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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.

______________________________________/

Supreme Court No. 158141

Court of Appeals No. 336583

Oakland County Circuit Court No. 16-152229-NI

CORRECTED PRINTING OF
DEFENDANT-APPELLANT GEICO INDEMNITY COMPANY'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

In its Application for Leave to Appeal to this Court, Defendant-Appellant, GEICO Indemnity Company, posed the following as its principal question presented:

> Should the Court overrule *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38 (1998), and its §3012-based insurance coverage rule, under which non-Michigan auto insurance policies are deemed to provide Michigan no-fault coverage when the insurer knows–or has reason to know–that its policy purchaser resides in Michigan, where the rule is conclusively unsupported by the text of the statute and effectively imposes a duty on agents of non-Michigan insurers that conflicts with well-established Michigan law?

(Application for Leave to Appeal, July 24, 2018, p. vii).

In support of its contention that the answer to the question presented is, "Yes," GEICO's application brief proceeded to show that MCL 500.3012 manifestly does *not* authorize reformation of a non-Michigan auto policy to impose Michigan no-fault insurance coverage on the policy; that the Court of Appeals in *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38; 592 NW2d 395 (1998), clearly erred in holding that it does; and that, accordingly, the Court should overrule the *Farm Bureau* reformation rule as legally insupportable and inconsistent with Michigan law.

In its Order of July 26, 2019, the Court has directed additional briefing on the following questions:

> whether (1) MCL 500.3012 permits the reformation of a non-Michigan insurance contract to comply with the requirements of the Michigan no-fault act, MCL 500.3101 *et seq*; and (2) [whether] *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38 (1998) was correctly decided, and if not, whether it should be overruled.

(Order, No. 158141, July 26, 2019).

Defendant GEICO answers the first of the Court's questions in the negative, for the reasons already detailed in its principal application brief and reply brief and as further articulated below. The actual content of §3012 and of the preceding sections it references is specific and unambiguous with respect to the policy requirements created and the policies to which they apply. GEICO will challenge Plaintiff-Appellee Hahn to identify any text within those provisions lending any support whatsoever to the reformation rule created by the *Farm Bureau* decision.

In answer to the Court's second question, Defendant GEICO will reiterate that, while the ultimate outcome in *Farm Bureau* was a holding in favor of the defendant insurer (i.e., Michigan no-fault coverage was *not* imposed on the Indiana auto policy issued by Allstate), the reformation rule announced by the *Farm Bureau* opinion is legally indefensible and must be overruled. The following discussion will expand on this contention.

<u>ARGUMENT</u>

> **The Court should overrule the *Farm Bureau* court's §3012-based reformation rule since it is conclusively unsupported by the text of the statute, is otherwise unjustifiable, and is not subject to any reliance interests that could in any way mitigate against abolishing the rule.**

In its principal brief to this Court, GEICO quotes and discusses the actual text of MCL 500.3012, the statute on which *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38; 592 NW2d 395 (1997), derived the reformation rule at issue here. Under the *Farm Bureau* rule, an insurer (outside the State of Michigan) is deemed to violate Michigan law if it issues a non-Michigan auto policy to a person it knows or has reason to know is a

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Michigan resident, in which case the issued policy is transformed to provide Michigan no-fault coverage. *Id*., 233 Mich App at 41-42 and 43 n 2. GEICO's brief also quotes and discusses the text of the provisions §3012 incorporates by reference, "sections 3004 through 3012",[1] all of which identify precisely what the statutes require and the insurance policies to which they apply.

In summary, the dictates of these statutes are (1) that insurers will remain responsible for an insured's liability despite the insured's bankruptcy or insolvency (§3004 and §3006), (2) that "notice" to an insurer's authorized agent shall constitute notice to the insurer, and that notice deadlines shall be subject to an "as soon as reasonably possible" exception (§3004 and §3008), (3) that auto liability policies must provide bodily injury liability coverage of at least $20,000 per person and $40,000 per accident, and property damage liability coverage with limits of at least $10,000 (§3009), and (4) that policies advise insureds to report certain fire or explosion losses to law enforcement authorities (§§3010 and 3011). Further, the text of these statutes make clear that the policies to which these dictates apply are liability insurance policies *issued in Michigan*. See, §3004 (policies "issued or delivered *in this state*") (emphasis added) and §3009 (policies "delivered or issued for delivery *in this state* with respect to any motor vehicle *registered and principally garaged in this state*") (emphasis added). (Section 3012 directly incorporates these limitations –

[1] MCL 500.3004, MCL 500.3006, MCL 500.3008, MCL 500.3009, MCL 500.3010 and MCL 500.3011. (As MCL 500.3009 was amended June 11, 2019, along with numerous provisions of the no-fault act, all references in this brief to §3009 and to any section of the no-fault act, MCL 500.3101 *et seq*, are to the pre-amended version of the statutes.)

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"*Such a liability insurance policy* issued in violation of sections 3004 through 3012...") (emphasis added).

While GEICO has addressed and discussed the actual text of these provisions, to date Plaintiff-Appellee has failed to do so. GEICO submits that there is a fatal absence of textual support in the statutes from which the *Farm Bureau* court derived its reformation rule – the rule on which Plaintiff's sole remaining claim in this action is based. Query whether Plaintiff concedes that the cited statutes provide zero support for the *Farm Bureau* reformation rule. If not, GEICO would challenge Plaintiff to identify the actual text in §3012 or the preceding sections that support her claim, while noting that courts "discern the Legislature's intent by examining the language used," and that when its language "'is clear and unambiguous, the statute must be enforced as written and no further construction is permitted.'" *Hamed v Wayne County*, 490 Mich 1, 8; 803 NW2d 237 (2011); *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 840 NW2d 743 (2013), quoting *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

Notably, in discerning its reformation rule, the court in *Farm Bureau* itself did not rely on any specific text within §3012. Rather, citing instead to what it perceived to be "the basic purpose of §3012," *Farm Bureau* fashioned the rule as applicable to any insurer issuing a non-Michigan insurance policy "*purporting to be a Michigan policy that complies with Michigan law*," in which case, according to *Farm Bureau*, the policy will be treated "as such" (i.e., as if it were, in fact, a Michigan policy, complying with the dictates of the Michigan no-fault act). *Farm Bureau*, 233 Mich App at 41-42 (emphasis in original). Here

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again, GEICO would challenge Plaintiff to articulate how, in this case, GEICO is purportedly guilty of issuing Mr. Waller's North Carolina policy while "purporting" to issue a policy providing Michigan no-fault insurance coverage.

Plaintiff's only response, GEICO suspects, will be that GEICO, allegedly aware that Waller was from Michigan, was somehow *obligated* to issue him a Michigan no-fault insurance policy, whether he sought to purchase one or not. See Plaintiff-Appellee's Answer to the Application for Leave to Appeal, 12/11/2018, p. 32 at n. 22. But there simply is no authority for this proposition. As previously shown,[2] there is no dispute that Waller was required under North Carolina law to purchase the auto insurance policy he in fact purchased from GEICO. If he separately was required to maintain Michigan no-fault insurance on his North Carolina-registered vehicle, nothing compelled him to purchase such insurance from GEICO nor compelled GEICO to sell him such a policy.

A recent published opinion of the Court of Appeals demonstrates that this premise of Plaintiff's entire theory is fatally flawed. The court in *Johnson v USA Underwriters*, __ Mich App __; __ NW2d __; 2019 WL 2111326 (Court of Appeals No. 340323, May 14, 2019), rejected the notion that an automobile insurance policy – even one issued *in Michigan* – that did not include the coverages mandated by MCL 500.3101(1) (PIP, PPI, and residual BI liability insurance) but, rather, included only the particular coverages requested by the customer (collision and comprehensive) was not in any way contrary to Michigan law,

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[2] See GEICO's Application for Leave to Appeal, pp. 7, 28.

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or the no-fault act in particular, since the policy, by its terms, did not purport to be one providing PIP, PPI or residual BI liability coverage under Michigan law.

In *Johnson*, a bicyclist was injured in a motor vehicle accident and, having no other access to a no-fault insurance policy, filed his claim with the Michigan assigned claims plan, which in turn assigned the claim to Citizens Insurance Company. Citizens eventually learned that an insurance policy had been issued by USA Underwriters for the Chevy Impala involved in the accident, albeit one providing only collision and comprehensive coverage. Citizens nevertheless maintained that USA was responsible for the injured person's PIP benefits – on the premise that Michigan public policy mandated that the USA policy be reformed to provide Michigan's mandatory auto insurance coverages. But the Court found no support for this notion:

> The parties readily acknowledge that there are circumstances when a person may want to purchase limited coverages that do not meet the requirements of the no-fault act. For instance, limited coverage is entirely appropriate when the vehicle will not be operated on public roads *or if*, as asserted by [the] insurance agent, *the insured can obtain less expensive mandatory and optional coverages from multiple carriers*. ***MCL 500.3101(1) puts the onus on the insured to obtain the necessary coverages to meet the requirements of the no-fault act. The legislature has not imposed the same duty on insurers***. ... Here, USA's policy is crystal clear that it included coverage for physical damage only and did not meet the requirements of the no-fault act. ... The obligation is on the owner or registrant to procure the proper no-fault coverages. MCL 500.3101(1). Therefore, the trial court erred when it reformed USA's policy as violative of public policy.

Johnson v USA Underwriters, __ Mich App at __, slip op at 10-11 (emphasis added).

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Just as the policy issued to the vehicle owner in *Johnson* was clear that it did not contain Michigan's mandatory PIP, PPI and residual BI liability coverages, the North Carolina auto policy issued to Waller in this case likewise contained no hint or suggestion that it contained any Michigan no-fault coverages. If Waller was required to purchase Michigan no-fault automobile insurance for his vehicle *in addition* to the North Carolina insurance policy he did purchase (for a vehicle properly registered in North Carolina), it was Waller's obligation to act so as to comply with this requirement. As in *Johnson*, *supra*, this responsibility falls on the vehicle owner/registrant, not the insurer.

Thus, GEICO respectfully submits that §3012 provides no authority for the *Farm Bureau* reformation rule under which a non-Michigan insurance contract can be reformed to comply with the requirements of the Michigan no-fault act, and that the *Farm Bureau*'s rationale in formulating such a rule, relying vaguely on what it perceived to be the "basic purpose" of §3012, is legally invalid.

The Court, therefore, should overrule the *Farm Bureau* reformation rule. In *Hamed v Wayne County*, 490 Mich at 25-28, the Court discerned from prior cases a multi-factored test for determining when overruling precedent is appropriate. The Court stated preliminarily that, to be clear, it is under no obligation to let stand an erroneous decision in the interest of stability and continuity. *Id.*, 490 Mich at 25, citing *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). It then articulated the test for determining whether to overrule precedent: the Court must examine, first, whether the decision at issue was wrongly decided; second, whether the challenged holding "defies 'practical

workability'"; and third, "whether reliance interests would work an undue hardship" in the event the holding in question is overruled. *Hamed*, *supra*, citing *Robinson*, *supra*.

In this instance, GEICO has shown in its principal briefs to this Court, and as supplemented above, that the reformation rule announced by the Court of Appeals in *Farm Bureau* is indeed legally invalid. While the ultimate outcome in *Farm Bureau* was that the defendant insurer was *not* responsible for paying Michigan PIP benefits on the non-Michigan auto policy it issued, this was only because the facts of the case were found insufficient to meet the requirements of the reformation rule announced by the opinion. Yet the reformation rule itself, GEICO submits, is insupportable and must be disavowed.

On the question of whether the *Farm Bureau* reformation rule "defies 'practical workability'" (*Hamed*, *supra*), GEICO submits that it does. GEICO has previously detailed (see Application for Leave to Appeal, pp. 24-26, and GEICO's Reply Brief in Support of its Application for Leave to Appeal, pp. 7-8) that the rule fabricated in *Farm Bureau* unavoidably imposes an onerous duty on non-Michigan insurance agents not only to second-guess their customers as to what insurance products they should be buying, but to discern from the facts presented whether it appears the person might be domiciled in a state other then where the vehicle is registered, and then to counsel the customer, based on the agent's imputed knowledge of the other state's insurance laws, concerning what insurance the customer *should* be buying – whether the customer seeks such advice or not. As amicus curiae Insurance Alliance of Michigan has observed, such a duty unavoidably puts the insurance agent "on the horns of a dilemma":

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> Give the policyholder what he or she requests [in this case, a presumably modestly priced North Carolina insurance policy], 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.

(Brief of Amicus Curiae Insurance Alliance of Michigan in Support of Defendant-Appellant GEICO, 2/1/19.)

On the question of whether there are any potential "reliance interests" that would suffer undue hardship if the Court were to overrule the *Farm Bureau* reformation rule, the answer, unequivocally, is "no." Initially, the rule being challenged is one announced *not* by the Supreme Court but the Court of Appeals and thus is not nearly as subject to strong reliance interests as if the rule had emanated from this Court. See *Covenant Medical Center, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 200-201; 895 NW2d 490 (2017). More fundamentally, however, it is difficult even to conceive of any class of persons or interests who likely would rely on the continued existence of a rule of law under which the explicit terms of a contract (here, Waller's North Carolina insurance policy) do *not* mean what they say.

And finally, the *Farm Bureau* reformation rule is even less likely to have engendered any reliance interests because the rule may not even qualify as a "holding" in the first place given the ultimate outcome of the case. The rule may constitute only obiter dictum. Although the Court of Appeals in this case concluded otherwise (**Appellant's Appendix 42a** – unpublished per curiam opinion of the Court of Appeals No. 336583, June 12, 2018,

at 6), GEICO submits that the rule of law announced in *Farm Bureau* is no more a binding holding of the court than was the rule of law announced in *Roberts v Auto-Owners Ins Co*, 422 Mich 594; 374 NW2d 905 (1985), concerning whether Michigan recognizes a cause of action for intentional infliction of emotional distress. There, this Court laid out the elements of such a tort, but since the presented facts were found to fall short of meeting them, the Court held that it was "*constrained*" from adopting the cause of action "by the well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Roberts*, 422 Mich at 597-598 (emphasis added).

Whether the rule of law announced in *Farm Bureau* technically qualifies as precedent, as the lower court in this case held, or constitutes only dictum, as GEICO has maintained, is now largely moot since in no event is this Court bound by a holding of the Court of Appeals. Yet any argument that reliance interests would be prejudiced by "overruling" *Farm Bureau* disappears altogether if the challenged "rule" is mere dictum in the first place. But since the Court of Appeals has demonstrated that it regards the §3012-based reformation rule as one binding as a matter of law, corrective action by this Court surely is warranted.

In sum, contrary to the single remaining pillar of Plaintiff's claim against GEICO, MCL 500.3012 does *not* impose Michigan no-fault insurance coverage on *any* insurance policy, let alone one issued in another state in compliance with the laws of that other state. The issue presented to this Court is purely one of law, and its resolution is necessary both

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for a proper determination of the case at bar and, more broadly, to clarify the statutory obligations of all Michigan-authorized insurers who *do* rely on statutory mandates to properly assess risks and maintain premiums accordingly. This Court should issue a ruling that GEICO is entitled to summary disposition in this matter, expressly disavowing the *Farm Bureau* reformation rule.

RELIEF REQUESTED

For all the foregoing reasons and those more fully detailed in its principal application briefs, Defendant-Appellant, GEICO Indemnity Company, respectfully requests that this Honorable Court reverse the judgments of the lower courts and direct that summary disposition be granted in favor of GEICO.

Respectfully submitted,

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