STATE OF MICHIGAN

IN THE SUPREME COURT

KAITLIN HAHN,

Plaintiff-Appellee,

v

GEICO INDEMNITY COMPANY,

Defendant-Appellant.

Supreme Court No. 158141

Court of Appeals No. 336583

Oakland County Circuit Court
No. 16-152229-NI

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **Whether (A) the Supreme Court proceeds from the incorrect premise that the GEICO policy constitutes a "non-Michigan insurance contract," because a remand will most likely confirm the policy was mailed to Zach Waller at the Grass Lake, Michigan address listed on the declarations and, accordingly, is a Michigan insurance contract; (B) because GEICO did not provide Waller notice it was deleting mandatory PIP coverage under MCL 500.3009(4), this Michigan policy must be reformed to include first-party coverage mandated by the no-fault act; and (C) Judge Beckering's dissent in *Johnson v USA Underwriters*, __ Mich App __; __ NW2d __; 2019 WL 2111326 (No. 340323, May 14, 2019) (Plaintiff's appendix, p 16b) confirms that PIP coverage for a Michigan automobile insurance policy is mandatory and may only be deleted with notice under MCL 500.3009(4), establishing that her dissent should be adopted and the majority opinion overruled.**

II. **Whether, because Zach Waller was a Michigan resident for whom Michigan PIP coverage was mandated and GEICO is a Michigan PIP insurer, MCL 500.3012 permits the reformation of the GEICO policy to comply with the requirements of the Michigan no-fault act whether or not it was a non-Michigan insurance contract.**

III. **Whether *Farm Bureau v Allstate Ins Co* was correctly decided and, even if erroneous, should not be overruled.**

INTRODUCTION

This Court's July 26, 2019 MOA order instructed the parties to file supplemental briefs "addressing 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) *Farm Bureau Ins Co v Allstate Ins Co,* 233 Mich App 38[; 592 NW2d 395] (1998), was correctly decided, and if not, whether it should be overruled." (7/26/19 MOA order).

The order proceeds from the incorrect premise that the GEICO policy constitutes a "non-Michigan insurance contract." Because of the parties' limited discovery agreement, the record is incomplete. (See COA opinion, p 5, GEICO appendix, p 41a). A remand will most likely confirm that GEICO mailed, and therefore delivered, the policy to Zach Waller at his Grass Lake, Michigan address repeatedly listed in the declarations. This renders the policy a Michigan insurance contract. Because GEICO failed to provide Waller documentary notice it was deleting statutorily mandated PIP coverage under MCL 500.3009(4), the policy must be reformed to include that coverage pursuant to MCL 500.3012 and Judge Beckering's dissent in *Johnson v USA Underwriters*, __ Mich App __; __ NW2d __; 2019 WL 2111326 (No. 340323, May 14, 2019) (Plaintiff's appendix, p 16b). The majority decision in *Johnson* should be overruled.

Even if the GEICO policy is a "non-Michigan insurance contract," MCL 500.3012 permits reformation to comply with the requirements of the no-fault act. MCL 500.3012 unambiguously requires enforcement of MCL 500.3009(4) which, notwithstanding whether the policy was issued or delivered in Michigan or whether the vehicle was principally garaged in this state, allows an insurer to delete statutorily mandatory PIP

coverage only if it provides the insured documentary evidence of the deletion. *Farm Bureau, supra*, was correctly decided and should not be overruled.

ARGUMENT

I. THE COURT PROCEEDS FROM THE INCORRECT PREMISE THAT THE GEICO POLICY CONSTITUTES A "NON-MICHIGAN INSURANCE CONTRACT." A REMAND WILL MOST LIKELY CONFIRM THE POLICY WAS MAILED, AND THEREFORE DELIVERED, TO ZACH WALLER AT THE GRASS LAKE, MICHIGAN ADDRESS LISTED ON THE DECLARATIONS AND, ACCORDINGLY, IS A MICHIGAN INSURANCE CONTRACT. BECAUSE GEICO DID NOT PROVIDE WALLER NOTICE IT WAS DELETING MANDATORY PIP COVERAGE AS REQUIRED UNDER MCL 500.3009(4), THIS MICHIGAN POLICY MUST BE REFORMED TO INCLUDE FIRST-PARTY COVERAGE MANDATED BY THE NO-FAULT ACT. JUDGE BECKERING'S *JOHNSON* DISSENT CONFIRMS THAT PIP COVERAGE FOR A MICHIGAN AUTOMOBILE INSURANCE POLICY IS MANDATORY AND MAY ONLY BE DELETED WITH NOTICE UNDER MCL 500.3009(4). HER DISSENT SHOULD BE ADOPTED AND THE MAJORITY OPINION OVERRULED.

Argument Summary

The *Farm Bureau* rule authorizes reformation, pursuant to MCL 500.3012, of "out-of-state" automobile insurance policies issued to insureds whom the carrier knew or should have known were Michigan residents required to maintain personal protection insurance ("PIP") benefits under the no-fault act, MCL 500.3101 *et seq*. *Id*, 233 Mich App at 43 n 2. Before addressing whether MCL 500.3012 authorizes reformation of an "out-of-state" policy and *Farm Bureau* was properly decided, Plaintiff must correct the erroneous premise in this Court's MOA order that the GEICO policy constitutes a "non-Michigan insurance contract." GEICO most likely mailed, and therefore delivered, the policy to Zach Waller at the Grass Lake, Michigan address listed on the declarations. (GEICO policy declarations, GEICO appendix, pp 56a, 58a). Contrary to the MOA order's premise, this would render the policy a Michigan insurance contract.

MCL 500.3009(4) unambiguously allows an insurer to "delete" mandatory PIP coverage under MCL 500.3101 only if "the insurer shall send documentary evidence of the deletion to the insured."[1] MCL 500.3012 specifies that policies are deemed to include provisions required under MCL 500.3009(4).

In its supplemental brief, GEICO extensively relies on the majority opinion in *Johnson v USA Underwriters*, __ Mich App __; __ NW2d __; 2019 WL 2111326 (No. 340323, May 14, 2019) (Plaintiff's appendix, p 16b). (GEICO supplemental brief, pp 5-7). GEICO asserts that the *Johnson* majority declared "that an automobile insurance policy – even one issued *in Michigan*" – does not have to include "the coverages mandated by MCL 500.3101(1) …." (Id, pp 5-6; original emphasis). In her *Johnson* dissent, Judge Beckering demonstrated that "an insurance company providing automobile insurance in Michigan" must provide "the statutorily mandated coverages pursuant to MCL 500.3101(1) (and) … delete the mandatory coverages and maintain comprehensive coverage only if the car is not going to be driven or moved on a highway." *Johnson,* 2019 WL 2111326, at *17 (Beckering, J, dissenting) (Plaintiff's appendix, p 30b).

GEICO never sent Zach Waller "documentary evidence" that PIP coverage had been deleted.[2] Accordingly, based on MCL 500.3009(4), MCL 500.3012, and Judge

[1] As established in Argument II, MCL 500.3009(4) requires formal documentary notice deleting mandatory PIP benefits without regard to where the policy was issued/delivered or the vehicle was principally garaged. MCL 500.3012 therefore allows reformation of the policy to enforce MCL 500.3009(4) even if this is a "non-Michigan insurance contract."

[2] This is in contrast to *Johnson*, where the carrier provided documentary notice that the policy omitted PIP coverage. *Id,* 2019 WL 2111326, at *1 (Plaintiff's appendix, p 17b). Because GEICOC failed to provide Waller requisite documentary notice of the deletion under MCL 500.3009(4), the issue whether, or under what circumstances, a carrier may

Beckering's *Johnson* dissent, this case should be remanded for confirmation that the policy was delivered to Mr. Waller at his Michigan address and therefore constitutes a Michigan insurance contract which must be reformed to include mandatory PIP coverage under the no-fault act. The *Johnson* majority decision should be overruled.

A. A remand will likely confirm that GEICO mailed to policy to Zach Waller his Grass Lake, Michigan address listed on the declarations, establishing that the policy constitutes a Michigan insurance contract.

The Court's premise in its MOA order that the GEICO policy is a "non-Michigan insurance contract" most likely is incorrect. A remand will almost certainly confirm that GEICO mailed the policy to Zach Waller at this Grass Lake, Michigan address. This will establish that the policy was delivered in Michigan and constitutes a Michigan insurance contract.

It is national hornbook law that an insurance policy is made and is subject to the laws of the state where it is delivered. 2 Couch on Ins § 24:8. In particular, under Michigan law, the requirements of the no-fault act apply to automobile polices "issued or delivered to any person in this state …." MCL 500.2236(1); *Cruz v State Farm Mut Automobile Ins Co,* 466 Mich 588, 599 n 15; 648 NW2d 591 (2002) (Concluding that the Commissioner of Insurance has a duty under MCL 500.2236(1) to determine that policies issued or delivered in this state comply with all the statutory requirements of the no-fault act.).[3]

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delete PIP coverage is not material in this case. Whatever the parameters in which PIP coverage may be deleted, an insurer may do so only after providing documentary notice under MCL 500.3009(4).

[3] Additionally, MCL 500.2020 establishes mandatory cancellation rules for policies "issued or delivered in this state by an insurer authorized to do business in this state …." MCL 500.2020 applies to no-fault insurance policies. *Titan Ins Co v Hyten*, 491

National hornbook law also is clear that "the mailing of the policy to the insured is a delivery to him or her …" 1A Couch on Ins § 14:15; see also 44 CJS Insurance § 519 ("An insurance policy is deemed delivered to the insured when it is deposited in the mail, duly directed to the insured at her proper address, and with postage prepaid, even if the insured never receives it."); *Dean v Marvin*, 331 Mich 231, 233; 49 NW2d 148 (1951), superseded by statute on other grounds, noted in *Nowell v Titan Ins Co*, 466 Mich 478; 648 NW2d 157 (2002) ("The policy … was issued by the insurance company and delivered by mail to (defendant's) home address").

While the record is incomplete,[4] GEICO almost certainly mailed the four-page declarations and twenty-two page policy, (GEICO declarations and policy, GEICO appendix, pp 56a-81a), to Zach Waller at his Grass Lake, Michigan address. It is unrebutted that, at all times pertinent, Zach Waller was a Michigan resident and maintained a Michigan driver's license. (Waller dep, 25:12-25:15, 32:20-32:22, GEICO appendix, pp 137a, 139a; Police report, p 1, GEICO appendix, p 53a; DD Form 2058, GEICO appendix, p 86a). Even more, the policy's declarations repeatedly list Zach's address as "5750 Saint John Road, Grass Lake MI 49240-9568." (GEICO policy declarations, GEICO appendix, pp 56a, 58a; emphasis added). Since this is Waller's only residence address listed on the declarations, where else would GEICO have mailed the policy?

Mich 547, 566-567; 817 NW2d 562 (2012). GEICO concedes it was and is authorized to issue Michigan PIP policies under MCL 500.3163. (GEICO application, p 4).

[4] As the Court of Appeals explained, "the parties conducted discovery under an agreement to limit the subject matter of depositions" to the issues of Plaintiff's and Waller's residency. (COA opinion, p 5, GEICO appendix, p 41a). Other material issues, such as where the policy was delivered or whether GEICO knew or should have known Mr. Waller was a Michigan resident, were not resolved.

If GEICO mailed Waller the policy to the Grass Lake address, it "delivered" the policy in Michigan. Under Michigan and national law, and contrary to the premise in this Court's MOA order, this will render the policy a Michigan insurance contract, governed by Michigan law.

As demonstrated below, as required under MCL 500.3009(4), as enforceable under MCL 500.3012, and for reasons established in Judge Beckering's *Johnson* dissent, if this is a Michigan policy, GEICO was required to include statutorily mandated PIP coverage and could delete it only upon providing Mr. Waller documentary notice of the deletion. Plaintiff asks this Court to enforce MCL 500.3009(4) under MCL 500.3012, adopt Judge Beckering's dissent, overrule the *Johnson* majority opinion, and remand this case for completion of discovery – including on the issue where GEICO delivered the policy.

B. Pursuant to MCL 500.3009(4), MCL 500.3012 and Judge Beckering's well-reasoned *Johnson* dissent, which this Court should adopt, a Michigan automobile insurance contract must include statutorily mandated PIP coverage unless the carrier sends the policy holder documentary evidence that this coverage has been deleted.

If, as most likely occurred, GEICO delivered the policy to Mr. Waller in Michigan, it is a Michigan insurance contract under which PIP coverage is mandated. At all times pertinent, MCL 500.3009(4) stated: "If an insurer deletes coverage from an automobile insurance policy pursuant to [MCL 500.3101], the insurer shall send documentary evidence of the deletion to the insured."[5] As demonstrated in Argument II, MCL

[5] While other subsections of MCL 500.3009 were substantively amended in in PA 2019, No. 21 and PA 2019, No. 22, MCL 500.3009(4) was only stylistically changed ("pursuant to" was replaced with "under").

500.3009(4) (which does not include the geographic limiting language of subsection (1)) requires formal documentary notice that mandatory PIP coverage has been deleted without regard to where the policy was issued/delivered or the vehicle was principally garaged. It undoubtedly requires this notice for deletion of PIP coverage in a Michigan policy. MCL 500.3012 provides, in material part:

> Such a liability insurance policy issued in violation of sections 3004 through 3012 shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties and obligations of the insured, the policyholder and the injured person shall be governed by the provisions of such sections ….

Generally, when interpreting a statute, courts first focus on the plain language of the statute with the goal of giving effect to the intent of the Legislature. *People v Pinkney*, 501 Mich 259, 266-268; 912 NW2d 535 (2018). Courts must read individual words and phrases in the context of the entire legislative scheme, examining the statute as a whole. *Id.* When the language of the statute is unambiguous, the statute must be enforced as written, and no further judicial construction is required or permitted. *Id.*

GEICO acknowledges that "the statutes at MCL 500.3004 through MCL 500.3012 apply to 'liability insurance policies' issued or delivered in Michigan and thus naturally apply to Michigan no-fault policies since those are policies that provide liability insurance." (GEICO 1/21/19 reply brief, p 9). The no-fault act "is remedial in nature and must be liberally construed in favor of persons intended to benefit thereby." *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 179; 617 NW2d 735 (2000), quoting *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 61; 404 NW2d 199 (1987).

MCL 500.3012 unambiguously provides that policies issued in violation of MCL 500.3004-MCL 500.3012 are deemed to include coverages required by such sections.

This includes MCL 500.3009(4), which addresses mandatory PIP coverage under MCL 500.3101. Subsection (4) allows an insurer to delete PIP coverage only if it sends "documentary evidence of the deletion to the insured."

By specifically precluding deletion of coverage mandated under MCL 500.3101 unless the insurer sends "documentary evidence of the deletion to the insured," MCL 500.3009(4) expressly mandates that automobile policies (whether or not issued/delivered in Michigan) include PIP coverage. The Legislature could not have intended any other purpose.

GEICO's supplemental brief extensively relies on the majority opinion in *Johnson, supra*, for the proposition "that an automobile insurance policy – even one issued *in Michigan*" does not have to include "the coverages mandated by MCL 500.3101(1) …." (GEICO supplemental brief, pp 5-6; original emphasis). The *Johnson* majority opinion does not cite or address MCL 500.3009(4).

In her well-reasoned dissent, Judge Beckering establishes that "an insurance company providing automobile insurance in Michigan" must provide "the statutorily mandated coverages pursuant to MCL 500.3101(1) (and) … delete the mandatory coverages and maintain comprehensive coverage only if the car is not going to be driven or moved on a highway." *Johnson,* 2019 WL 2111326, at *17 (Beckering, J, dissenting) (Plaintiff's appendix, p 30b). As indicated below, Judge Beckering bases her opinion, in material part, on MCL 500.3009(4).

In *Johnson*, Citizens Insurance Company, the Michigan Automobile Insurance Placement Facility's assignee, sought reformation of a "collision and comprehensive" coverage policy issued to the plaintiff by USA Underwriters "to include mandatory no-fault coverages as a matter of law and public policy." *Id*, 2019 WL 2111326, at *2

(Plaintiff's appendix, p 17b). The trial court granted Citizens' motion concluding, in part, that "the policy violates the Michigan No-Fault Act" and must be reformed. *Id*.

The Court of Appeals majority reversed, holding that USA Underwriters' practice of selling "optional insurance coverages is not violative of Michigan law." *Id* at *7 (Plaintiff's appendix, p 22b). The majority ruled that (a) MCL 500.3101(1) "is clear that an insurer providing mandatory no-fault coverages has the discretion to 'allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion' so long as the 'motor vehicle ... is not driven or moved on a highway[,]'" *Id* at *6 (Plaintiff's appendix, p 20b); (b) under MCL 500.2102(2)(c), "the no-fault act does not define automobile insurance as only those policies that include the mandatory coverages[,] (but) recognizes that automobile insurance sold in the State of Michigan can be a policy that includes 'any' of the listed coverages, including '[i]nsurance coverages customarily known as comprehensive and collision[,]'" *Id* (Plaintiff's appendix, p 21b); and (c) the financial responsibility act, MCL 257.501 *et seq*, in particular MCL 257.520(g) and (j), provides for "optional" coverages and authorizes satisfaction of mandatory coverages through multiple policies, *Id*.

In her dissent, Judge Beckering indicated that the issue was "whether an insurance company can sell the non-mandatory portions of a car insurance policy in Michigan and yet not provide any of the mandatory coverages required by Michigan's no fault law." *Id* at *9 (Beckering, J, dissenting) (Plaintiff's appendix, p 24b). Disagreeing with the majority, Judge Beckering concluded that the policy had to be reformed to provide statutorily mandated PIP coverage, because:

1. Michigan insurance companies "are required to provide … (PIP) benefits … for certain expenses and losses." *Id* at *9, citing, in part, *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012) (Plaintiff's appendix, p 24b).

2. "An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the [no-fault] act." *Id* at *11, citing *Dobbelaere v Auto-Owners Ins. Co*, 275 Mich App 527, 530; 740 NW2d 503 (2007) and MCL 500.3105(1) (Plaintiff's appendix, p 26b).

3. "MCL 500.3101(2)(a) defines 'automobile insurance' as meaning 'that term as defined in [MCL 500.]2102.' MCL 500.2102 broadly defines 'automobile insurance' to include insurance 'customarily known as comprehensive and collision.' MCL 500.2102(2)(c). Thus, a comprehensive and collision insurance policy is an "an automobile insurance policy" as described in MCL 500.3101(1).[6] Reading the plain language in the third sentence of MCL 500.3101(1), an *insurer* may only *delete* the statutorily mandated coverage from an automobile insurance policy and maintain the comprehensive coverage portion under one condition. In other words, an automobile insurance policy *starts* with the mandatory coverages, because the word "delete" necessarily means initial inclusion. An insurer may only *delete* those mandatory coverages *if* the motor vehicle is not driven or moved on a highway." *Id* at *12 (footnote number omitted; original emphasis) (Plaintiff's appendix, p 26b).

4. "I interpret MCL 500.3101(1) of the no-fault act to mean that an insurer may not sell an automobile insurance policy in Michigan – including the one in question – without covering the statutorily required minimum coverages, absent circumstances not present here (*i.e.* for a car that is not going to be driven or moved on a highway)." *Id* at *12. This interpretation of MCL 500.3101(1) "is further bolstered by" MCL 500.3009(4), which states that, "if an insurer *deletes* coverage from an *automobile insurance policy* pursuant to section [MCL 500.]3101, the insurer shall send documentary evidence of the deletion to the insured." *Id* at *12-*13 (original emphasis) (Plaintiff's appendix, pp 26b-27b).

[6] Judge Beckering notes that "MCL 500.3206, which pertains to cancellation of automobile liability policies, defines 'policy of automobile insurance' as used in that chapter to mean "a policy insuring private passenger automobiles ... or that portion of a combination policy which insures private passenger automobiles.' Put simply, an 'automobile liability policy' and a policy insuring private passenger automobiles is one and the same thing." *Id* at 12 n 8 (Plaintiff's appendix, p 26b).

5. By addressing "'automobile insurance policies' and under what circumstances an insurer may *delete* the requisite statutory minimum coverages from an automobile insurance policy[,] MCL 500.3101 and MCL 500.3009(4) implicitly require every automobile insurance policy in Michigan to contain the requisite minimum no-fault coverage at the outset, whereafter optional, or non-mandatory, coverage may be added to that policy, "the rights and limitations of [which] are purely contractual and are construed without reference to the no-fault act." *Id* at *13, quoting *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005) (Plaintiff's appendix, p 27b).

6. "More explicitly, MCL 500.3131, pertaining to residual liability insurance, provides that "[t]his section shall apply to *all* insurance contracts in force as of October 1, 1973, or entered into after that date." MCL 500.3131(2) (emphasis added). Thus, the no-fault laws make clear that automobile insurance policies in Michigan must include at least the minimum no-fault coverages identified in MCL 500.3101(1), with those coverages being deletable only if the 'motor vehicle is not driven or moved on a highway,' and additional non-mandatory coverages can be added to the policy as agreed upon by the parties." *Id* at *13 (Plaintiff's appendix, p 27b).

7. "As manifested by MCL 500.3037, the starting point in Michigan is an automobile insurance policy that covers the mandatory minimum insurance required by MCL 500.3101. The new applicant can then decide whether to *add* collision coverage to the policy at that time or a later time in the life of the policy. Nowhere in the no-fault act does it say that insurance companies can sell automobile insurance policies to Michigan automobile owners that do not provide the mandatory minimum no-fault coverage." *Id* at *14 (Plaintiff's appendix, p 28b).

8. "My colleagues in the majority opinion note that the financial responsibility act 'permits insureds to fulfill their insurance needs by way of multiple policies through more than one carrier.' However, as our Supreme Court indicated in [*Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225; 531 NW2d 138 (1995)] the financial responsibility act should not be construed to contradict the no-fault act." *Id* at *15 (Plaintiff's appendix, p 28b). In particular, the Supreme Court in *Citizens* held that *"neither subsection (i) nor subsection (j) of the financial responsibility act permits an insurer ... to circumscribe the coverage directed by the no-fault act*; to reach that conclusion would not accord proper deference to the policy judgment implicit in the Legislature's decision to require *owners* and registrants of motor vehicles to obtain insurance for the residual liability arising from the *use* of their vehicles." *Id* at *15, quoting

> *Citizens, supra* at 232-233 (original emphasis) (Plaintiff's appendix, pp 28b-29b). "Thus, while it is incumbent upon owners and registrants to obtain the statutorily mandated insurance, insurers cannot "circumscribe the coverage directed by the no-fault act." *Id* at *16, quoting *Citizens* at 233 (Plaintiff's appendix, p 29b).

9. *Integral Ins Co v Maersk Container Serv Co, Inc*, 206 Mich App 325; 520 NW2d 656 (1994) "does not support the majority's position." *Id* at *16 (Plaintiff's appendix, pp 29b-30b).

Judge Beckering concluded, stating:

> In sum, the caselaw relied upon by the majority does not support its conclusion that the no-fault act allows an insurance company providing automobile insurance in Michigan to circumvent the no-fault act and sell only optional insurance coverages. The statutory scheme is clear: the starting point for achieving the goals of the no-fault act is an automobile insurance policy that provides the statutorily mandated coverages pursuant to MCL 500.3101(1), to which the parties may add elective coverages as agreed upon, and to delete the mandatory coverages and maintain comprehensive coverage only if the car is not going to be driven or moved on a highway. Automobile policies underwritten by USAU do not comply with the no-fault act. As such, I would affirm the ruling of the trial court.

Id at *17 (Plaintiff's appendix, p 30b).

Judge Beckering's reasoning is unassailably correct. She establishes that every Michigan automobile policy offering mandatory coverages for vehicles to be driven or moved on a highway policy must include statutorily mandated PIP coverage under the no-fault act.[7]

Because, unlike in *Johnson*, GEICO provided no documentary notice to Waller under MCL 500.3009(4) deleting mandatory PIP coverage, *Id,* 2019 WL 2111326, at *1

[7] One other statutory exception, MCL 500.3017(1)(b) which allows insurers of "transportation network company vehicles" to exempt "[p]ersonal protection and property protection insurance required under section 3101," did not apply in *Johnson* and is inapplicable in this case.

(Plaintiff's appendix, p 17b),[8] *Johnson's* specific holding does not apply in this case. Nonetheless, Judge Beckering establishes that a Michigan insurance contract must provide mandatory PIP coverage unless circumstances allowing deletion are present. The *Johnson* majority's principal counter argument – that the financial responsibility act, particularly MCL 257.520(g) and (j), authorizes insurers to provide separate mandatory coverages, including mandatory PIP coverage under the no-fault act, *Johnson, supra* at *6 (Plaintiff's appendix, p 21b) – is untenable.

MCL 257.520 applies only to a "motor vehicle liability policy," which constitutes an "owner's or an operator's policy of liability insurance, certified as provided in [chapter V of the insurance code, MCL 257.518 or MCL 257.519] as proof of financial responsibility...." MCL 257.520(a). In *Titan Ins Co v Hyten*, 491 Mich 547, 573; 817 NW2d 562 (2012), this Court overruled decades of case law preventing an insurer from rescinding an automobile liability policy to void, *ab initio*, coverage for a previously accrued tort claim of an injured innocent third party. In doing so, the Court rejected the argument that MCL 257.530(f)(1) precluded an insurer from rescinding all third-party liability policies, stating:

> We have closely reviewed MCL 257.520(f)(1), and we believe that the statute does not *in every case* limit the ability of an automobile insurer to avoid liability on the ground of fraud; its reference to "motor vehicle liability policy" is not all encompassing. Rather, as used in MCL 257.520(f)(1), "motor vehicle liability policy" refers only to an "owner's or an operator's

[8] In sharp contrast to this case, both the application and certificate of insurance in *Johnson* specified that the policy did not provide coverage under "the Michigan No-Fault Act, Chapter 31 of the Michigan Insurance Code." *Id* at *1 (Plaintiff's Appendix, p 17b). Because GEICOC did not provide Waller requisite documentary notice of the deletion under MCL 500.3009(4), the issue whether a carrier may always delete PIP coverage, as the *Johnson* majority held, or may delete coverage only if the vehicle is not driven or moved on a highway, as Judge Beckering concluded, is not material in this case. Whatever the parameters in which PIP coverage may be deleted, an insurer may do so only after providing documentary notice under MCL 500.3009(4).

> policy of liability insurance, certified as provided in [MCL 257.518] or [MCL 257.519] as proof of financial responsibility...." MCL 257.520(a). Thus, *absent* this certification, MCL 257.520(f) has no relevant application. Further, MCL 257.520(f)(1) refers only to "the insurance *required by this chapter,*" (emphasis added), and the only insurance required by chapter V of the Michigan Vehicle Code is insurance "certified as provided in [MCL 257.518] or [MCL 257.519] as proof of financial responsibility...." MCL 257.520(a). Therefore, as we stated in *Burch v Wargo,* 378 Mich 200, 204; 144 NW2d 342 (1966), MCL 257.520 "applies only when 'proof of financial responsibility for the future' ... is statutorily required...." See also MCL 257.522 ("This chapter shall not be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by any other law of this state ...."); and *State Farm Mut Auto Ins Co v Ruuska,* 412 Mich 321, 336 n 7; 314 NW2d 184 (1982) ("[I]n discussing the requisites for an automobile liability policy issued as proof of future financial responsibility, the Legislature [in MCL 257.520(b)], after requiring an owner's policy to designate by explicit description or appropriate reference all covered motor vehicles, limited the liability coverage to only those automobiles listed in the policy by speaking in terms of the use of 'such' vehicle(s)."). For these reasons, we now clarify that MCL 257.520(f)(1) does not apply to a motor vehicle liability insurance policy unless it has been certified under MCL 257.518 or MCL 257.519 ….

Id, 491 Mich at 559-560 (original emphasis).

Relying on *Titan*, in *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016), affirmed in part, reversed in part, 502 Mich 390; 919 NW2d 20 (2018), the Court of Appeals held that the no-fault act does not preclude insurers from rescinding PIP policies due to fraudulent procurement. The Court of Appeals rejected the argument that MCL 257.520(f)(1) precluded the insurer from rescinding the PIP policy – even though it provided statutorily mandated benefits – emphasizing that the financial responsibility act governs only third-party liability policies certified under chapter V of the insurance code and does not apply to the policies issued under the no-fault act:

> Therefore, it is necessary to determine exactly to what coverage the restrictions of MCL 257.520(f)(1) apply. First, it only restricts application of the fraud defense to coverage required in Chapter V. As discussed in the above quotation from *Titan,* the only insurance coverage required in Chapter V is the proof of financial responsibility under MCL

> 257.518 and MCL 257.519. And that proof of financial responsibility is only required to prevent the suspension of the license, registration and nonresident driving privileges of a person against whom there is an unsatisfied judgment as defined in Chapter V. Therefore, unless the insured in this case had an outstanding, unsatisfied judgment – and there is no indication that this is the case – then the provisions of MCL 257.520 would simply not apply. This is in contrast to MCL 500.3101 of the no-fault act, which requires that the owner or registrant of a motor vehicle driven on a highway carry certain insurance coverages, including residual liability insurance. And under MCL 500.3131 and MCL 500.3009, the minimum limits are similar to that required under the financial responsibility act. But unlike the provisions of the financial responsibility act, those statutory sections do not restrict the availability of the fraud defense.

Id at 777. This Court affirmed that portion of the Court of Appeals' decision, reiterating that MCL 257.520, applicable only to liability policies required by chapter V, does not limit the right of an insurer to rescind a policy issued under the no-fault act based on fraudulent procurement. *Id*, 502 Mich at 401.

Titan and the *Bazzi* decisions conclusively rebut the *Johnson* majority's central contention that the financial responsibility act, MCL 257.520(g) and (j), authorizes insurers to omit PIP coverage from a policy providing mandatory coverages. The *Johnson* majority's opinion should be overruled and Judge Beckering's dissent adopted.

As demonstrated above, the GEICO policy most likely is a Michigan insurance contract. The policy therefore must be reformed to provide statutorily mandated PIP coverage. Indeed, the facts warranting reformation are more compelling in this case than in *Johnson*. Unlike in *Johnson*, where both the application and certificate of insurance specified that the policy did not provide coverage under "the Michigan No-Fault Act, Chapter 31 of the Michigan Insurance Code," *Id* at *1 (Plaintiff's Appendix, p 17b), no document connected to the GEICO policy contains such a disclaimer. Moreover, GEICO – a certified Michigan no-fault insurer under MCL 500.3163 – not only

knew (or should have known) the insured, Mr. Waller, was a Michigan resident, but repeatedly listed his Grass Lake, Michigan address on the policy declarations. Plaintiff respectfully requests that this Court enforce MCL 500.3009(4) and MCL 500.3012, adopt the reasoning of Judge Beckering's *Johnson* dissent that PIP coverage is mandatory, overrule the *Johnson* majority opinion, and remand this case for reformation of the policy to include PIP coverage if discovery confirms the policy constitutes a Michigan insurance contract.

II. BECAUSE ZACH WALLER WAS A MICHIGAN RESIDENT FOR WHOM MICHIGAN PIP COVERAGE WAS MANDATED AND GEICO IS A MICHIGAN PIP INSURER, MCL 500.3012 PERMITS REFORMATION OF THE GEICO POLICY TO ENFORCE MCL 500.3009(4) AND COMPLY WITH THE REQUIREMENTS OF THE MICHIGAN NO-FAULT ACT – WHETHER OR NOT IT WAS A MICHIGAN INSURANCE CONTRACT.

MCL 500.3012 authorizes the lower courts' reformation of the policy to include statutorily mandated PIP coverage. This is the case whether or not the policy constitutes a Michigan insurance contract.

Once again, MCL 500.3012 states, in material part:

> Such a liability insurance policy issued in violation of sections 3004 through 3012 shall, nevertheless, be held valid but be deemed to include the provisions required by such sections, and when any provision in such policy or rider is in conflict with the provisions required to be contained by such sections, the rights, duties and obligations of the insured, the policyholder and the injured person shall be governed by the provisions of such sections ….

MCL 500.3012 specifies that policies issued in violation of MCL 500.3004-MCL 500.3012 are deemed to include coverages required by such sections.

This includes MCL 500.3009 which, at all times pertinent,[9] provided:

> (1) An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to all of the following limits:
>
> (a) A limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident.
>
> (b) Subject to the limit for 1 person in subdivision (a), a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.
>
> (c) A limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.
>
> * * *
>
> (4) If an insurer deletes coverage from an automobile insurance policy pursuant to [MCL 500.3101], the insurer shall send documentary evidence of the deletion to the insured.

MCL 500.3009(1) addresses mandatory third-party liability coverage. This provision is incorporated into the no-fault act pursuant to MCL 500.3131(2).

MCL 500.3009(4) addresses mandatory PIP coverage under MCL 500.3101. Subsection (4) allows an insurer to delete PIP coverage only if it sends "documentary evidence of the deletion to the insured."

Pursuant to the cannons of statutory interpretation, set forth in Argument IB, by specifically precluding deletion of coverage mandated under MCL 500.3101 unless the insurer sends "documentary evidence of the deletion to the insured," MCL 500.3009(4) mandates that automobile policies include PIP coverage. The Legislature could not have intended any other purpose. To reiterate, GEICO has acknowledged "the statutes at MCL 500.3004 through MCL 500.3012 apply to 'liability insurance policies' issued or

[9] That is, before the June 2019 no-fault act amendments in PA 2019, No. 21 and PA 2019, No. 22, which amended MCL 500.3009(1). As noted above, MCL 500.3009(4) remained substantively unchanged (the words "pursuant to" were changed to "under").

delivered in Michigan and thus naturally apply to Michigan no-fault policies since those are policies that provide liability insurance." (GEICO 1/21/19 reply brief, p 9).

According, because MCL 500.3009(4) requires auto insurance policies to include statutorily mandated PIP coverage unless the carrier provides the insured with documentary evidence that this coverage has been deleted, MCL 500.3012 – which enforces MCL 500.3009 – authorizes reformation of policies omitting that coverage. See *Blakeslee v Farm Bureau Mut Ins Co of Mich*, 388 Mich 464, 474 n 8; 201 NW2d 786 (1972) (holding that MCL 500.3012 requires revision of a policy to include statutorily mandated provisions).[10] As established above, this is clearly the case if the policy is a Michigan insurance contract. Because GEICO is a certified Michigan insurer and Zach Waller, as a Michigan resident, was required to purchase mandatory PIP coverage, it is also the case if the policy is not a Michigan insurance contract.

MCL 257.216 provides, in pertinent part, that "every motor vehicle ... when driven or moved upon a highway, is subject to the registration and certificate of title provisions of this act." MCL 500.3101(1) mandates that "[t]he 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." MCL 500.3102 exempts maintenance of a Michigan PIP insurance policy only for vehicles owned by non-residents operated in Michigan less than 30 days. *Wilson v League Gen Ins Co,* 195 Mich App 705, 709-710; 491 NW2d

[10] The fact that *Blakeslee* addressed coverage under a subsequently repealed uninsured motorist coverage statute, MCL 500.3010, is immaterial. *Blakeslee* establishes enforcement of statutorily required provisions through MCL 500.3012.

642 (1992).[11] Vehicles required to be registered in this state are subject to the requirements of the no-fault act." *Covington v Interstate Sys.,* 88 Mich App 492, 494; 277 NW2d 4 (1979).[12]

It is undisputed that, because Zach Waller was a Michigan resident who would drive his vehicle on Michigan highways, he was required to insure the vehicle with a Michigan PIP policy. *Wilson, supra*; see also *Tienda v Integon National Ins Co*, 300 Mich App 605, 613 n 1; 834 NW2d 908 (2013); *Witt v American Family Mut Ins Co*, 219 Mich App 602, 607; 557 NW2d 163 (1996). Once again, it is also undisputed that GEICO is a certified PIP insurer under Michigan law. (GEICO application, p 4).

Accordingly, when Mr. Waller purchased the subject policy, if GEICO knew or should have known Waller was a Michigan resident, GEICO, as a Michigan insurer, was required to include mandatory PIP coverage. This is the case whether or not it was a non-Michigan insurance contract.

As this Court recently held in *Dye by Siporin & Associates, Inc v Esurance Property & Casualty Ins Co*, ___ Mich ___; ___ NW2d ___ (No. 155784, July 11, 2019), "PIP benefits are paid to injured persons solely by insurers who are authorized to write

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[11] MCL 500.3017(1)(b) which, importantly, is part of the same Insurance Code Chapter as MCL 500.3012, allows insurers of "transportation network company vehicles" to exempt "[p]ersonal protection and property protection insurance required under section 3101." Otherwise, all auto insurance policies must include mandatory PIP coverage to Michigan residents under MCL 500.3101 and MCL 257.216. See *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525 and n 3; 502 NW2d 310 (1993); *Bazzi v Sentinel Ins Co*, 502 Mich 390, 400; 919 NW2d 20 (2018); and Judge Beckering's *Johnson* dissent (addressing the other exception when a vehicle is not driven or moved on the highways).

[12] GEICO's contention that MCL 257.216 "and its related provisions do not address insurance at all" is unavailing. (GEICO 1/21/19 reply brief, p 7). It is well accepted that MCL 257.216 and MCL 500.3101 are construed together and require mandatory PIP benefits. *Coffey v State Farm Mut Auto Ins Co*, 183 Mich App 723, 726; 455 NW2d 740 (1990).

no-fault insurance policies in this state or who have voluntarily filed a certificate complying with MCL 500.3163." *Id*, slip opinion, p 11. Under the no-fault act, insurance companies are required to provide PIP benefits for certain expenses and losses. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). As an authorized and certified Michigan insurer under MCL 500.3163, because the subject policy covered a Michigan resident (and Plaintiff, his resident spouse) and was not issued on a "transportation network company vehicle" triggering the exemption of MCL 500.3017(1)(b), GEICO was required to tender Zach Waller mandatory coverage under the no-fault act. [13]

None of GEICO's arguments rebut the fact that MCL 500.3012 authorizes reformation of the policy – even if a non-Michigan insurance contract. GEICO mistakenly argues that PIP coverage was not mandated under MCL 500.3009 because the policy was not "delivered or issued for delivery *in this state* with respect to any motor vehicle *registered and principally garaged in this state*." (GEICO supplemental brief, p 3; original emphasis). As demonstrated in Argument IA, the policy almost certainly was "delivered or issued for delivery in this state." As also demonstrated above, the vehicle was required to be registered in Michigan.

Plaintiff agrees that, at the time the policy was issued, the vehicle was not "principally garaged" in Michigan. GEICO, however, omits that the "principally garaged"

[13] Since MCL 500.3101(5) and MCL 500.3017(1)(b) permit auto insurers to exclude PIP coverage only under the enumerated exception – when the policy covers a "transportation network company vehicle" – the Legislature mandated that, in all other circumstances, insurers issue PIP policies to Michigan residents, like Zach Waller. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (stating that enumeration of exceptions or conditions "eliminates the possibility of [there] being other exceptions under the legal maxim *expressio unius est exclusio alterius*").

requirement is set forth in MCL 500.3009(1) – relating to third-party residual liability coverage. MCL 500.3009(4), addressing mandatory PIP coverage, does not include a "principally garaged" requirement. Indeed, since any vehicle driven on Michigan highways by a Michigan resident must be registered and insured under MCL 500.3101, the issue where the vehicle was "principally garaged" is irrelevant to whether the policy must include statutorily mandated PIP coverage.

GEICO's contention – that the onus to purchase mandatory PIP coverage rested exclusively on Zach Waller – is untenable. MCL 500.3009(4) allowed GEICO to delete PIP coverage only if it sent "documentary evidence of the deletion to the insured." GEICO never provided this requisite "documentary evidence of the deletion" to Waller. As such, GEICO cannot disavow its responsibility to provide mandatory PIP coverage.

In answer to the MOA order's question, 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*. The lower court rulings must be affirmed.

III. *FARM BUREAU V ALLSTATE INS CO* WAS CORRECTLY DECIDED. EVEN IF ERRONEOUS, THE DECISION SHOULD NOT BE OVERRULED.

Farm Bureau and its progeny were correctly decided. MCL 500.3012 authorizes reformation of an automobile insurance policy issued by a Michigan-authorized carrier to include statutorily mandated PIP coverage when the insurer knew or should have known the insured was a Michigan resident. *Id*, 233 Mich App at 41-43 and n 2. As established above, MCL 500.3012 requires enforcement of MCL 500.3009(4) – which mandates maintenance of PIP coverage unless the insurer sends "documentary evidence of the deletion to the insured." Because (a) Zach Waller was a Michigan resident required to maintain PIP insurance on the vehicle, (b) GEICO is a certified PIP

carrier, and (c) GEICO never provided Waller "documentary evidence of the deletion of" PIP coverage, if evidence on remand proves GEICO knew or should have known he was a Michigan resident, the policy must be reformed to include PIP coverage.

GEICO's complaint that *Farm Bureau* did not engage in a detailed textual analysis of MCL 500.3012 and MCL 500.3009 is unavailing. Whether the court's analysis could have been more detailed does not alter the fact that it reached the correct result. Indeed, even if *Farm Bureau's* analysis was incomplete or erroneous, this Court "frequently affirms" lower court decisions when they have "reached the right result for the wrong reason." *Michigan Gun Owners Inc v Ann Arbor Public Schools*, 502 Mich 695, 736; 918 NW2d 756 (2018) (citation omitted).

GEICO incorrectly asserts that application of the factors in *Hamed v Wayne County*, 490 Mich 1, 25; 803 NW2d 237 (2011) demonstrate that *Farm Bureau* must be overruled. At the outset, the *Hamed* test hinges on the conclusion that the decision was wrongly decided. As shown, *Farm Bureau* was correctly decided.

Contrary to GEICO's position, *Farm Bureau* does not defy "practical workability." (GEICO supplemental brief, p 8, citing *Hamed* at 25). A non-Michigan policy may be reformed to include PIP coverage only if a Michigan-authorized insurer knows or should know that the policyholder is a Michigan resident for whom PIP coverage is mandatory. The *Farm Bureau* majority unequivocally rejected the proposition that an insurer doing business in Michigan and other states must "routinely investigate every person who seeks automobile insurance outside Michigan while using a non-Michigan address[14] to

[14] Of course, Zach Waller did not use "a non-Michigan address."

determine whether that person is a Michigan resident[,]" which would impose "an onerous burden on insurers." *Id*, 233 Mich App at 44.[15] The majority added that:

> To generally hold that such an out-of-state policy entered into by a Michigan resident would be treated as if it were a Michigan 'no-fault' policy might well assist some unscrupulous Michigan residents to obtain a Michigan no-fault policy at the lower rate of an out-of-state policy. We will not construe § 3012 in such a manner and, thus, we conclude that it has no application to the Indiana insurance policy that Allstate issued to its insured in this case.

Id at 43.

Effectuating these concerns, *Farm Bureau* limited grounds for reformation only in cases where the 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 …." *Id*, 233 Mich App at 43 n 2. The *Farm Bureau* decision clearly protected insurers from onerous burdens or unintended consequences.

As demonstrated in Plaintiff's application response, under *Farm Bureau's* narrow framework, only four cases have even addressed whether grounds for reformation are met. Of these, only the case at bar and *Gordon v GEICO Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 301431) (GEICO Appendix, p 182a) found grounds for potential reformation based on a material fact question whether the insurer had actual or constructive notice the insured was a Michigan resident.

The rule requiring Michigan-authorized insurers to offer policyholders, who they know or should know are Michigan citizens, statutorily mandated PIP coverage does not

[15] Once again, this conclusively rebuts GEICO's allegation that *Farm Bureau* improperly "imposes an affirmative duty on insurance agents to discern the insurance needs of their customers and advise them to purchase more or different coverage than provided by the (non-Michigan) policy they have selected" contrary to *Harts v Farmers Ins Exchange,* 461 Mich 1; 597 NW2d 47 (1999).

defy "practical workability." *Hamed, supra*. It imposes no undue burden – let alone an "onerous duty," (GEICO supplemental brief, p 8) – on insurers.

Finally, GEICO spuriously argues that overruling *Farm Bureau* will not frustrate any "reliance interests" because the rule authorizing reformation constituted "obiter dictum." (GEICO supplemental brief, p 9). The Court of Appeals correctly rejected this argument because *Farm Bureau's* analysis of the reformation issue was "germane to the controversy" in that case. (COA decision, p 6, GEICO appendix, p 42a, citing *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007)). The court explained:

> The discussion of MCL 500.3012 in *Farm Bureau Ins Co* was clearly essential to a proper determination of the case. The discussion of the topic dispelled one potential avenue for requiring an insurer to provide personal protection insurance (PIP) benefits. Indeed, that very discussion was the topic of the dissent in that case, which would have reached the opposite result based on the dissenting judge's analysis of the issue.

(*Id*, citing *Farm Bureau, supra*, 233 Mich App at 47-51 (Griffin, J, dissenting).

Farm Bureau was correctly decided. Even if this Court finds portions of *Farm Bureau's* analysis lacking, it reached the right result and should not be overruled.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellee respectfully requests that this Honorable Court deny Defendant-Appellant's application for leave to appeal or, if leave is granted, either (1) affirm the lower court rulings, or (2) if the lower court rulings are reversed, overrule the majority decision in *Johnson v USA Underwriters*, __ Mich App __; __ NW2d __; 2019 WL 2111326 (No. 340323, May 14, 2019) (Plaintiff's appendix, p 16b), adopt Judge Beckering's dissent, and remand to the trial court for reformation of the policy to include PIP coverage if discovery confirms the policy was mailed to Zach Waller in Michigan and therefore constitutes a Michigan insurance contract.

Respectfully submitted,

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