporation.) The defendant insured the vehicle that struck the claimant. The plaintiff initially paid PIP benefits to claimant, but then denied coverage. The defendant then paid PIP benefits to claimant. The plaintiff filed suit against the defendant for reimbursement of PIP benefits paid, and the defendant likewise filed a counter-complaint against the plaintiff for reimbursement of PIP benefits paid. The trial judge, Judge Archie Hayman of the Genesee County Circuit Court, ruled that the claimant was a "ward" of the adult foster care home at the time of the accident, and thus qualified as a "family member" under the auto insurance policy issued to the adult foster care home. The plaintiff appealed and the Court of Appeals affirmed.

In *United States Fidelity & Guaranty Company*, the Court of Appeals noted that the outcome might be different but for the very general terms of the plaintiff's insurance policy. In particular, the plaintiff's policy defined an "insured" to include any "family member":

B. WHO IS AN INSURED

1. You and any "family member."

In addition, "family member" was broadly defined as follows:

"Family member" means a person related to you by blood, marriage or adoption who is a resident of your household, *including a ward or foster child.*

United States Fidelity & Guaranty Company, 241 Mich App at 86.³³
[Emphasis added by Court of Appeals.]

The next issue for the Court of Appeals was whether the claimant was a "ward" of the adult foster care home (the plaintiff's insured). The term was not defined in the policy. The Court of Appeals looked to the case of *Hartman v. Ins. Co. of North America*, 106 Mich App 731; 308 NW2d 625 (1981), where a common dictionary definition of "ward" was used.³⁴ Based upon the

³³ This is the exact same language as in the case at issue.

³⁴ "Ward" was defined as "a person ... under the protection or tutelage of a person."
United States Fidelity & Guaranty Company, 241 Mich App at 87, quoting *Webster's Third New International Dictionary (1965)*, p. 2575.

dictionary definition, the Court of Appeals agreed with the trial court that the claimant was a ward of the adult foster care home, and thus an insured family member under the policy. The trial court also found that it made no difference that the adult foster care home was a corporation:

[A] corporation can sue in its own name. It's considered as a person for purposes of suits, for purposes of owning property, et cetera, and I don't see any reason why they can't have wards. In fact, I think that's exactly what this situation is.

This is an individual who was under the care of this adult foster care facility, which is a corporation. This corporation handles their funds. It decides where they're going to eat, where they're going to sleep, how they're going to live, when they're going to get to go outside, when they're not going to get to go outside. They basically control this person's life. And I don't know, if that's not being a ward, I don't know what is being a ward.

And I don't find that because it's a corporation, that that says they can't have a ward. And I don't know any case law that says that, either; and it's not so obvious to me that there wouldn't be some case law needed to be put on this.

United States Fidelity & Guaranty Company, 241 Mich App at 88-89.

The case of *United States Fidelity & Guaranty Company* correctly applied Michigan law and enforced the applicable contract as written. As this Court recognized, insurance companies may provide broader coverage than required by Michigan law. In *Krohn v. Home-Owners Insurance Company*, 490 Mich 145, 167; 802 NW2d 281 (2011), this Court stated: "This opinion does not in any way prevent no-fault insureds from themselves paying for procedures that are not 'reasonably necessary' or entering into insurance contracts that provide broader coverage." In *United States Fidelity & Guaranty Company*, the Court of Appeals noted:

The issue whether Dennis Flynn was a resident relative of plaintiff's insured, Paragon, at the time of the pedestrian/automobile collision would be difficult and its resolution might be different were it not for the terms of plaintiff's policy" which contained the "broad definition" of "family member." 241 Mich App at 86.

In *United States Fidelity & Guaranty Company* the Court of Appeals simply enforced the insurance policy as written in a manner consistent with this Court's later decision in *Rory*, 473 Mich at 461, 468. The same "broad definition" of "family member" discussed in *United States Fidelity & Guaranty Company* was used by National Liability & Fire Insurance Company in the policy issued to Quality AFC Home, Inc.. Just as the trial court was affirmed in *United States Fidelity & Guaranty Company*, the trial court's wise opinion and order should be reinstated in this case.

The reasoning of the dissent in *United States Fidelity & Guaranty Company* is greatly flawed. The dissent stated: "A corporation cannot have a family member and I think it is a strained interpretation to conclude that it can have a ward." 241 Mich App at 90. Contrary to the dissent, however, corporations can and do have wards in Michigan. Corporations can be appointed as guardians for disabled people.³⁵ MCL 330.1628. As evidenced by this case, corporations can be licensees to operate adult foster care facilities. MCL 400.703; MCL 400.705. Whether serving as a legal guardian for a disabled person or operating an adult foster care facility, corporations provide care and protection for disabled people in Michigan.

Moving to the question of whether a corporation can have a family member, this Court has recognized: "[t]he general rule [of contracts] is that competent persons shall have utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Terrien v. Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002), quoting *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356; 51 S.Ct. 476; 75 L.Ed. 1112 (1931). Moreover, "[o]ne does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." *Rory*, 473 Mich at 469-470, quoting 15 Corbin, *Contracts* (Interim ed.), ch 79, § 1376, p. 17. National Liability & Fire

³⁵ For example, see Family Service Agency of Mid Michigan (1422 W. Court St., Flint, MI 48505) [www.fsamich.org] and Adult Well Being Services (1423 Field, Detroit, MI 48214) [www.awbs.org/] as Michigan corporations that serve as guardians for people and have wards.

Insurance Company issued an insurance policy in which it agreed to insure the wards of Quality AFC Home, Inc., and that agreement should be enforced.

In *United States Fidelity & Guaranty Company*, the Court of Appeals enforced an insurance policy that contained "an expansive definition of the terms 'insured' and 'family member.'" As this Court has noted, "the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government." *Rory*, 473 Mich at 476. Further, this Court determined that "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous, and not in contravention of public policy." *Raska v. Farm Bureau Mut. Ins. Co. of Michigan*, 412 Mich 355, 361-362; 314 NW2d 440 (1982). The decision reached in *United States Fidelity & Guaranty Company* did not violate the no-fault statute or Michigan public policy. In the final analysis, *United States Fidelity & Guaranty Company* was rightly decided.

"Consistent with our prior jurisprudence, unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy." *Rory*, 473 Mich at 491. The majority in *United States Fidelity & Guaranty Company* understood that insurance companies should be bound by the contracts they write and sell. That decision was correct and should be followed today.

CONCLUSION

As this Court pointed out: "[t]he notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable." *Wilkie*, 469 Mich at 52.

Based on the foregoing law and fact, this Court should reverse the judgment of the Court of Appeals and reinstate the opinion and order of the trial court.

RELIEF REQUESTED

Plaintiff-Appellant/Plaintiff-Appellee, Michigan Insurance Company respectfully requests that this Honorable Court grant its application for leave to appeal, or, in the alternative, preemptorily reverse the judgment of the Court of Appeals and reinstate the trial court's opinion and order, which granted summary disposition in favor of Michigan Insurance Company.

Respectfully submitted,

kallas & henk pc



KENNETH S. DOMBROWSKI (P55596)
Attorney for Plaintiff-Appellant, Michigan Ins Company
43902 Woodward Ave., Suite 200
Bloomfield Hills, MI 48302
(248) 335-5450, Ext. 210

Dated: October 17, 2012

"APPENDIX 1"

Westlaw.

Page 1

Not Reported in N.W.2d, 2010 WL 3815395 (Mich.App.)
(Cite as: 2010 WL 3815395 (Mich.App.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
AUTO CLUB INSURANCE ASSOCIATION,
Plaintiff-Appellant,
v.
Francine SCOTT, Defendant,
and
Farmers Insurance Exchange, Defendant-Appellee.

Docket No. 291911.
Sept. 30, 2010.

West KeySummaryInsurance 217 ↪ 2660.5

217 Insurance
217XXII Coverage—Automobile Insurance
217XXII(A) In General
217k2660 Persons Covered
217k2660.5 k. In general. Most Cited
Cases

Insurance 217 ↪ 2671

217 Insurance
217XXII Coverage—Automobile Insurance
217XXII(A) In General
217k2668 Occupancy of Vehicle
217k2671 k. No-fault coverage. Most
Cited Cases

No-fault claimants, who were injured in an automobile accident, both qualified as “any other person occupying [the] insured car”, and thus came within the meaning of “insured person” in insurer’s automobile insurance policy, defined in the policy as “any other person occupying [the] insured car”, unambiguously included claimants. The insured car was involved in an accident while being used by claimants with the permission of the car’s owner.

Wayne Circuit Court; LC No. 07-713613-NF.

Before: WILDER, P.J., and CAVANAGH and M.J.
KELLY, JJ.

PER CURIAM.

*1 At issue in this appeal is whether defendant Farmers Insurance Exchange (“Farmers”) is liable for no-fault personal injury protection (“PIP”) benefits for two individuals who were injured while occupying a vehicle owned by defendant Francine Scott. Farmers insured the vehicle under a no-fault policy issued to Willie Sims. The trial court granted Farmers’ motion for summary disposition and dismissed plaintiff Auto Club Insurance Association’s claim for reimbursement of PIP benefits from Farmers on the ground that Farmers’ policy did not provide coverage for the injured individuals. Plaintiff appeals as of right. We reverse the order of summary disposition in favor of Farmers and remand for entry of an order of partial summary disposition in favor of plaintiff and for further proceedings not inconsistent with this opinion.

The underlying facts are not in dispute. Farmers issued a no-fault insurance policy for a 2000 Dodge Caravan. The named insured was Willie Sims, but the vehicle was actually owned by Sims’ daughter, Francine Scott, who resided with her son, Vernest Scott, and his wife, Kim Scott. Sims did not reside with Francine. According to Francine, the vehicle was insured in Sims’ name in order to take advantage of a discounted rate. In May 2006, the vehicle was involved in an accident while being used by Vernest and Kim Scott, with Francine’s permission. Vernest and Kim filed claims for no-fault PIP benefits with the Michigan Assigned Claims Facility (MACF) and their claims were assigned to plaintiff. Plaintiff thereafter filed this action against Francine and Farmers, seeking reimbursement of the PIP benefits it had paid to Vernest and Kim. In its answer to the complaint, Farmers admitted that the vehicle was covered by a no-fault

Not Reported in N.W.2d, 2010 WL 3815395 (Mich.App.)
(Cite as: 2010 WL 3815395 (Mich.App.))

policy on the date of the accident. Farmers later moved for summary disposition under MCR 2.116(C)(10) on the ground that the injured claimants did not qualify for PIP benefits under MCL 500.3114. Plaintiff opposed the motion and sought summary disposition under MCR 2.116(I)(2) on the ground that the insurance policy issued to Sims established the injured claimants' entitlement to PIP benefits from Farmers. The trial court determined that the policy did not provide coverage for the injured claimants and granted Farmers' motion.

We review de novo a trial court's decision regarding a motion for summary disposition pursuant to MCR 2.116(C)(10). *Auto-Owners Ins. Co. v. Martin*, 284 Mich.App. 427, 433, 773 N.W.2d 29 (2009). "Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact." *Id.* We also review de novo whether an insurance policy is ambiguous. *Id.* at 434, 773 N.W.2d 29. Although an insurance policy is governed by principles of contract interpretation, mandatory statutory provisions must be read into the policy. *Id.* at 433-435, 773 N.W.2d 29. Contractual language is ambiguous only where two provisions irreconcilably conflict, or a term is equally susceptible to more than one meaning. *Coates v. Bastian Bros., Inc.*, 276 Mich.App. 498, 503, 741 N.W.2d 539 (2007).

*2 We conclude that the trial court erred in finding that Farmers' insurance policy did not provide coverage for the injured claimants. The insurance policy provides coverage for PIP benefits for an "insured person," which is defined, in pertinent part, as "any other person occupying your insured car." Because the parties do not dispute that the injured claimants qualify as "any other person occupying," we turn to the policy's definition of "your insured car." The policy provides:

Your Insured Car means *the vehicle described in the declarations for which the Liability Insurance of this policy applies, and which security under the provisions of the Code is required; or a*

motor vehicle to which the Liability Insurance of this policy applies, if it does not have the security required by the Code, and is operated but not owned by you or a family member. [Emphasis added.]

We agree with plaintiff that the Dodge Caravan that the injured claimants were using at the time of the accident qualifies as "your insured car" under the first part of this definition. There is no dispute that the Dodge Caravan is described in the declarations and that the liability insurance applies to it. The material question is whether the phrase "and which security under the provisions of the Code is required" is linked to the Dodge Caravan, as argued by plaintiff, or to any owners or registrants of the vehicle, as argued by Farmers based on the security requirements of MCL 500.3101(1). We agree with plaintiff's argument.

Although we agree that the word "Code," as defined in the general definitions section of the insurance policy, refers to the no-fault act, the requirements of the no-fault act are not dispositive of the meaning of the disputed phrase, inasmuch as policy provisions that do not directly conflict with the no-fault act are permitted. See *Doss v. Citizens Ins. Co. of America*, 146 Mich.App. 510, 512-514, 381 N.W.2d 409 (1985). Here, Farmers has not established any conflict.

The disputed phrase commences with the word "and," which is defined as "with; as well as; in addition to" when "used to connect grammatically coordinate, words, phrases, or clauses." *Random House Webster's College Dictionary* (1997), p 49; see, also, *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28, 33, 732 N.W.2d 56 (2007) (word "and" generally reflects that both requirements must be satisfied), and *Singer v. American States Ins.*, 245 Mich.App. 370, 377, 631 N.W.2d 34 (2001) (absent a clearly defined definition in an insurance policy, a policy term is given its commonly understood meaning). Examined in its grammatical context, the phrase "and which security under the Code is required" unambiguously links the required security

Not Reported in N.W.2d, 2010 WL 3815395 (Mich.App.)
(Cite as: 2010 WL 3815395 (Mich.App.))

to the vehicle, regardless of who provides it. Cf. *Iqbal v. Bristol West Ins. Group*, 278 Mich.App. 31, 39, 748 N.W.2d 574 (2008) (MCL 500.3113(b), as construed in its grammatical context, linked the required security for a person to avoid being disqualified from PIP benefits to the vehicle). Indeed, while not dispositive of our construction of the policy, this result is consistent with the facts of this case, which involve the issuance of an insurance policy to an individual, Sims, who was not required to insure the Dodge Caravan under MCL 500.3101(1).

*3 We conclude that the well-established rule that PIP coverage applies to the insured person, *Amerisure Ins. Co. v. Coleman*, 274 Mich.App. 432, 438, 733 N.W.2d 93 (2007), is immaterial to how the disputed provision of the insurance policy should be construed. To the extent that Farmers views its dispute with plaintiff as one involving a priority dispute, and not merely whether the insurance policy provides coverage for the injured claimants, we conclude that this case does not present any priority issue because plaintiff, as an MACF assignee, would be an insurer of last priority. MCL 500.3172(1); *Bronson Methodist Hosp. v. Allstate Ins. Co.*, 286 Mich.App. 219, 225, 779 N.W.2d 304 (2009), lv pending. Although MCL 500.3114 also contains priority provisions in the sense that it defines when a particular insurer is liable for PIP benefits, *Dobbelaere v. Auto-Owners Ins. Co.*, 275 Mich.App. 527, 531-532, n. 1, 740 N.W.2d 503 (2007), where, as in this case, there is evidence that an injured claimant operated the motor vehicle, the language of the insurance policy is appropriately considered to determine the insurer's liability. MCL 500.3114(4)(b); *Amerisure Ins. Co.*, 274 Mich.App. at 436-437, 733 N.W.2d 93. Therefore, Farmers has not established any basis for avoiding liability for PIP benefits based on the no-fault act's priority provisions for insurers.

In sum, we conclude that the meaning of "insured person" in Farmers' insurance policy unambiguously includes the injured claimants because

they both qualify as "any other person occupying your insured car." Accordingly, we reverse the trial court's order of summary disposition in favor of Farmers and remand for entry of an order of partial summary disposition under MCR 2.116(I)(2) in favor of plaintiff with respect to this contractual issue.

Reversed and remanded for entry of an order of partial summary disposition in favor of plaintiff and for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

Mich.App.,2010.
Auto Club Ins. Ass'n v. Scott
Not Reported in N.W.2d, 2010 WL 3815395
(Mich.App.)

END OF DOCUMENT

Westlaw.

Date of Printing: Oct 17, 2012

KEYCITE

H Auto Club Ins. Ass'n v. Scott, 2010 WL 3815395 (Mich.App., Sep 30, 2010) (NO. 291911)

History

Direct History

- => 1 Auto Club Ins. Ass'n v. Scott, 2010 WL 3815395 (Mich.App. Sep 30, 2010) (NO. 291911)
Appeal Denied by
- H** 2 Auto Club Ins. Ass'n v. Scott, 488 Mich. 1049, 794 N.W.2d 342 (Mich. Mar 08, 2011) (NO. 142061)

Court Documents

Dockets (U.S.A.)

Mich.

3 AUTO CLUB INSURANCE ASSN v. FRANCINE SCOTT, NO. 142061 (Docket) (Mich. May 6, 2009)

Mich.App.

4 AUTO CLUB INSURANCE ASSN v. FRANCINE SCOTT, NO. 291911 (Docket) (Mich.App. May 6, 2009)