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STATE OF MICHIGAN

IN THE SUPREME COURT

KAITLIN HAHN,

Plaintiff-Appellee,
v

GEICO INDEMNITY COMPANY,

Defendant-Appellant,
and

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant.
_____/

SC No. 158141
COA No. 336583
LC No. 16-152229-NI
(Oakland Circuit Court)

BRIEF OF AMICUS CURIAE INSURANCE ALLIANCE OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT GEICO INDEMNITY COMPANY

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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STATEMENT OF THE QUESTION PRESENTED

WHETHER MCL 500.3012 APPLIES ONLY TO A LIABILITY INSURANCE POLICY ISSUED OR DELIVERED IN THE STATE OF MICHIGAN, AND IF SO, WHETHER ITS APPLICATION AUTOMATICALLY CREATES RESPONSIBILITY FOR MICHIGAN PIP BENEFITS?

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STATEMENT OF INTEREST OF AMICUS CURIAE INSURANCE ALLIANCE OF MICHIGAN

Insurance Alliance of Michigan ("IAM")[1] supports the position of Defendant-Appellant GEICO Indemnity Company ("GEICO") with respect to the issue upon which this Court has granted leave to appeal. As indicated in its Motion for Leave, the IAM has an interest in the proper development and maintenance of Michigan automobile no-fault law. This includes as a top priority the proper interpretation and application of legislation affecting such insurance.

As explained in the following pages, the trial court's interpretation of certain portions of Michigan's No-Fault Act, including MCL 500.3012 and 500.3163, unduly expands liability beyond the express words of the subject statutes. The Court of Appeals opinion in this case understandably deferred to the reasoning in its earlier published decision of *Farm Bureau v Allstate Ins Co*, 233 Mich App 38; 592 NW2d 395 (1999), which applied MCL 500.3012 to insurers issuing non-Michigan policies outside the State of Michigan. In so doing, the insurance contracts of carriers such as GEICO are judicially expanded in ways that are not only improper but unexpected and inexplicable. In turn, uncertainty is increased through judicial interpretation which raises the insurers' cost of doing business, cost inevitably passed on to the consumers. Court decisions eliminating certainty do not aid insureds or insurers because neither party can be sure that the express, plain terms of the policy will be enforced. If a policyholder or a claimant is allowed to interject extrinsic evidence of legislative intent absent

[1] IAM is a government affairs and public information association representing more than 90 property/casualty insurance companies/groups and related organizations operating in the State of Michigan. Major insurance companies representing thousands of Michigan employees and millions of customers statewide joined forces to create IAM, which is comprised of two former major statewide organizations, the Insurance Institute of Michigan and the Michigan Insurance Coalition. IAM speaks with a single, unified voice on insurance industry issues, and is a respected spokesperson for Michigan's property and casualty insurance industry.

any ambiguity in the plain terms of the policy, the certainty and predictability necessary for the proper underwriting of risks are eliminated. The ability of insurance companies to continue gathering relevant data and underwrite policies with reasonable premiums will be unduly disrupted.

For these reasons, as more fully explained in the following pages, IAM urges this Court grant leave to appeal and issue the relief sought by GEICO.

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STATEMENT OF FACTS

Amicus Curiae concurs with the Statement of Facts and Proceedings set forth by GEICO Insurance Company in its Application for Leave to Appeal, and does not repeat the facts here as it would be unnecessarily duplicative.

ARGUMENT

MCL 500.3012 APPLIES ONLY TO A LIABILITY INSURANCE POLICY ISSUED OR DELIVERED IN THE STATE OF MICHIGAN, AND IF APPLICABLE OTHERWISE, DOES NOT AUTOMATICALLY CREATE RESPONSIBILITY FOR MICHIGAN PIP BENEFITS.

In this case, the parties agree that the covered vehicle was registered and principally garaged in North Carolina, not Michigan. As such, there is no legal basis for holding GEICO liable for payment of Michigan PIP benefits under MCL 500.3012. This is evident upon a plain reading of the text of MCL 500.3012, as well as the statutes referenced under that provision.

GEICO has explained how § 3012 should be interpreted as limited to an insurance policy issued or delivered in the state of Michigan. (GEICO application, pp 17-19, 20-23). Specifically, § 3012 provides that a policy which violates MCL 500.3004 through 500.3012 shall be deemed to include the provisions required by such sections. However, each of the sections referenced applies to Michigan policies, either issued or delivered in this state. See MCL 500.3004 ("No policy of insurance . . . shall be issued or delivered *in this state*… ." (emphasis supplied)); 500.3006 and 500.3008 ("such liability insurance policies"); and 500.3009 (an automobile liability or motor vehicle liability policy shall not be delivered or issued for delivery *in this state* with respect to any motor vehicle *registered or principally garaged in this state* (emphasis supplied)). From there, section 3012 refers back to "[s]uch a liability policy," i.e., those

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described in sections 3004 through 3012. "Such a liability policy" means those ("such") referenced in the earlier section, from which certain provisions are then to be incorporated ("deemed to include") into the policy. Thus, § 3012 does not apply to insurers issuing non-Michigan policies outside the State of Michigan.

Under this reasoning, the circuit court clearly erred by finding that GEICO bears liability to Plaintiff for payment of Michigan no-fault benefits, under a North Carolina insurance policy issued pursuant to North Carolina law. The Court of Appeals rotely relied on its earlier decision of *Farm Bureau*, which contains virtually no statutory interpretation analysis and makes judicial assumptions about the scope and role of § 3012 which are conspicuously absent from the text of the statute. Additionally, even assuming *arguendo* § 3012 applies to a policy not issued or not delivered in the state of Michigan, the "remedy" imposed by the trial court - automatically creating responsibility for Michigan PIP benefits, rather than incorporating certain statutory provisions into the North Carolina policy - is contrary to the words of the Legislature.

Farm Bureau is a flawed decision that should be overruled by this Court. While ostensibly acknowledging that the primary goal of statutory construction "is to ascertain and give effect to the intent of the Legislature," 233 Mich App at 41-42, the *Farm Bureau* Court feared that "unscrupulous Michigan resident [may] obtain a Michigan no-fault policy at a lower rate with an out-of-state policy," *Id*. at 43, which in turn may not be countenanced by the Court. Thus, the Court concludes:

"§ 3012 [will] not be construed in such a manner… ."

Id. at 43. Then, having determined "scrupulous" as the guiding principle, *Farm Bureau* excuses "unscrupulous" conduct when the insurer is aware it is dealing with a Michigan resident:

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> "We emphasize that a case in which an insurer is aware that it is dealing with a Michigan resident and nevertheless issues an out-of-state automobile insurance policy that does not comply with Michigan's no-fault act would be a far different circumstance."

Id. at 43, n2.

None of this is evident in the terms of § 3012. Instead, as explained, what are referenced – sections 3004 through 3012 – are integrated statutory provisions *that apply to Michigan policies*. *Farm Bureau's* travels into the presumed role and equities of § 3012 cannot govern.

Farm Bureau's statutory interpretation violates well-established Michigan rules regarding statutory interpretation, well-briefed by GEICO, universal to the proper understanding of legislation. Of particular note are the federal cases, including United States Supreme Court opinions, which analysis upends the trial court's improper interpretation of § 3012. With respect to statutes, "[t]he text is what it is, no matter which side benefits." *Bormes v United States,* 759 F3d 793, 798 (CA 7, 2014). The role of the court is to apply the statute as it is written—even if the court believes that some other approach might "accor[d] with good policy." *Burrage v United States,* —— US ——, 134 S Ct 881, 892 (2014) (quoting *Commissioner v Lundy,* 516 US 235, 252, 116 S Ct 647, 133 L Ed2d 611 (1996) (other citation omitted)). *See also Michigan v Bay Mills Indian Community,* —— US ——, 134 S Ct 2024, 2034 (2014) ("This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that ... Congress 'must have intended' something broader."); *Util Air Regulatory Group v EPA,* —— US ——, 134 S Ct 2427, 2446 (2014) ("The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not

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include a power to revise clear statutory terms that turn out not to work in practice."). "The question ... is not what Congress 'would have wanted' but what Congress enacted[.]" *Republic of Argentina v Weltover, Inc,* 504 US 607, 618 (1992). "[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens v Hewitt Assocs,* 508 US 248, 261 (1993) (emphasis in original). "[C]ourts, out of respect for their limited role in tripartite government, should not try to rewrite legislative compromises to create a more coherent, more rational statute. A statute is not 'absurd' if it could reflect the sort of compromise that attends legislative endeavor." *Robbins v Chronister,* 435 F3d 1238, 1243 (CA 10, 2006). "In reviewing statutes, courts do not assume the language is imprecise ... Rather, we assume that in drafting legislation, Congress says what it means." *Sundance Associates, Inc v Reno,* 139 F3d 804, 809 (CA 10, 1998). "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie v US Trustee,* 540 US 526, 542 (2004). These cases reinforce Michigan's plain meaning statutory interpretation approach – the majority rule – which will be undercut if the trial court's decision is accepted.

The trial court's reading of § 3012 on the facts of this case creates uncertainty and liability which simply cannot be expected from the standpoint of the insurer. Here, non-Michigan policies were issued to Zachery Waller, who at all pertinent times was residing in North Carolina and was garaging and operating his insured vehicle[s] in North Carolina. Under North Carolina law, Gen Stat § 20-309, he was required to obtain a North Carolina policy, which eliminates any reasonable interpretation that the policy issued was purported to be a Michigan policy. See GEICO's application, p 28, n 10.

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By imposing terms required of a Michigan insurer on this North Carolina policy, above and beyond those required by § 3012, the trial court effectively rewrote the insurance contract in violation of the cardinal rules of statutory construction. This in turn creates uncertainty in the insurance arena if the consequence defined in § 3012 is expanded to transform wholesale the out-of-state policy into a Michigan no-fault policy. Insurers write their policies with precision to avoid uncertainty that is anathema to the cornerstone of insurance underwriting: evaluating the risks and calculating the premiums accordingly. The position taken by Plaintiff and the trial court is dangerous because it adds a "heaping measure of uncertainty where certainty is essential." *Travelers Ins Co v Budget Rent-A-Car Sys, Inc*, 901 F2d 765, 768-769 (CA 9, 1990). As that court observed:

> "Insurance companies, like other commercial actors, need predictability; they write their contracts in precise language for that reason and they calculate their premiums accordingly."

(*Id.*).[1] Altering contractual terms creates uncertainty affecting the ability of the insurer to calculate risk:

> "When insurance contracts no longer mean what they say, it becomes exceedingly difficult to calculate risks."

(*Id.* at 768-769). Such uncertainty works to the detriment of insurers and policyholders alike:

[1] In *Travelers v Budget,* the district court held that a rental car company was not required to indemnify a restaurant insurer for benefits paid to a car renter who was injured by a vehicle while being handled by a restaurant parking valet. Travelers asked the district court to read into the rental agreement an implied term providing liability coverage to anyone who drove the vehicle with the authorized driver's permission. Both the district court and the Ninth Circuit Court of Appeals disagreed. The principles relied upon by the *Travelers* court are applicable here.

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> "Increasing uncertainty through judicial meddling raises insurers' costs of doing business; inevitably, those costs are passed on to the consumers."

(*Id.* at 769).

By imposing terms that are not otherwise found in the insurance contract, the trial court unnecessarily created the very uncertainty that disrupts the insurance arena by judicial fiat:

> "The primary basis of contract law is to provide certainty to the contracting parties. Court decisions eliminating this certainty do not aid insureds or insurers. Neither party can be sure that express, plain terms will be enforced. If either party can convince the fact-finder that the intent was something other than what the plain terms suggest, these plain terms will be ignored. This is the opposite of insurance."

Tavella, *Are Insurance Policies Still Contracts?* 42 Creighton L Rev 157, 170 (2009).

The trial court's ruling creates uncertainty for another reason. Under *Farm Bureau*, 233 Mich App at 43 n2, relied upon by Plaintiff, the trial court and the Court of Appeals, an insurer providing a policy to a non-Michigan resident must ensure—in the first instance—that there is no set of circumstances under which the policyholder requesting the policy could be deemed a Michigan resident. Even if a policyholder selects a non-Michigan policy, the insurer or the agent is charged with knowing whether the customer may be found to be a Michigan resident. In such circumstances, the insurer and/or the agent finds itself on the horns of a dilemma: Give the policyholder what he or she requests, and hope a court does not read legislation contrary to its express terms, unduly expanding the intended scope of the policy issued; or charge a higher premium because the risk entailed has been enlarged to include Michigan no-fault coverage. Multiply this effect across 50 state lines, and any semblance of predictability is lost. Equally devastating, the logical extension of the trial court's ruling is that each out-of-state insurance policy is suddenly rendered a Michigan policy.

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Consider the situation of an insurer in another state, having already issued an automobile policy in conformity with the laws of that state, being held liable because the policy will be deemed a Michigan no-fault policy when the customer's circumstances suggest that he or she actually needed Michigan no-fault insurance. As GEICO has explained, this consequence is contrary to Michigan law. *Harts v Farmers Insurance Exchange*, 461 Mich 1; 597 NW2d 47 (1999). If it were otherwise, as derived from the cases relied upon by Plaintiff, every insurance agent would be required to do a complete review of the policy with every insured and establish some sort of record to support the conclusion that the insured was advised of and understood the nature, extent and limitations of the policy that was purchased. Specific inquiry would have to be made with respect to potential residency in any state. The sale of insurance across the country would take on much the same formality as taking a plea of guilty in a criminal case. The agent, like the judge in the criminal case, would have to advise the insured of rights and consequences of accepting the policy presented. To memorialize the exchange, it would be necessary for a verbatim record to be made of the discussion and the negotiations. This dynamic would also cut directly across Michigan's well-established rule that written contract language governs. The resulting certitude of the written contract would be subject to the vagaries of oral agreements and the myriad of misunderstandings that arise from such agreements. In modern commercial practice, including the insurance industry, it is essential that the written contract govern. It is designed to eliminate disputes and intended to establish certitude in setting up the agreement of the parties.

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CONCLUSION

If the trial court's and *Farm Bureau's* interpretation of § 3012 is left to stand, parties in Michigan will be less secure in their contract relationships. In fact, without reversal of the trial court's decision, parties to insurance contracts in Michigan and policies issued in other states involving motor vehicles operated in Michigan cannot be safe in the certainty that the contract will be enforced as written, and that the risks reflected in the insurance contract will be those contractually assumed by the insurer and purchased by the insured. Indeed, under the lower court's reasoning, a party disappointed by the explicit terms of an insurance contract will have great incentive to find—perhaps even create—facts that might permit escape from those explicit terms, entirely innocent of acts of the insurer, to secure payment, for any number of reasons, on the claims.

RELIEF REQUESTED

Amicus Curiae Insurance Alliance of Michigan joins in the Relief Requested found in GEICO Indemnity Company's Application for Leave to Appeal.

Respectfully submitted,

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PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Monique M. Vanderhoff, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on February 1, 2019, she caused to be served a copy the Brief of Amicus Curiae Insurance Alliance of Michigan in Support of Defendant-Appellant GEICO Indemnity Company and Proof of Service/Statement Regarding E-Service as follows:

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