S T A T E O F M I C H I G A N

SUPREME COURT

WILLIE GRIFFIN,

Plaintiff-Appellant,

v No. 162419

TRUMBULL INSURANCE COMPANY and MICHIGAN ASSIGNED CLAIMS PLAN,

Defendants-Appellees,

and

ALLSTATE INSURANCE COMPANY, ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANY,

Defendants.

CLEMENT, J. (*dissenting*).

I believe that the trial court properly identified the reasons for granting summary disposition to defendants-appellees in this matter. This means, on the one hand, that I dissent from the Court's decision to reverse the trial court. It also means that I decline to join Justice ZAHRA's dissent, because I am not persuaded by the Court of Appeals' rationale for granting summary disposition to defendant-appellee Trumbull Insurance Company, which he would adopt. Rather, I believe—as the trial court held—that plaintiff failed to exercise reasonable diligence in identifying the correct insurer to file a claim against, and I would affirm the Court of Appeals on that alternative basis.

It is well established that the goal of our no-fault system "was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). The intended comprehensiveness of the program is demonstrated by the existence of the assigned-claims system, which creates what is "essentially an insurer of last priority," *Cason v Auto Owners Ins Co*, 181 Mich App 600, 610; 450 NW2d 6 (1989), from which an injured person can recover benefits if no other applicable insurance is available, MCL 500.3172(1). On the other hand, the no-fault act textually imposes the burden of filing a proper claim on a claimant. Thus, "*a person* who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle *shall claim* personal protection insurance benefits from insurers in" a stated order of priority. MCL 500.3114(5) (emphasis added). "[T]he presumption is that 'shall' is mandatory." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). The law therefore does not contemplate a claimant simply filing a claim with *an* insurer that is *somewhere* in the order of priority, leaving it up to that insurer to ascertain whether a higher-priority insurer exists—the statutory text imposes the obligation on claimants to claim in the stated order of priority.

In light of this obligation to claim in the stated order of priority, the Court of Appeals concluded—and Justice ZAHRA agrees—that whether an insurer is liable "calls for a binary analysis that asks only whether a higher-priority insurer is identifiable." *Griffin v Trumbull Ins Co*, 334 Mich App 1, 11-12; 964 NW2d 63 (2020). If a higher-priority insurer is identified, at any point and for any reason, then a lower-priority insurer is necessarily relieved of liability under this rule. I do not agree that the analysis is this simple. As noted,

the structure of the no-fault system makes it clear that it is intended to be comprehensive. It is notable in this regard that all the instances of individuals who are excluded from benefits in MCL 500.3113 involve people who had control, in one way or another, over being excluded from benefits. When a claimant has demonstrated reasonable diligence in identifying the highest-priority insurer with which to file a claim, I do not believe that the insurer should then have a defense to paying benefits (at least, not after the limitations period of MCL 500.3145(1) has expired) because, by a stroke of chance, a higher-priority insurer is subsequently discovered.

The facts of *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004), are illustrative of this principle. There, the plaintiff was a passenger on a motorcycle that had to swerve when an oncoming automobile crossed the center line of the road, causing the plaintiff to hit the ground. *Id*. at 733. Under MCL 500.3114(5)(a) and (b), the insurer of the owner of that automobile was the highest-priority insurer and the insurer of the operator of the automobile was the next highest, but because of the hit-and-run nature of the accident no information was known, or knowable, about those insurers, *id*. at 736-737, and the Court held that the priority analysis would proceed to insurers further down the list of priority, *id*. at 738. If, serendipitously, the owner of the automobile involved in the *Frierson* accident had come to light after the limitations period had expired—imagine if the automobile owner had business in the same courtroom in which *Frierson* was being litigated and remarked to one of the *Frierson* lawyers that he had been driving the automobile in that accident—I do not think the injured person could be denied benefits from the highest-priority insurer who *was* identified even while being time-barred from recovering benefits from the belatedly identified highest-priority insurer.

To this extent, then, I agree with the majority that the Court of Appeals' analysis was erroneous. The statute directs an injured person to "claim" in a stated order of priority, but by definition an injured person can give no more than their best effort at making such a claim. In light of the textual indications of the system's intended comprehensiveness, I would interpret the statute as requiring a claimant to show at least, but also no more than, reasonable diligence when it requires an injured person to "claim." It is obviously impossible for claimants to see the future, and if that is the only way a claimant could identify a higher-priority insurer within the limitations period, then I would not construe MCL 500.3114(5) as requiring a claimant to do something that is impossible in order to enjoy the benefits the system clearly contemplates should be made available.

On the other hand, I do not believe that the trial court clearly erred by concluding that plaintiff had not demonstrated reasonable diligence in trying to identify the insurer of the motor vehicle he swerved to avoid while riding a motorcycle. Plaintiff waited until roughly two weeks remained in the limitations period before filing suit against several potentially implicated insurers known to him (including Trumbull), the Michigan Assigned Claims Plan, and a fictitious "John Doe Insurance Company," a stand-in for the insurer ultimately identified as Harleysville. Plaintiff did so knowing that he was in an accident that involved a motor vehicle and thus that the insurer of that vehicle—if there was one—would be at the top of the order of priority. See MCL 500.3114(5)(a). He further knew the identity of the operator of the vehicle. He reached out via letter to the operator of the vehicle to get more information but received no answer. He knew that he could file suit against the unknown insurer of the accident vehicle under MCR 2.201(D) to subpoena the known operator of the vehicle and try to use legal process to compel the operator to disclose

the information plaintiff knew he might need to file a claim with the highest-priority insurer. Subpoenaing the driver, after all, is exactly how Trumbull discovered the name of the higher-priority insurer that has prompted this appeal. Not taking these steps, in my view, exposed plaintiff to the risk of a higher-priority insurer being discovered after the limitations period had expired with plaintiff lacking an adequate excuse for not discovering that insurer within the limitations period.

Of course, we have no way of knowing whether the operator would have cooperated with plaintiff. It is possible that the operator would not have disclosed the information in a timely manner, and therefore plaintiff would have been left with no recourse but to sue a lower-priority insurer anyway. In light of the no-fault system's intended comprehensiveness, plaintiff's reasonable efforts to identify a higher-priority insurer should shield him from summary disposition if such an insurer is discovered after the limitations period expires when we construe whether he has made a proper "claim" under MCL 500.3114(5). But I do not believe that it is reasonable to conclude that two weeks was enough time to realistically expect to use legal process to obtain the necessary information from the operator of the vehicle that caused plaintiff to swerve and crash, and as a result I do not believe that the trial court clearly erred by holding that plaintiff had not demonstrated reasonable diligence in pursuing his claim.

The majority, in coming to the opposite conclusion, focuses on Trumbull's conduct during the run-up to plaintiff's filing suit. But Trumbull's conduct is irrelevant; as noted, the burden was on *plaintiff* to file a proper claim under MCL 500.3114(5). As a result, whether "the basis for Trumbull's nearly year-long silence and inaction on Griffin's claim was a phantom priority dispute" is immaterial—to place the onus on Trumbull "to point to

a higher-priority insurer" is to invert the burden that the text of MCL 500.3114(5) places on the claimant and instead impose it on the insurer to identify higher-priority insurers if it wants to "protect[] its rights." An insurer is undoubtedly going to act in its own interest, and at times that interest will be aligned with the interest of its insured—for example, before the limitations period expires, the insurer's desire to avoid liability for benefits is aligned with the insured's desire to identify higher-priority insurers so as to make a proper claim. But no statute gives an insured a right to rely on that temporary alignment of interests; in the end, it is the insured who must claim against the proper insurer, which is likely why the majority cites no authority for its assertion that "an insurer that is confident that it is not liable to pay PIP benefits . . . should promptly deny the claim so that the claimant can . . . take other actions that might be necessary to preserve the right to PIP benefits." Absent some form of relief like estoppel—which neither plaintiff nor the majority argues is applicable here—the conduct of the insurer simply is not a relevant consideration in determining whether the plaintiff has made a claim with the proper insurer under MCL 500.3114(5).

The majority asserts that "[w]hat Trumbull could not do was leave its insured in limbo for nearly a year under the guise of 'investigation,' " but the majority identifies no legal authority that Trumbull violated. Given that Trumbull's arguments are characterized as a "fog of legal posturing" and its handling of its investigation as "pull[ing] the rug out after a lawsuit was filed and the limitations period . . . had run," I take it that Trumbull's conduct offends the majority's moral sensibilities. Statutes like MCL 500.3142(1) to (3) and MCL 500.3148(1) certainly provide, as the majority states, "strong incentives for prompt resolution of claims and avoidance of needless litigation," but they are no more

than that—incentives. They do not "establish that the insurers . . . must act diligently when investigating, responding to, and resolving [PIP benefits] claim[s]"—or, at least, they owe no such *duty to their insureds*. They certainly do not relieve the insured of the obligation to identify the correct insurer and make a claim with that insurer.

For my part, in looking at a system whose structure communicates a legislative policy of comprehensively available benefits but which places the onus on claimants to identify the correct insurer with which to make claims, I believe that the trial court identified the correct rule: claimants must demonstrate reasonable diligence in identifying the highest-priority insurer. I do not believe that the trial court clearly erred by concluding that plaintiff had not demonstrated such diligence, so I would affirm the Court of Appeals on that basis. I dissent from the Court's decision to reverse.

Elizabeth T. Clement