STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN STATES INSURANCE COMPANY,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant,

and

CYNTHIA LONGCORE, GARY LONGCORE, MacGILLIVARY CHEVROLET/PONTIAC/ BUICK, INC., JAMES VERNON McINTYRE, MARY E. EATON, JEFF EATON, LEIGH A. FUHER, NOLAN FUHER, and MICHAEL FUHER,

Defendants.

December 15, 1993

No. 143916
LC No. 90-65408-NI

Before: Marilyn Kelly, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Cynthia Longcore took her Chevrolet Blazer to MacGillivary Chevrolet/Pontiac/Buick, Inc. (Mac Chevrolet) for repair work. After making the repairs, a Mac Chevrolet employee, James Vernon McIntyre, took the vehicle for a test drive. He became involved in an automobile accident which allegedly injured Mary Eaton, Jeff Eaton, Leigh Fuher, Nolan Fuher, and Michael Fuher. At the time, Longcore's vehicle was insured by defendant State Farm. Mac Chevrolet had insurance issued by plaintiff.

Defendant's insurance policy contains an exclusionary clause for persons engaged in a car business. It provides:

> THERE IS NO COVERAGE UNDER COVERAGES A AND Y:
>
> 1. WHILE ANY VEHICLE INSURED UNDER THIS SECTION IS:
>
> b. BEING REPAIRED, SERVICED OR USED BY ANY PERSON EMPLOYED OR ENGAGED IN ANY WAY IN A CAR BUSINESS.

At the time of the accident, Mac Chevrolet was engaged in a "car business" within the meaning of the policy exclusion.

Plaintiff filed a declaratory action arguing that defendant's exclusionary clause was contrary to the financial responsibility act and against public policy. The trial court agreed. Defendant now appeals as of right. We reverse.

We agree with defendant, that the trial court erred in declaring that its "car business" exclusionary clause contravened the financial responsibility act, MCL 257.520(b)(2); MSA 9.220(b)(2). We are bound by Administrative Order 1990-6 to follow the recent case of State Farm Mutual Automobile Ins Co v Snappy Car Rental, Inc, 196 Mich App 143; 492 NW2d 500 (1992), where this Court acknowledged that neither the

no-fault act nor the financial responsibility act specifically require an owner to provide primary residual liability insurance for permitted users. Snappy Car Rental, supra, p 150; State farm Mutual Automobile Ins Co v Auto-Owners Ins Co, 173 Mich App 51, 54-55; 433 NW2d 323 (1988).

Our disposition of the above issue makes it unnecessary to address defendant's remaining claim.

Reversed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

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Defendants.

Before: Marilyn Kelly, P.J., and MacKenzie and Neff, JJ.

MARILYN KELLY, P.J. (dissenting).

I respectfully disagree with the other panel members that we are bound by Administrative Order 1990-6 to resolve this case by following State Farm Mutual Auto Ins Co v Snappy Car Rental, 196 Mich App 143; 492 NW2d 500 (1992). Instead, I conclude that, pursuant to Administrative Order 1990-6, this case is controlled by Citizens Ins Co of America v Federated Mutual Ins Co, 199 Mich App 345; 500 NW2d 773 (1993). Consequently, I would affirm.

In Citizens, Arthur Ulrich took his vehicle to a garage for repairs. He was given a loaner automobile from the garage and, while driving it, became involved in an accident. The loaner automobile was insured by Federated. Federated's policy excluded from coverage an automobile used by customers if they had insurance in excess of the legal financial responsibility limits. We concluded that the exclusionary clause violated the financial responsibility act requirement that coverage be provided for permitted users. MCL 257.501 et seq.; MSA 9.2201 et seq.

In Snappy, the automobile rental agreement offered renters the option of either paying a greater amount in order to get insurance coverage or relying on their existing insurance. The renter there chose to rely on the coverage available through her own insurer and then became involved in an accident. The Court found that neither the no-fault act nor the financial responsibility act specifically requires that an owner provide primary residual liability coverage for permitted users. It held that the provision in the defendant's rental agreement was not void as violative of the no-fault act.

Snappy was decided before Citizens. Nevertheless, the majority in Citizens believed that Snappy did not control and distinguished it because of the role the permitted user played in prioritizing coverage. The majority in Citizens recognized that a consumer might naively or innocently cause a change in coverage from one insurer to another; this could be accomplished simply by the consumer electing to pay less for a rental car because he already had auto insurance. The majority here concludes that this distinction is insignificant as it relates to the rule of law set forth in Snappy.

However, the importance of the distinction should not be underestimated. Snappy should be viewed as creating a narrow exception to the general principle that an owner's policy of liability insurance covers permitted users of the vehicle, MCL 257.520(b); MSA 9.2220(b). The consumer in Snappy, making a short-term rental, chose to rely on the insurance she had already purchased, rather than pay an additional fee for rental car insurance. The consumer shifted the risk of covering an accident to her own insurer.

Here, the defendant insurer attempted to exclude a class of permitted users from coverage, in circumstances very different from those described in Snappy. Here, as in Citizens, no individual consumer made an intervening decision. Neither the employee nor the auto owner was asked to decide which insurance would cover a test driver if an accident occurred. The owner of the car defendant insured was not given the choice of paying less for repairs if she elected to have her insurance cover a repairman test-driving her car.

Because of the absence here of action by the individual consumer which occurred in Snappy, it is Citizens not Snappy that controls the outcome. In this case, as in Citizens, the insurer attempted to escape liability for accidents involving a class of permitted users:

> [D]efendant has through its own policy provisions attempted to exclude from coverage a class of permissive users who have their own coverage in excess of the legal financial responsibility requirements. [Id., 347-348.]

Section 3101(1) of the no-fault act and § 520 of the financial responsibility act require that an owner's policy of liability insurance provide primary residual liability insurance for any permitted user. MCL 500.3101(1); MSA 24.13101(1); MCL 257.520(b)(2); MSA 9.220(b)(2). Therefore, defendant's exclusionary clause violated the financial responsibility act and the no-fault act by denying coverage to James McIntrye, a permitted user.

I believe that the trial court correctly concluded that defendant's "car business" exclusionary clause contravened the financial responsibility act and is against public policy. MCL 257.520(b)(2); MSA 9.220(b)(2). Consequently, the trial court in this case did not err in invalidating defendant's "car business" exclusionary clause. I would affirm.

/s/ Marilyn Kelly