STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Honorable Jane M. Beckering, Stephen L. Borrello and Peter D. O'Connell

MATTHEW DYE, by his Guardian,
SIPORIN & ASSOCIATES, INC.,

Plaintiff-Appellee/Cross-Appellant,

v

ESURANCE PROPERTY & CASUALTY
INSURANCE COMPANY,

Defendant/Cross-Plaintiff/
Appellant/Cross-Appellee,

and

GEICO INDEMNITY COMPANY,

Defendant/Cross-Defendant/
Appellee/Cross-Appellant.

Supreme Court No. 155784

Court of Appeals No. 330308

Circuit Court No. 14-516-NF

DEFENDANT-APPELLEE GEICO INDEMNITY COMPANY'S BRIEF ON APPEAL

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DEFENDANT-APPELLEE GEICO INDEMNITY COMPANY'S BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

Appellee/Cross-Appellee/Cross-Appellant GEICO Indemnity Company ("GEICO") acknowledges that on December 27, 2017, this Court granted Plaintiff-Appellee/Cross-Appellant Matthew Dye's ("Plaintiff") Application for Leave to Cross-Appeal. *Dye v Esurance Prop & Cas Ins Co,* 501 Mich 944; 904 NW2d 620 (2017). This Court's leave grant is "limited to the issue whether an owner or registrant of a motor vehicle involved in an accident may be entitled to personal protection insurance benefits for accidental bodily injury where no owner or registrant of the motor vehicle maintains security for payment of benefits under personal protection insurance…." *Id.* This is a proper exercise of this Court's jurisdiction under Const 1963, art 6, § 4 and MCR 7.307(A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was *Barnes v Farmers Ins Exchange* correctly decided by the Court of Appeals?

Matthew Dye answers: No.

The Court of Appeals declined to address this question.

GEICO answers: *Yes.*

INTRODUCTION

This lawsuit stems from a motor vehicle accident that occurred on September 26, 2013, in which Plaintiff Matthew Dye sustained injuries. (Appellant's Brief, p 1.) The question now before this Supreme Court is the impact of *Barnes v Farmers Ins Exchange*, 308 Mich App 1; 862 NW2d 681 (2014) on this case and more specifically, whether *Barnes* was correctly decided.

The No-Fault Act requires the "owner or registrant of a motor vehicle" to maintain "personal protection insurance [PIP], property protection insurance, and residual liability insurance." *Barnes*, 308 Mich App at 6. "The no-fault act sets forth a consequence in the event that the required insurance is lacking." *Id.* Specifically, MCL 500.3113(b) provides that "[a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident … [t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by MCL 500.3101 or MCL 500.3103 was not in effect." Here, it is undisputed that Plaintiff Matthew Dye was the owner of the 1997 BMW that he was driving when he was involved in the September 26, 2013 accident. *Matthew Dye was not a named insured or listed driver on any policy of automobile no-fault insurance.*[1]

Although the 1997 BMW admittedly was insured by Matthew's father, the Court of Appeals definitively held in *Barnes*, 308 Mich App at 8, that owners cannot "avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance." In other words, "under the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits." *Barnes*, 308 Mich App at 8-9. Therefore, under *Barnes*, the insurance purchased by Paul Dye – which named only Paul Dye as

[1] The Declarations Sheet for GEICO's policy can be found at Appendix 65b. The only named insured is Matthew Dye's wife, Lisa, and there are no "additional drivers." The Declarations Sheet for GEICO's policy (the only policy covering the 1997 BMW) can be found at Appendix 66b. The only named insured is Matthew Dye's father, Paul, and there are no "rated operators."

an insured – does not allow Matthew Dye to "avoid the consequences of MCL 500.3113(b)" *unless Paul Dye was also an owner of the 1997 BMW*, which per the Court of Appeals' holding in this case is to be decided by the jury. While GEICO challenged the Court of Appeals' application of MCR 2.116(C)(10) in this case,[2] *as a matter of statutory construction* the Court of Appeals' holding here was correct, as *Barnes* was correctly decided for reasons set forth above.

While the result compelled by *Barnes* may seem harsh, the outcome makes sense when viewed in light of the statute's objectives. Only an owner of a motor vehicle has the necessary proprietary and possessory usage of a motor vehicle in order to give rise to an insurable interest in the motor vehicle. Permitting any type of recovery consistent with the facts in the case at bar belies the legislative mandate that owners of motor vehicles bear responsibility for properly insuring vehicles in this compulsory system of insurance. It would encourage individuals with bad driving records, numerous moving violations, and repeated drunk driving offenses to continue driving on the roads while imperiling law abiding citizens. Insurers could not properly assess risk without disclosure of ownership interests and the garaging of vehicles, and in fact, would escape liability in cases such as the one at bar and shift the burden back to the government to make payment of benefits to an individual who failed to comply with the law. Further, it would allow and encourage individuals to have friends and/or family who reside in communities with lower insurance costs to procure insurance policies for those titled owners whose vehicles are garaged and used in communities with higher insurance costs. This was clearly not the intent of the Legislature as seen in the plain language of MCL 500.3101(1), which requires owners to

[2] Again, Judge O'Connell would have granted GEICO's Motion for Summary Disposition on the ownership issue. (Appendix 13a.) This was the gist of GEICO's Application for Leave to Cross-Appeal, which this Court has denied.

maintain insurance on their vehicles and the exclusion for benefits for owners who do not properly maintain insurance on their own vehicles under MCL 500.3113(b).

Moreover, accurate underwriting is a necessary component of all successful insurance programs. Insurers must be able to properly assess the risk they are assuming to recover an appropriate premium. In the early years of Michigan's shift to compulsory no-fault insurance, this Court addressed the constitutionality of the new system in *Shavers v Kelley*, 402 Mich 554, 600; 267 NW2d 72 (1978). In the course of discussing the nature of no-fault insurance, the Court made the point that insurers are to apply rating plans that "measure any differences among risks that may have a probable effect upon losses and expenses." *Id.*

As will be explained below, the only approach that carries out the legislative intent embodied in § 3101(1) is to equate "shall maintain security" with being a named insured on a policy of automobile no-fault insurance. Anyone who owns a vehicle in Michigan knows that it is the named insured who applies for auto insurance. That's the person who fills out the form developed by the insurer to obtain the information needed to accurately underwrite the coverage. These form applications typically ask for information on a variety of factors personal to the applicant. See *Ins Inst of Mich v Comm'r, Financial & Ins Services*, 486 Mich 370; 785 NW2d 67 (2010). For the system to work for all members of the pool, risk must be allocated and managed as accurately as possible. Through MCL 500.3101(1), the Michigan Legislature recognized that what matters most for no-fault insurance is the identity of the vehicle owner or registrant. Otherwise, vehicle owners with high risk factors would be able to avoid premiums applicable to the risk they present by adding their vehicles to the policies of others, including friends and even roommates. And the problem is not resolved by requiring owners of other

vehicles to be listed as drivers because listed drivers do not fill out applications; they do not receive the same scrutiny as an applicant.

The thrust of Plaintiff's argument is that *Barnes* incorrectly interpreted MCL 500.3101(1) and 3113(b) by focusing on the "who" rather than the "what." (Appellant's Brief, pp 10-11.) Plaintiff's position is that, when read together, these provisions purportedly do not make any particular person "responsible for procuring the security" but rather they only require that "the security required … be in effect *for the vehicle*." (Id., emphasis added.) But Plaintiff's interpretation flows from a selective reading of § 3101(1). The subpart does not merely require that "security for payment of benefits" be in place for the vehicle – it further states that such security "shall" be maintained by the "owner or registrant" of the vehicle. (See Appellant's Brief, p 10.)[3] So while Plaintiff may be partially correct that § 3113(b) ties "security" to the motor vehicle itself, that subpart's reference to "security required by section 3101" means that the vehicle is not properly insured unless that security is maintained by an "owner or registrant." (See Appellant's Brief, p 9.) Put another way, the "what" is not satisfied - the vehicle is not properly insured under the statue - if insurance is not maintained by the proper "'who."

Plaintiff also suggests that the insurance purchased by Paul Dye satisfied the statute because the statutory term "maintain" does not require "that the owner be the named insured." (Appellant's Brief, p 14.) The argument appears to be that Matthew Dye "maintained" security for the 1997 BMW by passively allowing his father to purchase insurance for it. Here Plaintiff conflates the term "maintain" with merely allowing coverage to exist. While there are a number of potentially relevant definitions of the phrase "maintain insurance,"[4] all of them require some

[3] "[E]ffect should be given to every phrase, clause, and word in the statute." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).
[4] See *Anderson v US Fid & Guar Co*, 44 NM 483; 104 P2d 906, 907 (1940).

affirmative act. The *Barnes* panel correctly acknowledged this through its use of words such as "provide," "obtain," and "supply." *Barnes*, 308 Mich App at 8-9. Given that at least one owner clearly must affirmatively *do something* to secure insurance for their vehicle, the *Barnes* panel was correct to equate "maintain" insurance with *being a named insured under a policy*, as that is the only affirmative act that can be measured by the insurance industry for the purposes of managing risk and setting premiums. See *Shavers*, 402 Mich at 600. Any other conception of the statutory phrase "maintain" leaves the insurance industry subject to the vagaries of undocumented transactions between friends and family members (as we see in this case), making it impossible to accurately assess and allocate risk.

STATEMENT OF FACTS

On or about July 25, 2013, Plaintiff Matthew Dye purchased the aforementioned 1997 BMW. (Appellant's Brief, pp 1-2.) Because the Plaintiff was in the process of moving, he granted his father Paul Dye power of attorney. (Id., p 2.)[5] Pursuant to the power of attorney, Paul Dye assisted in Matthew's purchase of the 1997 BMW by applying for the title, to be issued in Matthew's name, and by purchasing insurance for the vehicle. (Id., pp 2-4.) However, the insurance Paul purchased from Defendant/Cross-Plaintiff/Appellant/Cross-Appellee Esurance Property & Casualty Insurance Company ("Esurance") identified Paul Dye as the only named insured, and did not identify any "rated operators." (See Appendix 2a.)

Although Paul Dye helped Matthew with the purchase, it is undisputed that Plaintiff Matthew Dye owned the 1997 BMW. As noted above, Paul did not contribute any money

[5] While Appellant's Brief emphasizes Matthew's military service, Matthew had returned from active duty in August 2011, approximately two years before this purchase. (Appellant's Brief, p 1.) So Matthew's father's involvement in this transaction was a matter of convenience for Matthew, not something that was necessitated by the exigency of his overseas deployment.

toward the purchase price. (Appendix 8a.) Paul had no recollection of ever driving the vehicle. (Id.) Paul testified that if he had ever had a reason to use the 1997 BMW, he would have certainly asked Matthew's permission. (Id.) Paul did not have a set of keys. (Id.) Paul had no recollection of the vehicle ever being garaged at his home. (Appendix 122a, 148a, 151a.) Paul testified that "it was basically Matthew's car … and when we registered it, we did so in his name." (Appendix 121a.) And Matthew testified that he purchased the 1997 BMW with his own money, that he paid for all of the vehicle's fuel, that he would have paid for the maintenance had he owned the vehicle long enough, that the vehicle was never garaged at his father's house, and that his father did not have a set of keys. (Appendix 201a, 202a, 206a, 209a, 210a, 231a, 232a.)

As noted above, on September 26, 2013, Matthew Dye was injured in an accident while driving the 1997 BMW. (Appellant's Brief, p 1.) Matthew Dye had been married to GEICO's insured, Lisa Dye, for approximately three and a half months before this accident occurred. (Id.) Neither he, nor the vehicle he was driving (a 1997 BMW that Matthew owned), were listed on the GEICO policy at the time of the loss. GEICO did not receive a premium for insuring this vehicle[6] and was not even aware that the 1997 BMW was a part of its insured's household until after the accident. On the other hand, Esurance insured Matthew Dye's father, Paul. (Appellant's

[6] "[I]t is impossible to hold an insurance company liable for a risk it did not assume." *Hunt v Drielick,* 496 Mich 366, 372-373; 852 NW2d 562 (2014).

Brief, p 2.) The Esurance policy listed the 1997 BMW, but Paul purchased the policy and was the only named insured under that policy. (Id.)[7]

It is undisputed that at the time of the accident, the vehicle was not insured under any policy that listed Matthew Dye as a named insured. (Appellant's Brief, p 3.) The only existing insurance for the 1997 BMW was a policy issued by Esurance to Matthew's father. (Id.) Mathew Dye did not live with his father, but rather, at the time of the accident, Matthew lived with his wife, who insured a different vehicle through GEICO. (Id., p 2.) Matthew initially looked to Esurance, as the insurer of the 1997 BMW, for his PIP benefits (Appendix 2a.) Esurance, in turn, pointed to GEICO as being first in priority, based upon Matthew's status as a resident relative of GEICO's insured, Lisa Dye. (Id.)

On September 9, 2015, GEICO filed separate Motions for Summary Disposition as to the Plaintiff Matthew Dye and as to Esurance. (See Appendix 61a.) Plaintiff and Esurance each filed responses and counter-requests for summary disposition under MCR 2.116(I)(2). (Id.) The lower court heard all of these motions on October 22, 2015. (Id.) GEICO's counsel argued that Paul did not have unfettered access to the vehicle and therefore did not satisfy the criteria for constructive "ownership" under the case law. Plaintiff responded with testimony that Paul could have used the vehicle whenever he wanted (provided he asked Matthew and Matthew was not otherwise using it) as well as a family history of treating each other's vehicle's as a "family fleet" that they all shared (although the 1997 BMW itself was never actually shared and

[7] Ordinarily, Matthew would look to his own household first for PIP benefits, which would put GEICO first in priority under MCL 500.3114(1). See *Michigan Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 630; 455 NW2d 352 (1990). However, MCL 500.3113(b) requires that, because Matthew was injured while driving a vehicle he owned, that vehicle had to be insured *by an owner or registrant*; otherwise he is disqualified from receiving PIP benefits. Per *Barnes*, 308 Mich App at 1, it not sufficient that *someone* insure the vehicle; § 3113(b) requires that insurance be maintained by an owner or registrant.

GEICO's counsel argued that it was therefore speculative whether this particular vehicle ever would have been treated as such). (See Appendix 75a-81a.) Matthew Dye's counsel also argued that Paul satisfied MCL 500.3101 – and in turn, MCL 500.3113(b) – because apart from whether he was an owner, he was a "registrant" of the 1997 BMW. (Id.) GEICO's counsel responded that the Plaintiff's "registrant" argument is simply nonsense; Paul clearly signed the application for title in his capacity as Matthew's attorney in fact; he printed Matthew's name and signed his own name below that with the designation "P/A." (Appendix, 81a.) A handwritten "power of attorney" document was also attached to the registration, further underscoring that Paul was not signing the document on his own behalf. (See Id.) GEICO's counsel argued that if the Plaintiff's "registrant" argument is accepted, it would nullify the very concept of a power of attorney. (Appendix 82a.)

The trial court granted the Plaintiff's Motion for Summary Disposition on this issue and denied GEICO's, finding that Paul was an "owner" of the 1997 BMW and that GEICO therefore had no coverage defense under *Barnes*. (Appendix 83a, 84a.) Judge Connors further found that Paul was a "registrant" of the 1997 BMW. (Id.) GEICO timely applied for leave to appeal, which the Court of Appeals granted on April 5, 2016. (Appendix 1a, n 1.) After hearing oral argument on March 15, 2017, the panel reversed the trial court in an opinion issued on April 4, 2017. Although the panel unanimously reversed the summary disposition ruling in Matthew Dye's favor, the majority found that questions of fact precluded the entry of summary disposition in GEICO's favor on the ownership issue. (Appendix, 9a.) The panel explained:

> In the case at bar, Geico contends that Paul's use of the BMW was sporadic and incidental at best. Paul did not contribute to the BMW's purchase price, could not remember driving it, could not remember garaging it, did not have his own set of keys to the car, and said he would ask plaintiff's permission if he ever had reason to use it. The trial court, however, found dispositive the deposition

testimony of plaintiff and Paul asserting Paul's continuous right to use the BMW.

Indeed, both plaintiff and Paul testified that Paul could use the car at his discretion and without direction or permission from anyone. Although Paul testified that he would ask first before swapping vehicles, his and plaintiff's testimony indicates that obtaining permission was more for the purpose of coordinating use of the vehicles and respecting the rights of others than for asking for the right to use an otherwise available vehicle. In addition, … there was a significant relationship between Paul and plaintiff. The relationship appears to have been close, both geographically, as Paul lived only a few blocks from plaintiff, and personal, as Paul served as plaintiff's attorney-in-fact for plaintiff's personal business matters during plaintiff's deployment to Afghanistan and assisted him in like matters thereafter. Moreover, Paul undertook to register the BMW with the Secretary of State's Office, albeit on plaintiff's behalf, but he also paid the registration fee and the insurance premium. Plaintiff also testified that he considered Paul to be a "part owner." The continuous nature of Paul's right to use the BMW, testimony asserting his right to use the car at his discretion, the broader context of plaintiff's and Paul's relationship, and their history of shared vehicle usage supports the trial court's finding that Paul was an owner for purposes of the no-fault act.

Nevertheless, as Geico points out, Paul did not have his own set of keys and, although plaintiff testified that a spare set was available to Paul to take and use at will, reasonable minds could differ as to whether the nature of Paul's access to the keys supported or hindered a proprietary or possessory use of the BMW. In addition, reasonable minds could differ as to whether Paul's actual usage of the BMW during the two months prior to the accident sufficiently establishes a pattern of regular usage. The testimony itself is somewhat conflicting; Paul could not remember driving or parking the car at his house during the two months since it had been purchased, but plaintiff remembered that Paul had kept the car overnight, and Lisa remembered that Paul had driven it once or twice for a day or two during the two months that they had the car. Lisa's description of Paul's use of the car might signify a "spotty and exceptional pattern," and her testimony that Paul used the car because they needed to use his vehicle appears to be usage that was "merely incidental" rather than "proprietary or possessory." … However, plaintiff only had the car for two months, and it might be questionable whether a pattern of any sort could arise during such a short period. …[W]hen determining whether a person is an owner for purposes of the no-fault act, a person's actual usage of a

> vehicle is analytically subordinate to the nature of a person's right to use the vehicle.
>
> The relationship between plaintiff and Paul, their history of sharing vehicles, and testimony regarding the nature of Paul's continuous right to use the BMW without direction or permission may support the trial court's finding that Paul is an owner for purposes of the no-fault act. However, circumstances surrounding Paul's access to the car keys and the actual usage Paul made of the car during the two months prior to the accident could lead a reasonable juror to a contrary conclusion. Accordingly, we conclude that the trial court erred in granting plaintiff summary disposition, as reasonable minds could differ as to whether Paul was an owner of the BMW…. (Appendix 8a-9a, citations omitted.)

Judge Peter O'Connell dissented "as to the majority's conclusion that Paul Dye may qualify as an owner of this vehicle. Based upon these set of facts, Matthew Dye is both the registrant and owner of this vehicle." (Appendix 13a.)

On May 16, 2017, Esurance applied for leave to appeal to this Court, seeking review of the Court of Appeals decision only as it related to the purported settlement between Esurance and GEICO. On June 12, 2017, Matthew Dye applied for leave to cross-appeal, asserting that *Barnes* was wrongly decided and alternatively, that the trial court correctly found no questions of fact for the jury regarding Paul Dye's status as an owner/registrant. The next day, GEICO applied for leave to cross-appeal, arguing that summary disposition should have been granted *in its favor* on question of Paul Dye's status as an owner/registrant. On December 27, 2017, this Court granted Matthew Dye's application only, "limited to the issue whether an owner or registrant of a motor vehicle involved in an accident may be entitled to personal protection insurance benefits for accidental bodily injury where no owner or registrant of the motor vehicle maintains security for payment of benefits under personal protection insurance…." *Dye*, 501 Mich at 944. This Court denied leave as to all of the other issues. *Id.*

STANDARDS OF REVIEW

Again, this Court granted leave to consider the Court of Appeals' treatment of MCL 500.3101(1) and MCL 500.3113(b), as articulated in *Barnes,* 308 Mich App at 1. This presents a question of statutory construction which this Court reviews *de novo. Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412, 415 (2012).

ARGUMENT

I. *Barnes v Farmers Ins Exchange* was correctly decided by the Court of Appeals under well-established canons of statutory construction, as *Barnes* reflects the only approach that places the risk of injury upon the person who has ultimate control of a vehicle, consistent with the Legislature's intent as evinced by the plain language of MCL 500.3101(1).

MCL 500.3113(b) states that a "person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident … [t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect." MCL 500.3101(1), in turn, states that the "owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." These provisions are subject to ordinary rules of statutory construction. *Twichel v MIC Gen Ins Corp,* 469 Mich 524, 527–528; 676 NW2d 616 (2004). "In reviewing questions of statutory construction, [a court's] purpose is to discern and give effect to the Legislature's intent." *People v Holder,* 483 Mich 168, 172; 767 NW2d 423 (2009). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed and enforce that statute as written." *Id.* "We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look

outside the statute to ascertain legislative intent." *Id.* Courts may not "rewrite the plain statutory language and substitute [their] own policy decisions for those already made by the Legislature." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000). Courts have "no authority to add words or conditions to [a] statute." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 214 n 10; 731 NW2d 41 (2007).

"[T]he policy behind a statute cannot prevail over what the text actually says. The text must prevail." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005). "The Legislature is held to what it said. It is not for us to rework the statute. Our duty is to interpret the statute as written." *Id.* at 425. The "Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature." *Id.* (citation omitted). Even when "the Legislature's policy choice can be debated," the "judiciary is not the constitutional venue for such a debate." *Id.*

Or as this Court explained in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 64; 718 NW2d 784 (2006), litigants cannot ask "that all the disciplines that judges, lawyers, and even lay people use for giving meaning to documents and distinguishing in a principled fashion between potentially conflicting instruments … be disregarded" so that courts can "raise our eyes from the tedious page, weigh who is the most compelling litigant, and 'effect legislative intent.'" Such arguments beg "the question … of why the words the Legislature used do not do that better than their efforts to find the 'real intent.'" *Id.* "Moreover, with a system of mandatory automobile no-fault insurance such as the Legislature has enacted, it just may be, because of the economies required to make it work, that the Legislature's 'real intent' was to set up strict rules

that can unfortunately, but unavoidably if you want no-fault insurance, produce some sad outcomes." *Id.*[8]

The purpose of the No-Fault Act "is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 37; 748 NW2d 574 (2008). The No-Fault Act, however, requires the "owner or registrant" of a vehicle to maintain "personal protection insurance [PIP], property protection insurance, and residual liability insurance." MCL 500.3101(1). The purpose of this statute is to place the risk of damage or injury "on the person who has ultimate control of a vehicle." *Twichel*, 469 Mich at 531. The No-Fault Act provides a consequence in the event that the required insurance is lacking. MCL 500.3113 provides that "A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed: … (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect."

The issue presented in *Barnes* was whether MCL 500.3113(b) barred plaintiff's receipt of PIP benefits where the vehicle plaintiff was driving at the time of the accident was insured by someone, but not an owner. The plaintiff in *Barnes* cited *Iqbal* for the proposition that she could recover as an owner as long as *anyone* has insurance on the vehicle. The *Barnes* panel rejected this argument.

In *Iqbal*, the plaintiff was injured while driving a car that was titled and registered only in his brother's name. The brother insured the car through Auto Club Insurance Association. The

[8] Although *Cameron* was overruled by *Univ of Mich Regents v Titan Ins Co*, 488 Mich 893, 794 NW2d 570 (2010), *Cameron* was expressly reinstated by *Joseph*, 491 Mich at 221.

plaintiff lived with his sister, who had a household no-fault insurance policy issued by Bristol West Insurance Group. The plaintiff sought PIP benefits. Following the trial court's determination that Bristol had priority to handle the claim, Bristol argued that the plaintiff should be precluded from receiving PIP benefits under MCL 500.3113(b) because the plaintiff was an "owner" of the car (he had primary possession of it) and he did not insure the car himself. The trial court ruled that whether the plaintiff was an "owner" under MCL 500.3101(2) was irrelevant because the car indisputably was insured by the brother, who was an owner. *Iqbal*, 278 Mich App at 33–36.

The *Iqbal* panel agreed that the plaintiff was not precluded from receiving PIP benefits under MCL 500.3113(b). The *Iqbal* panel assumed that the plaintiff was an owner and held:

> the phrase "with respect to which the security required by section 3101...was not in effect," § 3113(b), when read in proper grammatical context, defines or modifies the preceding reference to the motor vehicle involved in the accident, here the BMW, and not the person standing in the shoes of an owner or registrant. The statutory language links the required security or insurance solely to the vehicle. Thus, the question becomes whether the BMW, and not plaintiff, had the coverage or security required by MCL 500.3101.... While plaintiff did not obtain this coverage, there is no dispute that the BMW had the coverage, and that is the only requirement under MCL 500.3113(b), making it irrelevant whether it was plaintiff's brother who procured the vehicle's coverage or plaintiff. *Iqbal*, 278 Mich App at 39-40 (emphasis added).

Some construed *Iqbal* to say that § 3113(b) would not bar a claimant so long as *someone* had insurance in place for the vehicle at the time of the accident. But *Barnes* clarified that § 3113(b) – through its reference to "the security required by section 3101" – requires that the person who secures insurance for the vehicle *be an owner*. *Barnes* arose out of an automobile accident in which the plaintiff was injured while driving a 2004 Chevrolet Cavalier. Plaintiff and her mother, Joyce Burton, who lived together in the same house in Detroit, indisputably were the

only titled owners of the Cavalier at the time of the accident. Burton originally insured the Cavalier under an Allstate insurance policy. But she allowed that policy to lapse after health problems resulted in the amputation of both her legs, leaving her unable to drive. Thereafter, Burton requested that Richard Huling, a close friend from her church, use the Cavalier to drive her to and from frequent church visits. Burton testified that she paid Huling to insure the Cavalier and that Huling bought a State Farm auto policy in 2008. It was undisputed that no one else besides Huling had insurance on the vehicle.

The plaintiff in *Barnes* cited *Iqbal* and argued that the fact that neither she nor Burton insured the Cavalier did not matter because Huling did. Plaintiff contended that this was so regardless of whether Huling was an owner of the Cavalier. But the *Barnes* panel disagreed, finding that "*Iqbal* should not be read so broadly to apply to even non-owners." *Barnes*, 308 Mich App at 8. According to the *Barnes* panel, *Iqbal* was not controlling because the *Iqbal* opinion "made it clear that it was addressing the problem of requiring 'each and every owner' to maintain insurance on a vehicle." *Barnes*, 308 Mich App at 8. *Iqbal* found that every owner could not be required to maintain insurance because otherwise, an owner who obtained insurance could be precluded from receiving PIP benefits if any other co-owner did not maintain coverage as well. This was not the situation in *Barnes*, where *no owner* insured the vehicle.

Barnes went on to explain that all of the other published cases had "involved at least one owner having obtained the insurance coverage." *Barnes*, 308 Mich App at 8. Also, allowing insurance purchased by a non-owner to relieve an owner from the consequences of § 3113(b) "would render MCL 500.3101(1)'s language requiring '[t]he owner or registrant' of a vehicle to maintain insurance nugatory, which is not favored." *Barnes*, 308 Mich App at 8. *Barnes* further explained:

> …while *Iqbal* held that each and every owner need not obtain insurance, it did not allow for owners to avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance. **Thus, under the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits.** And because it is undisputed that the only coverage was supplied by Huling, who had been deemed to not be an owner, plaintiff is precluded from recovering PIP benefits pursuant to the no-fault act. *Barnes*, 308 Mich App at 8-9 (emphasis added).

Barnes is now a 3 ½ year old precedent. No subsequent panel of the Court of Appeals has expressed disagreement with it – including the panel in this case, despite Matthew Dye and Esurance's requests for a conflict panel under MCR 7.215(J)(2). The Court of Appeals recently followed *Barnes* unanimously and without reservation in *Alani v Sentinel Ins Co,* unpublished memorandum opinion of the Court of Appeals, issued January 30, 2018 (Docket No. 334061) (Appendix 1a),[9] *Salmo v Oliverio,* unpublished opinion per curiam of the Court of Appeals, issued October 17, 2017 (Docket No. 333214) (Appendix 6b), and *Colvin v Trumbull Ins Co,* unpublished memorandum opinion of the Court of Appeals, issued May 12, 2017 (Docket No. 336640) (Appendix 7a). *Barnes* was also followed without any apparent reservation in *Adams v Curtis,* unpublished opinion per curiam of the Court of Appeals, issued April 11, 2017 (Docket No. 330999) (Appendix 13b),[10] *Beaumont Health Sys v State Farm Mut Auto Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued November 8, 2016 (Docket No.s

[9] "In this case, plaintiff was the sole owner of the Chrysler involved in the accident, and therefore, the only owner capable of maintaining the requisite insurance under MCL 500.3113(b). … Although the car was covered by an insurance policy, the named insured, Alani, had no ownership interest in the car. Thus, in accordance with *Barnes*, the plaintiff is barred from recovering PIP benefits from Sentinel because he was the sole owner and registrant of the vehicle involved in the accident pursuant to MCL 500.3113(b) and failed to maintain insurance on the vehicle as required by MCL 500.3101(1)." *Alani,* unpub op at 3 (Appendix 3b).

[10] "If a vehicle is not insured by an owner (titled or constructive), then the vehicle cannot be properly insured under Michigan law. …[I]t is not sufficient for a non-owner to insure a vehicle…." *Adams,* unpub op at 3 (Appendix 15b).

328291, 329103) (Appendix 18b),[11] and *Frankenmuth Mut Ins Co v Zaguroli*, unpublished opinion per curiam of the Court of Appeals, issued October 10, 2017 (Docket No.s 333152 & 333502) (Appendix 23b). And even after this Court's leave grant, the Court of Appeals again followed *Barnes* without any apparent reservation in *Easter v Progressive Marathon Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2018 (Docket No. 335815), noting: "caselaw is clear that MCL 500.3113(b) precludes an owner from obtaining no-fault benefits if only a nonowner has obtained security for the vehicle." (Appendix 68b, 70b.)

In *Zaguroli*, Frankenmuth argued that Zaguroli was the one and only owner of the vehicle involved in the accident for purposes of the No-Fault Act and yet did not maintain the requisite insurance at the time of the accident; thus, he was precluded from receiving PIP benefits. The Court of Appeals agreed, noting that "Zaguroli exclusively and continuously possessed, drove, and maintained the vehicle from shortly after his mother died in 2010 until the time of this accident in 2014…." *Zaguroli*, unpub op at 2 (Appendix 24b). In that case, Mr. Zaguroli "was the only person having the use of a motor vehicle, under a lease or otherwise, for a period that is greater than 30 days. … [He] kept the vehicle at his residence, drove the vehicle on a daily basis to work and for personal errands, and serviced as well as maintained the vehicle…." *Id.* "In other words, he used the vehicle in ways that comported with the concepts of ownership *and was the only person to do so*." *Id.* (emphasis added). "Because Zaguroli is considered the only owner of the vehicle for purposes of the no-fault act, and he did not have insurance on the vehicle at the time of the accident as required under MCL 500.3101(1), he is precluded from

[11] "*Barnes* [and *Iqbal*] … evince this Court's consistent position that when an owner insures a car, then any other owner is entitled to PIP benefits under the security obtained for the car, but when no owner insures the car, then any owner is not entitled to PIP benefits." *Beaumont Health Sys*, unpub op at 4 (Appendix 21b).

receiving PIP benefits under MCL 500.3113(b)." *Zaguroli*, unpub op at 2 (Appendix 24b). The same is true of the Plaintiff here.

All of these were unanimous decisions, and none of the plaintiffs except Alani filed leave applications to this Court (and Alani appears to have applied for leave only in attempt to piggy-back on the leave grant Order in this case).[12] This belies Matthew Dye's assertion that *Barnes* is somehow a tenuous or controversial precedent.

Plaintiff argues that *Barnes* incorrectly interpreted MCL 500.3101(1) and 3113(b) by focusing on the "who" rather than the "what." (Appellant's Brief, pp 10-11.) As noted above, Plaintiff's position is that, when read together, these provisions purportedly do not make any particular person "responsible for procuring the security" but rather they only require that "the security required … be in effect *for the vehicle*." (Id., emphasis added.) But Plaintiff's interpretation flows from a selective reading of § 3101(1). The subpart does not merely require that "security for payment of benefits" be in place for the vehicle – it further states that such security "shall" be maintained by the "owner or registrant" of the vehicle. (See Appellant's Brief, p 10.) When used in a statute, "[t]he word 'shall' is unambiguous and is used to denote mandatory, rather than discretionary, action." *Yachcik v Yachcik*, 319 Mich App 24, 36; 900 NW2d 113, 122 (2017). See also *Browder v Intl Fid Ins Co*, 413 Mich 603, 612; 321 NW2d 668, 673 (1982). So the word "shall" in this context refers to the "owner or registrant" – making it mandatory that this is *who* must "maintain" security for the vehicle. So although Plaintiff may be partially correct that § 3113(b) ties "security" to the motor vehicle itself, that subpart's reference to "security required by section 3101" – and its use of the mandatory term "shall" in

[12] See Appendix 29b, Plaintiff-Appellant's Supreme Court leave application in *Alani*, Docket No. 157368.

reference to "[t]he owner or registrant"[13] – means that the vehicle is not properly insured unless that security is maintained *by* an "owner or registrant." (See Appellant's Brief, p 9.) Put another way, the "what" is not satisfied - the vehicle is not properly insured under the statue - if insurance is not maintained by the proper "'who."

Plaintiff also suggests that the insurance purchased by Paul Dye satisfied the statute because the statutory term "maintain" does not require "that the owner be the named insured." (Appellant's Brief, p 14.) The argument appears to be that Matthew Dye "maintained" security for the 1997 BMW by passively allowing his father to purchase insurance for it. Here Plaintiff conflates the term "maintain" with acquiescence. As noted above, there are a number of potentially relevant definitions of the phrase "maintain insurance." *Anderson*, 44 104 P2d at 907. "Maintain insurance" can mean "to bear the expense thereof … to support; to keep up." *Id.* It can also mean "to hold and keep in any particular state or condition, especially in a state of efficiency or validity" or "to keep in force." *Id.* (citations omitted). Dictionaries have further defined "maintain" to mean: "to support; to sustain; to uphold; to keep up; not to suffer to fail or decline," to "keep possession of; to hold and defend; not to surrender or relinquish," to "continue; not to suffer to cease or fail," and "to supply with what is needed." *Id.* at 907.

But the common thread in all of these definitions is that some affirmative act is necessary *by the person required to* "maintain" the insurance. It cannot be said that Matthew Dye did anything to "support," "sustain," "uphold," "keep up," "supply" or "keep in force" security for

[13] "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security…." MCL 500.3101(1). When interpreting statutory language, we begin with the plain language of the statute." *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016). "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Id.* "Additionally, when determining this intent we must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Id.*

the 1997 BMW. Matthew Dye passively allowed his father to buy the insurance. There is no indication in the record that Matthew Dye ever talked to anyone at Esurance prior to the loss to inquire about coverages or premiums. He does not appear to have ever read the policy; at his deposition he could not say whether or not he was even a named insured. (Appendix 219a-221a.) When asked, "Do you know if you were listed on the policy?," Matthew answered "I don't remember the specific document." (Appendix 221a.) Reading the policy is generally *the minimum* that an individual is expected to do in order ensure that they have insurance coverage.[14] Moreover, Matthew Dye had no knowledge of how the policy was paid for or who paid for it. (Appendix 222a.) When asked "Did you procure that policy of insurance for the BMW? … What was your involvement?," Matthew deferred to his father. (Appendix 218a-219a.) Therefore, regardless of which dictionary definition of "maintain" may be deemed most relevant, Matthew Dye did not satisfy any of them.

Certainly one could imagine scenarios where an owner did more to procure coverage, which would necessitate a closer look at which of the competing definitions of "maintain" is more germane to MCL 500.3101(1). For example, in *Barnes*, 308 Mich App at 3, one of the vehicle's two owners (Burton) testified that she had paid the non-owner who had insured the vehicle (Huling) and that Huling used those funds to buy the policy. While the panel held that this did not satisfy the Act because the resulting policy only named the non-owner Huling, the reasoning advanced by the Plaintiff here could have resulted in an interesting argument about whether Burton's act of giving money to Huling meant that she "maintained" insurance on her

[14] *Stitt v Locomotive Engineers' Mut Protective Ass'n*, 177 Mich 207, 208; 142 NW 1110 (1913). "[A]n insured is obligated to read his or her insurance policy and raise questions concerning coverage within a reasonable time after the policy is issued." *In re Jackson Nat'l Life Ins Co Premium Litig*, 107 F Supp 2d 841, 857-858 (WD Mich 2000).

vehicle, under the dictionary definitions of that word. But it is difficult to imagine that the Legislature intended for the owner's responsibilities under § 3101(1), and the availability of no-fault benefits under § 3113(b), to hinge upon the vagaries of undocumented transactions between friends and family members. Again, as noted in *Cameron,* 476 Mich at 64, "a system of mandatory automobile no-fault insurance" implies certain "strict rules…."

Therefore, the only approach that carries out the legislative intent embodied in § 3101(1) is to equate "shall maintain security" with being a named insured on a policy of automobile no-fault insurance. As noted above, anyone who owns a vehicle in Michigan knows that it is the named insured who applies for auto insurance. That's the person who fills out the form developed by the insurer to obtain the information needed to accurately underwrite the coverage. These form applications typically ask for information on a variety of factors personal to the applicant. See *Ins Inst of Mich,* 486 Mich at 392 n 21 (for automobile insurance, such factors include the applicant's age, usage, garage location, accident history, credit scores, employment, and more). For the system to work for all members of the pool, risk must be allocated and managed as accurately as possible. Through MCL 500.3101(1), the Michigan Legislature recognized that what matters most for no-fault insurance is the identity of the vehicle owner or registrant. Otherwise, vehicle owners with high risk factors would be able to avoid premiums applicable to the risk they present by adding their vehicles to the policies of others, including friends and even roommates. And the problem is not resolved by requiring owners of other vehicles to be listed as drivers because listed drivers do not fill out applications; they do not receive the same scrutiny as an applicant.

Moreover, the argument that Plaintiff "maintained" the required security, by allowing his farther to purchase it, is somewhat circular. Plaintiff asserts that he "maintained" security

because the insurance – in Paul's name only – supposedly satisfied the statute. But if that insurance *did not* satisfy the statute, then Matthew did not "maintain" the required security. Matthew only "maintained" the security *if Paul's policy is sufficient*. The argument "begs the question" by presupposing the very thing that is in dispute – the sufficiency of the Esurance policy with only Paul as the named insured.[15] The argument attempts to lift itself up by its own bootstraps.

Plaintiff further suggests that MCL 500.3113(b) must be read in light of MCL 500.3102(2). (Appellant's Brief, p 10.) The idea seems to be that because § 3102(2) more expressly links "the penalty to the owner or registrant," then § 3113(b) should be read as dealing only "with the what," i.e., "the security required … for the vehicle." (Appellant's Brief, p 11.) This argument seems to be predicated upon a misreading of § 3113(b) coupled with a misunderstanding of the doctrine of *in pari materia*. First, § 3113(b) does in fact link the penalty to the owner, just as § 3102(2) does. MCL 500.3113(b) states that "[a] *person* is not entitled to be paid" PIP benefits if "[t]he *person* was the owner or registrant of a motor vehicle … involved in the accident with respect to which the security required by section 3101 … was not in effect." (Emphasis added.) And § 3113(b)'s reference to § 3101 reinforces the link between the penalty and the person because, as explained above, § 3101(1) dictates *who* "shall maintain security" – it must be an "*owner or registrant.*" (Emphasis added.)

[15] The "fallacy of begging the question … consists in taking for granted precisely what is in dispute, in passing off as an argument what is really no more than an assertion of your position." *Wilburn v Commonwealth*, 312 SW3d 321, 334 (Ky 2010) (Noble, J., dissenting). Or, put another way, "[t]he fallacy of begging the question occurs when a claim is dependent on another claim that is implicitly assumed but has not been established in the argument." *Pioneer Ridge Nursing Facility Operations, L.L.C. v Ermey*, 41 Kan App 2d 414, 421; 203 P3d 4 (2009).

The second flaw in Plaintiff's argument with respect to § 3102(2) is that under the doctrine of *in pari materia*, "statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law. *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201, 206 (2015). So if § 3102(2) is relevant it all,[16] the fact that it ties the penalty to a person actually reinforces GEICO's position that § 3113(b) likewise does. After all, both provisions penalize owners or registrants for failing to maintain the security required by § 3101. (See Appellant's Brief, p 10.)

Finally, Plaintiff suggests that the *Barnes* panel – and in turn, the panel here – was compelled to reach a different result by a passage in *Iqbal*, 278 Mich App at 39-40 which suggests that only the motor vehicle needs to be insured in order to satisfy § 3113(b). Although the *Barnes* panel was required by MCR 7.215(C)(2) and (J)(1) to follow any "rule of law established by" *Iqbal*, it is also true that *Iqbal* can only be precedent in light of the facts and arguments then before the Court of Appeals. See *People v Eliason*, 300 Mich App 293, 312; 833 NW2d 357, 370 (2013). "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." *Id.* (citations omitted). As the *Barnes* panel noted, the vehicle in question in *Iqbal* was insured by *an* owner, just not the plaintiff in that case. *Barnes*, 308 Mich App at 7. The *Iqbal* panel "made it clear that it was addressing the problem of whether the statute required 'each and every owner' to maintain insurance on a vehicle." *Barnes*, 308 Mich App at 8, citing *Iqbal*, 278 Mich App at 40 n 2. The

[16] The *in pari materia* doctrine cannot operate to contradict legislative intent or the plain language of a statute. *People v Mazur*, 497 Mich at 314-315. In other words, if the intent of § 3113(b) is clear on its face, the Court has no reason to look to § 3102(2).

problem of a vehicle that was not insured by any owner was not before the Court of Appeals in *Iqbal*. Therefore, anything the *Iqbal* panel said about that fact pattern would have been dicta.[17]

Moreover, whether *Barnes* should have followed *Iqbal* is of no consequence to *this Supreme Court's* determination of whether *Barnes* correctly applied the relevant statutes. If these two published Court of Appeals decisions conflict, it is *Iqbal* that deviates from the statute to the extent the opinion suggests that *anyone's* maintenance of insurance on the vehicle will protect the owners from the consequence of § 3113(b). (See Appellant's Brief, p 12.)

CONCLUSION AND RELIEF REQUESTED

The No-Fault Act requires the "owner or registrant of a motor vehicle" to maintain "personal protection insurance [PIP], property protection insurance, and residual liability insurance." *Barnes*, 308 Mich App at 6. "The no-fault act sets forth a consequence in the event that the required insurance is lacking." *Id.* Specifically, MCL 500.3113(b) provides that "[a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident…[t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by MCL 500.3101 or MCL 500.3103 was not in effect." Here, it is undisputed that Plaintiff Matthew Dye was the owner of the 1997 BMW that he was driving when he was involved in the September 26, 2013 accident. Although the 1997 BMW admittedly was insured by Matthew's father, the Court of Appeals definitively held in *Barnes*, 308 Mich App at 8, that owners cannot "avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance." In

[17] A case is not controlling precedent as to an issue not actually considered. *Sizemore v Smock*, 430 Mich 283, 291 n 15; 422 NW2d 666 (1988). Dicta has been defined as "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication." *Wold Architects and Engineers v Strat*, 474 Mich 223, 233 n 3; 713 NW2d 750 (2006).

other words, "under the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits." *Barnes*, 308 Mich App at 8-9. Therefore, under *Barnes*, the insurance purchased by Paul Dye – which named only Paul Dye as an insured – does not allow Matthew Dye to "avoid the consequences of MCL 500.3113(b)" unless Paul Dye was also an owner of the 1997 BMW, which per the Court of Appeals' holding in this case is to be decided by the jury. While GEICO challenged the Court of Appeals' application of MCR 2.116(C)(10) in this case, as a matter of statutory construction the Court of Appeals' holding was correct, as *Barnes* was correctly decided for reasons set forth above.

For these reasons, GEICO respectfully requests that this Supreme Court affirm the Court of Appeals.

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