# STATE OF MICHIGAN

# COURT OF APPEALS

BREANNE BAUER-ROWLEY, Individually and as Next Friend of AMELIAH ROWLEY, Minor,

Plaintiffs-Appellants,

v

THOMAS RUSSELL HUMPHREYS, MOORE INSURANCE SERVICES, INC., FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, and CITIZENS INSURANCE CO OF THE MIDWEST,

Defendants

and

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
October 27, 2022
9:20 a.m.

No. 358846
Ionia Circuit Court
LC No. 20-034539-NI

Before: SHAPIRO, P.J., and GADOLA and YATES, JJ.

SHAPIRO, P.J.

In this action involving first-party no-fault benefits, plaintiffs challenge on appeal the trial court's award of attorney fees and costs to defendant Auto-Owners Insurance Company under MCR 1.109(E) and MCL 600.2591. For the reasons stated in this opinion, we reverse the portions of the trial court's orders that awarded attorney fees and costs as a sanction for filing a frivolous complaint.[1]

[1] Auto-Owners challenges this Court's jurisdiction on the ground that the trial court improperly entered a final order in this case because there remain issues for the trial court to resolve. In a civil

## I. BACKGROUND

The underlying case arose from an accident that occurred on October 10, 2019, when a vehicle driven by plaintiff Breanne Bauer-Rowley, and in which plaintiff Ameliah Rowley was a passenger, was rear-ended at an intersection. The owner of the vehicle that Bauer-Rowley was driving was insured by Auto-Owners. Plaintiffs sought first-party no-fault personal protection insurance (PIP) benefits from Auto-Owners, and, when Auto-Owners did not pay their claim, plaintiffs filed a complaint on September 28, 2020, alleging breach of contract against Auto-Owners and the Michigan Auto Insurance Placement Facility (MAIPF), which maintains the Michigan Assigned Claims Plan (MACP). Plaintiffs later amended their complaint to add Farm Bureau Insurance Company as a party defendant.

Auto-Owners sought summary disposition on the grounds that it was not liable for plaintiffs' PIP benefits under MCL 500.3114, either as amended by 2019 PA 21 or as it read prior to amendment. Auto-Owners argued that it was not liable under the preamendment version of MCL 500.3114 because the statute required that plaintiffs seek PIP benefits under a no-fault policy issued by Farm Bureau to plaintiffs' resident relative, Betty Rowley. And under MCL 500.3114(4) as amended by 2019 PA 21, Auto-Owners was not in the line of priority at all; a person injured in a motor vehicle accident who was not covered under a no-fault policy had to seek benefits through their own insurer, a spouse or resident relative, or the MAIPF.

In addition to seeking summary disposition, Auto-Owners argued that plaintiffs' complaint was not supported by existing law and devoid of arguable legal merit, making it frivolous as defined by MCL 600.2591(3). Auto-Owners argued that because Farm Bureau was highest in priority under both the former and the current versions of MCL 500.3114, had plaintiffs' attorneys conducted a reasonable inquiry before filing the complaint, Auto-Owners would never have been included in the litigation. For these reasons, Auto-Owners argued that it was entitled to an award of attorney fees and costs under MCR 1.109(E) and MCL 600.2591.

Plaintiffs denied that Auto-Owners had never been in the line of priority to pay PIP benefits to them. They supported their position with an October 23, 2020 letter from the MACP denying their claim on the basis that "higher coverage" was available with Auto-Owners and advising them to continue to submit their claims to Auto-Owners. Plaintiffs further contended that, according to

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case, the final order is the first order "that disposes of all of the claims and adjudicates the rights and liabilities of all of the parties . . . ." MCR 7.202(6)(a)(*i*). See also *Rooyakker & Sitz, PLLC v Plant & Moran, PLLC*, 276 Mich App 146, 148 n 1; 742 NW2d 409 (2007). Plaintiffs appeal from the September 20, 2021 order that the trial court designated as final. Before that order, the trial court issued orders disposing of the claims against defendants Auto-Owners, Farm Bureau Insurance Company, and Citizens Insurance Company. The September order disposed of plaintiffs' remaining claims against Humphreys and Moore Insurance Services, Inc. Therefore, the September order was the first order that disposed of all the claims and adjudicated the rights and liabilities of all the parties. Although there appear to be outstanding issues involving plaintiffs' payment of the judgment against them, any orders entered on the outstanding matters will be postjudgment orders and will have no effect on the September 20, 2021 final order. For these reasons, we reject Auto-Owners' jurisdictional challenge.

an order issued by the State of Michigan Department of Insurance and Financial Services (DIFS), the new order of priority resulting from the June 2019 amendment of MCL 500.3114 did not take effect for Auto-Owners until July 2020. To comply with other sections of the Insurance Code, DIFS Order No. 19-048-M purportedly prohibited automobile insurers from processing claims in accordance with the new order of priorities until they had submitted their revised insurance forms and rates to the DIFS for approval, and it also prohibited MACP from providing coverage in accordance with the new order of priorities unless the DIFS had approved the insurer's forms. Plaintiffs received information from the DIFS that Auto-Owners had submitted their forms in January 2020 and, therefore, that claims should continue to be processed under the preamendment order of priorities until July 2020. Thus, according to plaintiffs, the old order of priority was in effect at the time of plaintiffs' October 2019 accident. At a minimum, plaintiffs argue, the question was unclear.

Plaintiffs denied that they had filed their complaint to harass, embarrass, or injure Auto-Owners; asserted that they had a reasonable basis to believe that Auto-Owners was responsible for their PIP benefits; and contended that assenting to Auto-Owners' requests to dismiss it from the action could affect their claims detrimentally, especially because Farm Bureau would not admit to being the highest priority insurer and that the MAIPF had advised them to seek PIP benefits through Auto-Owners. Plaintiffs argued that if the trial court determined that Auto-Owners was not in the order of priority, sanctions should not be used to penalize plaintiffs because their claim appeared initially to be viable.

In reply, Auto-Owners argued that 2019 PA 21 had an effective date of June 11, 2019, and that plaintiffs' reliance on a DIFS bulletin was misplaced and unsupported by law, as was plaintiffs' assumption that the MAIPF's determination that Auto-Owners was an insurer of higher priority had any legal effect. Auto-Owners also contended that there was no priority dispute because Farm Bureau had agreed that Auto-Owners was not in the line of priority.

After hearing oral argument, the trial court granted Auto-Owners' motion for summary disposition. As to attorney fees and costs, the trial court stated that, if plaintiffs had not known that Auto-Owners was not in the order of priority before they filed their complaint, they certainly knew it before they filed their first amended complaint on October 23, 2020, that retained Auto-Owners as a party defendant. The trial court indicated that plaintiffs had taken a "shotgun" approach to the first amended complaint that was "sloppy and incomplete." The court said that it would not characterize the first amended complaint as "frivolous," but that, "connecting the dots, one could make that statement." An order was eventually entered granting Auto-Owners' motion for summary disposition and awarding Auto-Owners attorney fees and costs under MCR 1.109(E) and MCL 600.2591 in an amount to be decided after an evidentiary hearing. Subsequently, the parties agreed that the trial court could determine the amount of attorney fees and costs to be awarded on the basis of the parties' briefs, and the trial court entered an order reiterating its grant of summary disposition to Auto-Owners and awarding it $14,917.50 in attorney fees and costs under MCR 1.109(E) and MCL 600.2591.

## II. ANALYSIS

Plaintiffs argue that the trial court clearly erred by determining that their pleadings were frivolous and warranted sanctions. We agree.[2]

MCR 1.109(E)(5) generally provides that the signature of a person on a document submitted to a trial court certifies that the person who signed the document: (1) conducted a reasonable inquiry; (2) that the document is grounded in fact and supported by existing law; and (3) that the document is not interposed for an improper purpose. The trial court may impose sanctions for violation of this rule. MCR 1.109(E)(6). Under MCL 600.2591, the court may assess attorney fees and costs against a party for bringing a frivolous claim. MCL 600.2591(1). A civil action or defense is frivolous if any of the following conditions exist:

> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a)(*i*)-(*iii*).]

"Not every error in legal analysis constitutes a frivolous position." *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A court must determine whether a claim or defense is frivolous on the basis of the circumstances at the time it was asserted." *Meisner Law Group PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 732; 909 NW2d 890 (2017). The reasonableness of an attorney's inquiry into the factual and legal basis of a document "is determined by an objective standard and depends on the particular facts and circumstances of the case." *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995).

Viewing plaintiffs' complaint and first amended complaint in light of the particular facts and circumstances of the case, we are convinced that the trial court clearly erred by finding that plaintiffs' claim against Auto-Owners was frivolous.

Under the law as it existed before the 2019 amendment, Auto-Owners, as insurer of the vehicle occupied, was in the chain of priority. If there was no personal, spousal, or resident relative's policy, the insurer of the occupied vehicle was required to provide PIP to its injured occupants. See *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 531; 740 NW2d 503 (2007); MCL 500.3114(1) and (4), as amended by 2016 PA 347. If the preamendment version of the statute controlled, it was clearly proper to name Auto-Owners as a defendant, particularly given

[2] We review for clear error a trial court's finding that an action is frivolous. See *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 661-662.

that Farm Bureau denied that it was first in priority.[3] The trial court indicated that plaintiffs' initial complaint was not necessarily frivolous, but appeared to reason that, once plaintiffs were informed by Auto-Owners that Farm Bureau was higher in priority, there was no legal basis for retaining Auto-Owners as a party defendant in their first amended complaint. But the discovery that plaintiffs might be able to claim PIP benefits through a resident relative insured by Farm Bureau did not resolve the issue. As noted, the MACP had informed plaintiff that Auto-Owners was the responsible carrier and the other potential insurer, Farm Bureau, denied that it was first in priority. Indeed, Farm Bureau's denial that it was first in priority left plaintiffs' counsel little choice but to continue to pursue Auto-Owners as well as Farm Bureau. Dismissing one of two possible insurers while the other asserted it was not responsible to provide coverage presented risks not only to plaintiffs—who could be left without PIP benefits—but also to plaintiffs' counsel. Dismissing Auto-Owners prior to a legal determination that Farm Bureau was the higher-priority insurer would have left counsel at risk of a malpractice suit if the trial court or an appellate court ultimately concluded that Auto-Owners, not Farm Bureau, was in the highest priority. Attorneys should not be placed in the situation of having to choose between a possible malpractice case or possible sanctions.

We also reject Auto-Owner's contention that all plaintiffs' attorneys had to do before filing the complaint was determine who lived with plaintiffs at the time of the accident. As just discussed, until Farm Bureau agreed it was first in priority, plaintiffs' counsel had to protect their clients from ending up with no PIP benefits at all. Moreover, determining whether a person is "domiciled in the same household" for purposes of MCL 500.3114(1) is not always simple. Having the same address is not necessarily dispositive when determining whether a person is "domiciled in the same household."[4] One of plaintiffs' attorneys told the court that she asked her client questions on that matter and indicated that Bauer-Rowley did not believe "that Betty Rowley was a resident at the time of the accident." For all these reasons, the claim against Auto-Owners was not frivolous if determined under the preamendment statute.

It is undisputed that under the amendments to MCL 500.3114(4) made law by 2019 PA 21, the insurer of the owner or operator of the occupied vehicle is no longer a potential provider of the occupant's PIP benefits. The amended statute provides for only three layers of priority: the

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[3] In its affirmative defenses, Farm Bureau asserted that it "is not in the highest order of priority, pursuant to MCL 500.3114, for the payment of [PIP] benefits to Plaintiffs."

[4] Courts consider the following factors when determining domicile for purposes of MCL 500.3114:

> (1) the subjective or declared intent of the claimant to remain indefinitely in the insured's household, (2) the formality of the relationship between the claimant and the members of the household, (3) whether the place where the claimant lives is in the same house, within the same curtilage, or upon the same premises as the insured, and (4) the existence of another place of lodging for the person alleging domicile. [*Fowler v Airborne Freight Corp*, 254 Mich App 362, 364; 656 NW2d 856 (2002).]

No single factor is determinative. *Id.*

person's no-fault insurer, the insurer of a spouse or resident relative and lastly MACP.[5] However, given DIFS Order No. 19-048-M, there was a reasonable basis for plaintiffs' counsel to conclude that a court could find that the amendments did not apply to Auto-Owners at the time of the claim.

That September 2019 order directed that the MAIPF was to continue operating under the old order of priorities until new filings by the relevant insurers had been approved.[6] And the MAIPF continued to abide by the DIFS order until at least December 2020, when it announced in an industry bulletin that, pursuant to "court rulings indicating that the No Fault Statute did not support the [DIFS's] Order requiring MAIPF to only accept claims for which filings had been approved," MAIPF would begin processing claims in accordance with the new priorities. Thus, plaintiffs were protecting their interests by including Auto-Owners as a defendant because, regardless of the order of priorities stated in the amended version of MCL 500.3114(4), the MAIPF was operating according to the priorities stated in the former version of the statute.

Auto-Owners urged the trial court to interpret MCL 500.3114 without deference to the DIFS's interpretation that an insurer could not operate under the new order of priorities until the insurer received departmental approval for its new forms and rates. See *Clam Lake Twp v Dep't of Licensing & Regulatory Affairs/State Boundary Comm*, 500 Mich 362, 372; 902 NW2d 293 (2017) ("An agency's statutory interpretations are entitled to respectful consideration, but they cannot conflict with the plain meaning of the statute.") (quotation marks and citation omitted). To be clear, the trial court did not err by granting Auto-Owners' motion for summary disposition on the basis that Auto-Owners did not have any responsibility to provide PIP benefits to plaintiffs, despite the DIFS's prior interpretation of the statutory changes. However, by finding that plaintiffs' first amended complaint was frivolous, the court ignored the factual and legal uncertainties that plaintiffs' attorneys faced and the reasonable decisions they made to protect plaintiffs' interests. Specifically, there was a question of fact regarding whether plaintiffs were eligible for PIP benefits under Betty Rowley's policy with Farm Bureau. The legal effect of the DIFS order was also unclear considering that the MAIPF processed claims for no-fault benefits in compliance with the order.

It is relatively rare for trial courts to grant sanctions for frivolous litigation, see *BJ's Sons Const Co, Inc*, 266 Mich App 400, 402; 700 NW2d 432 (2006), and the circumstances presented here differ substantially from cases in which this Court has affirmed such sanctions. See e.g., *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 146-147; 946 NW2d 812 (2019) (affirming sanctions on the basis of the trial court's finding the defendants acted fraudulently and knew that they had engaged in fraud, but still put up a defense); *Bronson Health Care Group, Inc*

[5] MCL 500.3114(4), as amended by 20191 PA 21, provides:

> Except as provided in subsections (2) and (3), a person who suffers accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle who is not covered under a personal protection insurance policy as provided in subsection (1) shall claim personal protection insurance benefits under the assigned claims plan under sections 3171 to 3175.

[6] This likely explains why the MACP informed plaintiffs in October 2020 that Auto-Owners was higher in priority.

*v Titan Ins Co*, 314 Mich App 577, 585; 887 NW2d 205 (2016) (holding that the defendant's argument that it did not owe penalty interest on PIP benefits more than 10 months overdue because it paid the plaintiffs within 30 days of its own investigation was contrary to basic, undisputed law and, therefore, was frivolous); *BJ's & Sons Const Co, Inc*, 266 Mich App at 407, 410-411 (affirming sanctions against a plaintiff who brought a land-title claim for property in which he never claimed to have, and knew that he did not have, an interest).

Given the circumstances of this case, and considering the situations in which this Court has affirmed trial courts' findings that claims were frivolous, we conclude that the trial court clearly erred by finding that plaintiffs' first amended complaint was frivolous and warranted sanctions. Accordingly, we reverse those portions of the trial court's orders in which the trial court awarded attorney fees and costs to Auto-Owners under MCR 1.109(E) and MCL 600.2591. We do not disturb the trial court's grant of summary disposition to Auto-Owners.[7]

Reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs may tax costs as the prevailing party. See MCR 7.219(A).

/s/ Douglas B. Shapiro
/s/ Michael F. Gadola
/s/ Christopher P. Yates

[7] Given our ruling, we need not address plaintiffs' alternative argument that the trial court abused its discretion in determining the reasonableness of the awarded attorney fees.