

ARTHUR STEPHENSON,

Plaintiff,

vs

Case No.: 88-350655-
Hon. Robert L. Temple

ALLSTATE INSURANCE COMPANY, a
Foreign Insurance Corporation,

Defendant.

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY DISPOSITION AND IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

FACTS

On May 27, 1987, Arthur Stephenson, 23, plaintiff herein, an electrical engineering student at Oakland University, was operating a motorcycle in a westerly direction on East Jefferson Avenue in the City of Detroit. At the same time, an uninsured motorist, Sean Petty, operating an uninsured Chevy Blazer, went through a red light controlling northbound traffic on Beaubien. Mr. Petty drove in front of Mr. Stephenson's westbound motorcycle, which had the green light, and collided with it. The impact caused Mr. Stephenson to lose control of his motorcycle and fracture his lower left leg.

Mr. Stephenson had purchased a full coverage automobile insurance policy from the defendant which included coverage for personal protection (PIP) benefits as well as uninsured motorists benefits. For his motorcycle, he also purchased an insurance

coverage for PIP benefits nor for uninsured motorists coverage.

Mr. Stephenson claimed benefits under his automobile insurance policy with defendant Allstate Insurance Company, the terms of which cover expenses incurred for services, medical expenses (except those covered by his health insurer) and lost wages. The defendant refused to pay all of his expenses and lost wages (from Scallops Restaurant in Rochester), thereby forcing Mr. Stephenson to institute litigation to recover his personal protection benefits. This dispute is not part of the motion for summary disposition.

In addition, the defendant refused to honor its agreement in the uninsured motorist section of its policy to arbitrate his claims for economic and non-economic losses not covered by his first party personal protection (PIP) benefits.

Consequently, Mr. Stephenson added two counts to his complaint to compel payment of his non-economic losses under the uninsured motorists provision.

INTRODUCTION

This is a matter involving interpretation of an exclusionary clause in the uninsured motorists section of an insurance policy drafted by the defendant, a major national insurer of both commercial and personal lines. Both parties agree that the coverage clause¹ of the uninsured motorists section covers Mr. Stephenson, who paid for full coverage from defendant insurer.

However, the uninsured motorists section of the policy

¹ "Allstate will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the insured, caused by accident, and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by arbitration." p. 9 of defendant's policy.

However, the uninsured motorists provision contains three exclusionary clauses, which, if applicable, bar an insured who would otherwise be entitled to benefits, from recovering his losses. Defendant claims that one of the exclusions, number 2, can be interpreted to apply to the facts of this case. On the other hand, the law requires exclusionary clauses to be strictly construed against the insurer. Thus, the only issue before the court is the extent to which the defendant can diminish coverage by expanding the literal application of exclusionary clause number 2.²

Specifically, the policy precludes uninsured motorists coverage for persons who would otherwise be covered if they are injured while occupying an "owned" but uninsured automobile.

While Mr. Stephenson would not be barred from receiving benefits if the policy were read literally, defendant contends, under its interpretation of the policy, that Mr. Stephenson's motorcycle was an automobile. If this court agrees with the defendant's interpretation, Mr. Stephenson would be barred from coverage for uninsured motorists benefits.

Mr. Stephenson concedes that he would not be entitled to coverage under the uninsured motorists provision of his policy with Allstate if he had been operating an automobile which did not have uninsured motorist coverage of its own. However, that is not the situation before this court.

Despite much quoting of language from the policy it drafted and despite quoting language from an unpublished Court of Appeals opinion³ with which Mr. Stephenson agrees, there is simply one

² "This section II (Protection Against Bodily Injury by Uninsured Motorists) does not apply... (2.) to bodily to an insured while occupying an automobile (other than an insured automobile) owned by a named insured or any relative resident in the same household, or through being struck by such an automobile; ...", p. 10 of defendant's policy. (Emphasis added.)

³ See MCR (1985) 7.215 (c) "Precedent of Unpublished Opinions. An unpublished opinion is not precedentially binding under the rule of stare decisis."

Despite the court rule barring the use of unpublished
(Footnote Continued)

issue before the court:

DOES THE TERM "AUTOMOBILE" IN ITS
EVERY DAY USAGE INCLUDE A
MOTORCYCLE?

What complicates this matter is that the Michigan Co
Appeals has issued two conflicting published opinions on the
issue. One opinion was written by Judge Danhof, Weaver v Mich
Mut Liab Co, 32 Mich App 605 (1971) which, the defendant in the
case at bar failed to address Weaver in its brief. Weaver says,

"In construing insurance policies
we must give weight to the ordinary
meaning of words and attempt to
avoid strained interpretations
....We conclude that in its every
day usage the term 'automobile'
does not include a motorcycle." p
607.

On the other hand, the court of appeals in a per curiam
opinion said in, Ziegler v Goodrich, 163 Mich App 656 (1987),
"...(W)e conclude that plaintiff's motorcycle is an automobile
within the owned-vehicle exclusion."

In this brief, Mr. Stephenson will attempt to show that the
Weaver case is the better decision because it is consistent with
Michigan requirements for construing the terms of insurance
policies and that the Ziegler decision was an anomaly. Further,
Mr. Stephenson will show that the Weaver decision comports with
the majority of decisions from other jurisdictions that have
construed the identical exclusionary clause when faced with the
task of interpreting the same clause in their jurisdiction.

(Footnote Continued)

opinions as precedent, defendant felt it helpful to quote Brown v
State Farm Mutual Ins Co. Its reliance is misplaced. The
similar exclusion in the State Farm policy barred coverage for
insureds when occupying "a land motor vehicle owned by the named
insured." As long as the State Farm policy definition of "motor
vehicle" applies to vehicles having two wheels that are operated
by power other than muscular power, the State Farm exclusion
would apply to motorcycles and bar the insured's recovery.
However, the defendant in the case at bar chose to use the term
"automobile" in its exclusionary clause rather than "land motor
vehicle."

ISSUE

WHETHER AN EXCLUSIONARY CLAUSE IN A POLICY OF INSURANCE WHICH BARS COVERAGE FOR INSUREDS WHILE OCCUPYING ONE SPECIFIED FORM OF OWNED BUT UNINSURED LAND MOTOR VEHICLES, TO WIT, AN "AUTOMOBILE", CAN BE CONSTRUED IN A MANNER THAT WOULD EXPAND ITS APPLICATION TO ENABLE IT TO BAR COVERAGE FOR THE SAME INSUREDS OCCUPYING ALL OWNED BUT UNINSURED LAND MOTOR VEHICLES?

Plaintiff says, "No"

Defendant says, "Yes"

INSURANCE POLICIES PREPARED BY AN INSURER MUST BE CONSTRUED MOST STRONGLY AGAINST THE INSURER AND LIBERALLY IN FAVOR OF THE INSURED

Michigan appellate courts have adopted several rules of construction to assist trial courts in interpreting insurance policies. Some rules apply to the general liability section of an insurance policy (which is not in issue here). Other, and stricter, rules apply to exclusionary clauses.

In Nickerson v Citizens Mut Ins Co, 393 Mich 324 (1975), the Michigan Supreme Court was faced with the problem of interpreting the word "occupying". Although a case of first impression, the Supreme Court had the benefit of numerous decisions from other jurisdictions:

"What becomes clear upon research into the law on point is that there are two distinct lines of thought on this matter...

"In either case, courts considering this matter have uniformly interpreted such policy language bearing in mind the well-established maxim that language in an insurance policy is to be strictly construed against the insurer. This rule is similarly, well-embedded in Michigan law." pp. 329-330. (Emphasis added).

In its opinion the Michigan Supreme Court reaffirmed two rules of insurance policy construction: 1) The courts must provide a strict reading of the policy language and 2) the courts

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must construe the policy language against the insurer.

EXCEPTIONS TO THE GENERAL LIABILITY PROVIDED ARE TO BE
CONSTRUED AGAINST THE INSURER

As mentioned earlier, the clause at issue is not a clause but an exclusionary clause--an exception to the general liability which otherwise covers Mr. Stephenson. In Weaver v Mich Mut Liab Co, 32 Mich App 605 (1971), the Court of Appeals said,

"Exclusionary clauses are to be strictly construed against the insurer. Francis v Scheper (1949), 326 Mich 441; Michigan Mutual Liability Company v Karsten (1968), 13 Mich App 46. The insurance policy was prepared by the defendant insurance company and if defendant had intended to include motorcycles in the definition of automobile in Part IV (the uninsured motorist provision) of the policy it should have so stated." p. 609.

DEFENDANT'S MICHIGAN POLICY, AS DRAFTED BY DEFENDANT, DOES NOT
EXCLUDE INSURED'S INJURED WHILE OPERATING OWNED MOTORCYCLES

Section II of defendant's policy does not define "automobile" nor "motor vehicle." Nowhere in Section II is there a clear cross-reference to another section to obtain a definition of "automobile," as defendant contends in its brief.⁵ It only provides a vague cross-reference for a definition of "insured automobile" in Section I. It should be noted that "insured automobile" is not one of the terms in this dispute.

However, defendant wants the court to use its definition of

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Id., 331.

⁵
Contrast defendant's alleged obscure cross reference in Section II to Section I with its unequivocal cross-reference in Section III to Section I.

"The definitions of 'named insured', 'relative', 'war', 'automobile', 'owned automobile', 'non-owned automobile', 'additional automobile', 'temporary substitute automobile', 'private passenger automobile', 'utility automobile', and 'automobile business' under Section I apply under this Section and additional definitions under this Section are: (definitions are then set forth), p. 13 of defendant's Michigan policy.

"automobile" from Section I,⁶ which includes the term "motor vehicle", but not its definition of "motor vehicle" from Section I.⁷

In Section III, on page 13, defendant insurer specifies which definitions from Section I apply in Section III, including the definition of "automobile." However, defendant does not state in Section II which definitions from other sections of the policy apply to Section II. In the case at bar, the defendant is capriciously attempting to select the definitions from Section I that it wants to apply to Section II to assist it in this motion but is ignoring the remaining definitions from Section I that do not help it in this motion.

THE TERM AUTOMOBILE IN ITS EVERY DAY USAGE DOES NOT INCLUDE A MOTORCYCLE

Automobiles and motorcycles are two different forms of motorized vehicles. Tractors, mopeds, snowmobiles and riding lawn mowers are also land motor vehicles. Each item of personal property conjures up a different image in the reader's mind.

Adding the words "designed for use principally upon public roads" also fails to blur the difference. Some motorcycles are principally "dirt bikes" and are designed for use on surfaces other than public roads. Are these "dirt bikes" covered under defendant's interpretation of its policy?

Also, oil tankers, semi-trailers and dump trucks are motorized vehicles designed for use upon public roads. However, other vehicles, such as tree trimming trucks, cement mixers or utility repairing vehicles are designed for principal use at the

⁶ "'automobile' means a land motor vehicle designed for use principally upon public roads," page 2 of defendant's Michigan policy.

⁷ "'Motor vehicle' means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than two wheels." Pages 4 and 8 of defendant's Michigan policy.

work site. The truck is simply a means to arrive at the site. How would defendant's interpretation apply to such vehicle? In any event, no ordinary citizen would ever call any of these vehicles an automobile.

Contrary to defendant's interpretation, both dirt and 18-wheel semi-trailers are distinct motor vehicles used on land. They simply have two of many features in common; they (1) are motorized and (2) used on land. No one, even defendant's employees when away from their posturing in this proceeding, would ever call them automobiles.

Michigan's Court of Appeals previously ruled on this issue. In Weaver v Mich Mut Liab Co, supra, the court said:

"In construing insurance policies we must give weight to the ordinary meaning of words and attempt to avoid strained interpretations. Edgar's Warehouse, Inc. v. United States Fidelity & Guaranty Company (1965), 375 Mich 598; Huron Bowl, Inc., v. Security Insurance Company of New Haven (1968), 14 Mich App 62. We conclude that in its every day usage the term 'automobile' does not include a motorcycle." Id, 607.

As mentioned earlier, insurance companies such as defendant sell policies nationally. However, other insurance companies have worded their exclusion with broader language, such as "land motor vehicle" or "highway vehicle" when they intend to bar owner-occupants of motorcycles from receiving uninsured motorists coverage.

In defendant Allstate's policy, the identical clause, which diminishes the coverage afforded an insured, must be interpreted in every jurisdiction in the country to determine the extent of the diminution. At the present time, a majority of jurisdictions hold that the term "automobile" does not preclude an insured from having coverage against uninsured motorists while "occupying" an

owned motorc le or scooter. ⁸

WORDS SET FORTH IN THE SPECIFIC CANNOT BE EXPANDED TO INCLUDE ALL WORDS COVERED BY THE GENERIC

Since exclusionary clauses must be strictly construed ⁹ against the insurer, the claims department of an insurance company cannot expect language from the courts to limit the exposure that its other departments, presumably its underwriting or marketing department created. On the other side of the coin, if the other departments of the insurance company had intended to exclude owner-occupants of all land motor vehicles, it could have substituted the words "land motor vehicle" for "automobile" in

⁸
I Widiss, Alan I., Uninsured and Underinsured Motorist Insurance, 2d Ed., Anderson Publishing Co., p 24-53.

"2. Midwest Mut. Ins. Co. v. Indiana Mut. Ins. Co., 412 NE2d 84 (Ind App 1980); Brister v. American Indem. Co. 313 So 2d 335 (La App 1975); Boucher v. Employers Mut. Cas. Co., 431 A2d 137 (NH 1981) (citing ambiguity); Phillips v. Midwest Mut. Ins. Co., 329 F Supp 853 (D Ark 1971) (applying Arkansas law) plaintiff's son was injured while riding motorcycle; son had waived uninsured motorist coverage in motorcycle policy; excess clause in father's policy excluding coverage for non-owned "automobiles" did not include motorcycle; plaintiff could recover under that policy if primary coverage under son's policy was exhausted, since son's insurer had intended to provide uninsured motorist coverage.

"Weaver v. Michigan Mut. Liab. Co., 32 Mich App 605, 189 NW2d 116 (1971); Westerhausen v. Allied Mut. Ins. Co., 258 Iowa 969, 140 NW2d 719 (1966); Safeco Ins. Co. v. Vieth, 33 Cal App 3d 956, 109 Cal Rptr 493 (1973); Insurance Co. of Am. v. Godwin, 361 NYS2d 461 (App Div 1974); St. Charles v. Allstate Ins. Co., 115 Ariz 407, 565 P2d 913 (App 1977); Chateau v. Smith, 297 So 2d 268 (La App 1976); State Sec. Ins. Co. v. Goodman, 6 Ill App 3d 1008, 286 NE2d 374 (1972); Bankers v. State Farm Mut. Auto. Ins. Co., 216 Pa Super 162, 264 A2d 197 (1970)."

"3. Valdes v. Prudence Mut. Cas. Co., 207 So 2d 312 (Fla App 1968), approved 226 So 2d 119 (Fla App 1969) plaintiff was injured while riding motor scooter not named in his policy; clause excluding non-owned "automobiles" from coverage did not apply to motor scooter; plaintiff could recover." Id, footnotes 2 and 3.

⁹
Weaver v Mich Mut Liab Co, says,

"Exclusionary clauses are to be strictly construed against the insurer...The insurance policy was prepared by the defendant company and if defendant had intended to include motorcycles in the definition of 'automobile' in Part IV (the uninsured motorist provisions) of the policy it should have so stated." p. 609.

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the exclusio¹⁰ rather than asking the courts to do so and thereby forcing its policy holders to litigate.

Defendant's underwriting and/or sales department chosen the language of the Auto-Owners policy, "land mot vehicle," or it could have chosen the language of the 1966 Standard Form Uninsured Motorist Endorsement, "highway vehicle."¹¹ Both terms, in the eyes of the ordinary citizen, would have generically applied to automobiles, as well as most trucks and motorcycles.

Instead, the defendant, after marshalling its collective wisdom, chose to use the specific term "automobile" in the April, 1987 policy it issued to Mr. Stephenson and take its chances in court, although, at the time, Michigan¹² and a majority of states¹³ limited the term "automobile" to its ordinary every day¹⁴ meaning.

¹⁰
In Auto-Owners Ins Co v Ellegood, 149 Mich App 673 (1986), the Court of Appeals interpreted a similar exclusionary clause in the Auto-Owners policy:

'This coverage shall not apply:

* * *

'(e) to bodily injury to an insured sustained while in, upon, entering or alighting from any motor vehicle owned by the named insured, spouse or a relative of either who is a resident of the same household unless a premium charge for this coverage is shown in the Declarations for such vehicle.'
(Emphasis supplied by Court of Appeals.) p. 675.

¹¹
"The 1966 Standard Form Uninsured Motorist Endorsement states that uninsured motorist coverage does not apply 'to bodily injury to an insured while occupying a highway vehicle (other than an insured highway vehicle) owned by the named insured, any designated insured or any relative resident in the same household as the named or designated insured." Widiss, supra, p. 24-46. (Emphasis added.) (See Exhibit A for copy of 1966 Standard Form Uninsured Motorists Endorsement).

¹²
Weaver v Mich Mut Liab Co, supra, was the only decision on all fours with the case at bar at the time. The Court of Appeals did not decide Ziegler v Goodrich, 163 Mich App 656 (1987) until August 13, 1987.

¹³
See footnote 2.

¹⁴
Ziegler v Goodrich, 163 Mich App 656 (1987), which was decided after defendant issued its policy, was an anomaly. It
(Footnote Continued)

(Footnote Continued)

appears that the members of the panel and the research staff that worked on the opinion were unaware of the Court's strong opinion in Weaver v Mich Mut Liab Co, supra, which had served as valid precedent for sixteen years.

Neither attorney, notably plaintiff's counsel, cited the case in his brief; and, in its opinion, the Court of Appeals did not even acknowledge its existence. (See Exhibit B, Index of Authorities from Plaintiff-Appellee's Brief in the Court of Appeals, Docket No. 85313, and Exhibit C, Index of Authorities from Plaintiff-Appellant's Brief in the Supreme Court.)

If Plaintiff's counsel had informed the Court of Appeals of its existence, it is reasonable to assume that it would have addressed the decision before issuing a published decision that conflicted with a valid precedent.

Further, if plaintiff's counsel had informed the Supreme Court that the Michigan bar and bench were faced with two inconsistent opinions from the Court of Appeals, the Supreme Court may have granted leave to appeal to eliminate the conflict. See, MCR (1985)7.302(B) (5).

CONCLUSION

Although defendant could have expressly excluded owner-occupants of motorcycles from coverage under the uninsured motorists section, it elected to use the term "automobile". Strictly construing the term against the insurer and in favor of the insured precludes the defendant from calling a motorcycle an "automobile".

RELIEF REQUESTED

Plaintiff requests this Court:

- A) To grant his motion for Summary Disposition, and
- B) To Deny Defendant's Motion for Summary Disposition.

Respectfully submitted,

FRANKLIN G. KOORY (P-16145)
Attorney for Plaintiff
3155 W. Big Beaver, Suite 100
Troy MI 48064
(313) 649-3240

Dated: June 13, 1989

#S.BRF

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein, with postage fully pre-paid thereon on the 13th day of

June, 19 89
Victoria Romeo

2. 1966 Standard Form

{	STANDARD COVERAGE PART Protection Against UNINSURED MOTORISTS INSURANCE	}
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These provisions must be printed or assembled together with one or more Liability Standard Coverage Parts and the Standard Provisions for General-Automobile Liability Policies to form a complete policy and are subject to the general instructions applicable thereto.

This insurance may be prepared as an endorsement by adding the following preamble immediately under this title:

"The company, in consideration of the payment of the premium and subject to all of the provisions of the policy not expressly modified herein, agrees with the named insured as follows:"

{	[Part.....] ² Protection Against UNINSURED MOTORISTS INSURANCE	}
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L COVERAGE U—UNINSURED MOTORISTS**(Damages for Bodily Injury)**

The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

Exclusions

This insurance does not apply [under Part]²:

- (a) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this insurance who shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor;

- occupying a highway vehicle
icle) owned by the named
insured, any designated insured or any relative resident in the
same household as the named or designated insured, or through
being struck by such a vehicle, but this exclusion does not apply to
the named insured or his relatives while occupying or if struck by
a highway vehicle owned by a designated insured or his relatives;
- (c) so as to inure directly or indirectly to the benefit of any workmen's
compensation or disability benefits carrier or any person or organiza-
tion qualifying as a self-insurer under any workmen's compensation
or disability benefits law or any similar law.

II. PERSONS INSURED

Each of the following is an insured under this insurance to the
extent set forth below:

- (a) the named insured and any designated insured and, while residents
of the same household, the spouse and relatives of either;
- (b) any other person while occupying an insured highway vehicle; and
- (c) any person, with respect to damages he is entitled to recover because
of bodily injury to which this insurance applies sustained by an
insured under (a) or (b) above.

The insurance applies separately with respect to each insured, except
with respect to the limits of the company's liability.

III. LIMITS OF LIABILITY

Regardless of the number of insureds under this policy, the company's
liability [under Part.] ² is limited as follows:

- (a) The limit of liability stated in the [declaration] ² as applicable to
"each person" is the limit of the company's liability for all damages
because of bodily injury sustained by one person as the result of
any one accident and, subject to the above provision respecting
"each person," the limit of liability stated in the [declarations] ²
as applicable to "each accident" is the total limit of the company's
liability for all damages because of bodily injury sustained by two
or more persons as the result of any one accident.
- (b) Any amount payable under the terms of this insurance because of
bodily injury sustained in an accident by a person who is an
insured under this coverage shall be reduced by
- (1) all sums paid on account of such bodily injury by or on behalf
of
- (i) the owner or operator of the uninsured highway vehicle
and
- (ii) any other person or organization jointly or severally
liable together with such owner or operator for such
bodily injury,

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including all sums paid under the bodily injury liable coverage of the policy, and

- (2) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law.
- (c) Any payment made under this insurance to or for any insured shall be applied in reduction of the amount of damages which he may be entitled to recover from any person insured under the bodily injury liability coverage of the policy.
- (d) The company shall not be obligated to pay under this insurance that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured highway vehicle which represents expenses for medical services paid or payable under the medical payments coverage of the policy.

IV. POLICY PERIOD; TERRITORY

This insurance applies only to accidents which occur during the policy period and within the United States of America, its territories or possessions, or Canada.

V. ADDITIONAL DEFINITIONS

When used in reference to this insurance (including endorsements forming a part of the policy):

"designated insured" means an individual named in the schedule under Designated Insured;

"highway vehicle" means a land motor vehicle or trailer other than

- (a) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads,
- (b) a vehicle operated on rails or crawler-treads, or
- (c) a vehicle while located for use as a residence or premises;

"hit-and-run vehicle" means a highway vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with a vehicle which the insured is occupying at the time of the accident, provided:

- (a) there cannot be ascertained the identity of either the operator or owner of such highway vehicle;
- (b) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and

- (c) at the company's request, the insured or his legal representative makes available for inspection the vehicle which the insured was occupying at the time of the accident;

"insured highway vehicle" means a highway vehicle:

- (a) described in the schedule as an insured highway vehicle to which the bodily injury liability coverage of the policy applies;
- (b) while temporarily used as a substitute for an insured highway vehicle as described in subparagraph (a) above, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;
- (c) while being operated by the named or designated insured or by the spouse of either if a resident of the same household;

but the term "insured highway vehicle" shall not include:

- (i) a vehicle while used as a public or livery conveyance, unless such use is specifically declared and described in this policy;
- (ii) a vehicle while being used without the permission of the owner;
- (iii) under subparagraphs (b) and (c) above, a vehicle owned by the named insured, any designated insured or any resident of the same household as the named or designated insured; or
- (iv) under subparagraphs (b) and (c) above, a vehicle furnished for the regular use of the named insured or any resident of the same household;

"occupying" means in or upon or entering into or alighting from;

"state" includes the District of Columbia, a territory or possession of the United States, and a province of Canada;

"uninsured highway vehicle" means:

- (a) a highway vehicle with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law of the state in which the insured highway vehicle is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such vehicle, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder; or
- (b) a hit-and-run vehicle;

but the term "uninsured highway vehicle" shall not include:

- (i) an insured highway vehicle,
- (ii) a highway vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law,
- (iii) a highway vehicle which is owned by the United States of

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America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing.

VI. ADDITIONAL CONDITIONS

A. Premium.

If during the policy period the number of insured highway vehicles owned by the named insured or spouse or the number of dealer's license plates issued to the named insured changes, the named insured shall notify the company during the policy period of any change and the premium shall be adjusted in accordance with the manuals in use by the company. If the earned premium thus computed exceeds the advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

B. Proof of Claim; Medical Reports.

As soon as practicable, the insured or other person making claim shall give to the company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable hereunder. The insured and every other person making claim hereunder shall submit to examinations under oath by any person named by the company and subscribe the same, as often as may reasonably be required. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim.

The injured person shall submit to physical examinations by physicians selected by the company when and as often as the company may reasonably require and he, or in the event of his incapacity his legal representative, or in the event of his death his legal representative or the person or persons entitled to sue therefor, shall upon each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

C. Assistance and Cooperation of the Insured.

After notice of claim under this insurance, the company may require the insured to take such action as may be necessary or appropriate to preserve his right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; and in any action against the company, the company may require the insured to join such person or organization as a party defendant.

D. Notice of Legal Action.

If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible for the use of a highway vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with

such legal action shall be forwarded immediately to the company by the insured or his legal representative.

E. Other Insurance.

With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

F. Arbitration.

If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured highway vehicle because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this insurance, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration, which shall be conducted in accordance with the rules of the American Arbitration Association unless other means of conducting the arbitration are agreed to between the insured and the company, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this insurance.

G. Trust Agreement.

In the event of payment to any person under this insurance:

- (a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;
- (b) such person shall hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this insurance;

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- (c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;
- (d) if requested in writing by the company, such person shall take, through any representative designated by the company, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith;
- (e) such person shall execute and deliver to the company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the company established by this provision.

H. Payment of Loss by the Company.

Any amount due hereunder is payable

- (a) to the insured, or
- (b) if the insured be a minor to his parent or guardian, or
- (c) if the insured be deceased to his surviving spouse, otherwise
- (d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents;

provided, the company may at its option pay any amount due hereunder in accordance with division (d) hereof.

[Schedule] †

Coverage	Limits of Liability	Advance Premium
U. Uninsured Motorists	\$ each person \$ each accident	\$

Designated Insured

<p>Description of Insured Highway Vehicles (Check appropriate box)</p> <p><input type="checkbox"/> Any automobile owned by the named insured</p> <p><input type="checkbox"/> Any private passenger automobile owned by the named insured</p> <p><input type="checkbox"/> Any highway vehicle to which are attached dealer's license plates issued to the named insured</p>
--

arations of the
 policy [by the letters "OWN"] and a highway vehicle owner-
 ship of which is acquired during the policy period by the
 named insured as a replacement therefor

Any mobile equipment owned or leased by and registered in
 the name of the named insured

¹ Matter in brackets may be amended to read "INSURANCE AGAINST UNINSURED MOTORISTS."

² Matter in brackets may be omitted.

³ The word "schedule" should be sub-

stituted if the company elects to state limits of liability in the Coverage Part.

⁴ Matter in brackets may be amended, and may be printed as a part of a separate schedule of hazards.

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

RICHARD OTTO ZEIGLER,
Plaintiff-Appellee,

v

Court of Appeals No.

DWIGHT WHITNEY GOODRICH,
Defendant,

and

FARM BUREAU INSURANCE GROUP,
Defendant-Appellant.

Lower Court No. 83-974-NI

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PLAINTIFF-APPELLEE'S BRIEF

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STATE OF MICHIGAN
IN THE SUPREME COURT

RICHARD OTTO ZIEGLER,

Plaintiff-Appellant

Supreme Court No.

v

Court of Appeals No. 85937

DWIGHT WHITNEY GOODRICH

Lower Court No. 84-52818-AE

Defendant,

v

FARM BUREAU INSURANCE GROUP,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S BRIEF

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