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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

DEFENDANT-APPELLANT GEICO INDEMNITY COMPANY'S BRIEF IN REPLY TO PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

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TABLE OF CONTENTS

Page

Index of Authorities. ii

Argument

I. The principal argument asserted in Plaintiff's Supplemental Brief–that the subject GEICO policy is *not* an out-of-state insurance contract but is in fact a Michigan policy–should be rejected as it is non-responsive to the questions posed by the Court's Order of July 26, 2019, is inconsistent not only with both of the lower court opinions but also the position advanced by Plaintiff throughout this litigation, and in any event is without merit. 1

II. Where Plaintiff-Appellee's Supplemental Brief does address the questions posed by the Court, it fails to provide any legitimate rationale for *Farm Bureau's* §3012-based reformation rule or offer any compelling reason why such an illegitimate ruling should not be overruled.. 6

Relief Requested.. 10

INDEX OF AUTHORITIES

Cases **Page(s)**

Chrysler Corp v Skyline Industrial Services, Inc,
448 Mich 113; 528 NW2d 698 (1995). 5

Collins & Aikman Corp v Hartford Acc & Indem Co,
335 NC 91; 436 SE2d 243 (1993). 5

English v Saginaw County Treasurer,
81 Mich App 626; 265 NW2d 775 (1978). 8

Farm Bureau Ins Co v Allstate Ins Co,
233 Mich App 38; 592 NW2d 395 (1998). 2, 6, 7, 10

Grange Ins Co of Mich v Lawrence,
494 Mich 475; 835 NW2d 363 (2013). 9

Hendrickson v Lee,
199 NC App 444; 459 SE2d 275 (1995). 6

Johnson v USA Underwriters,
__ Mich App __; __ NW2d __; 2019 WL 2111326
(Court of Appeals No. 340323, May 14, 2019). 1, 8

Lawrence Baking Co v Unemployment Compensation Comm,
308 Mich 198; 13 NW2d 260 (1944). 8

Sam v Balardo,
411 Mich 405; 308 NW2d 142 (1981). 8

Turcheck v Amerifund Financial, Inc,
272 Mich App 341; 725 NW2d 684 (2007). 4, 5

Statutes and Court Rules

MCL 257.216. 9

MCL 257.216(a). 9

MCL 257.243(1). 9

MCL 257.243(4). 9

MCL 500.3006. 8

RECEIVED by MSC 12/18/2019 10:16:18 PM

MCL 500.3008. 8

MCL 500.3009(4). 7

MCL 500.3012. . . . . 2, 6, 7

MCL 500.3101. 8

MCL 500.3101(1). 8, 9

MCL 500.3101(2), as amended by 2019 PA 21. 8

MCL 500.3163. 7

NC Gen Stat §20-50(a). 5

NC Gen Stat §20-52(a)(1a)b.2. 5

NC Gen Stat §20-52(a)(1a)b.4. 5

NC Gen Stat §20-309(a). 6

NC Gen Stat §20-309(b). 6

NC Gen Stat §58-3-1. 5

Other Authorities

2 Couch on Ins §24:8. 4

2 Restatement Conflict of Laws, §187. 5

2 Restatement Conflict of Laws, §188. 5

2 Restatement Conflict of Laws, §193. 5

Merriam-Webster Collegiate Dictionary (11th ed). 9

RECEIVED by MSC 12/18/2019 10:16:18 PM

RECEIVED by MSC 12/18/2019 10:16:18 PM

ARGUMENT

I. The principal argument asserted in Plaintiff's Supplemental Brief–that the subject GEICO policy is *not* an out-of-state insurance contract but is in fact a Michigan policy–should be rejected as it is non-responsive to the questions posed by the Court's Order of July 26, 2019, is inconsistent not only with both of the lower court opinions but also the position advanced by Plaintiff throughout this litigation, and in any event is without merit.

In its order granting oral argument on Defendant's application for leave to appeal, this Court directed the parties to file supplemental briefs. Specifically, the Court ordered that the parties "address[] 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).

Yet as the primary argument advanced in her supplemental brief, Plaintiff Hahn takes issue with what Plaintiff describes as the Court's "incorrect premise that the GEICO policy constitutes a 'non-Michigan insurance contract.'" (Plaintiff-Appellee's Supplemental Brief, pp. v and 2 – Argument I point-heading and Counter-Statement of Questions Presented No. I). Most of Plaintiff's supplemental brief is then devoted to advocating the position of the dissenting opinion in *Johnson v USA Underwriters*, __ Mich App __; __ NW2d __; 2019 WL 2111326 (Court of Appeals No. 340323, May 14, 2019), to the effect that Michigan automobile insurance contracts must include personal protection insurance ("PIP") coverage and will be deemed to include such coverage even if the terms of the contract say otherwise. The Court should not and need not be drawn down that path.

First, the entire argument, based on the notion that GEICO's policy in this case is actually a "Michigan automobile insurance contract," is non-responsive to the Court's order requesting

supplemental briefs. The Court asked whether MCL 500.3012 "permits the reformation *of a non-Michigan insurance contract* to comply with the requirements of the Michigan no-fault act," and whether the case of *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38; 592 NW2d 395 (1998), "was correctly decided" (emphasis added). Properly so, Defendant submits, since Plaintiff has, up until now, relied on the premise that the *Farm Bureau* rule "authorize[s] reformation of an *out-of-state* auto policy" (Plaintiff's Answer to the Application for Leave to Appeal, 12/11/2018, p. 28) (emphasis added).[1]

Furthermore, both of the lower courts' opinions–consistent with the position Plaintiff has asserted–regarded the subject GEICO policy as an out-of-state insurance policy issued in North Carolina: "[GEICO] insured Waller's truck under a policy *issued in North Carolina*" (***Appellant's Apx, 38a*** – Court of Appeals unpublished opinion, 6/12/2018, at 2) (emphasis added); "Waller's truck was insured by Defendant GEICO ... *under a North Carolina automobile policy* which did not include an endorsement for Michigan No-Fault Coverage" (***Appellant's Apx, 4a*** – Circuit Court Opinion & Order, 1/10/2017, at 2) (emphasis added). And the *Farm Bureau* opinion itself, which is the authority on which Plaintiff's entire theory of recovery rests and whose validity constitutes the question before the Court, is premised entirely on the involvement of an insurer "that is dealing with a Michigan resident and nevertheless *issues an out-of-state insurance policy*[.]" *Farm Bureau*, 233 Mich App at 43 n 2 (emphasis added).

Plaintiff's new theory, in other words, not only is outside the scope of the Court's order for supplemental briefing and was never previously raised, but is directly inconsistent with the theory

[1] *Accord*, Plaintiff's Answer to the Application for Leave to Appeal, p. vi (Counter-Statement of the Questions Presented No. 1); *id*., p. 16 (heading to Argument B.1), and *id*., p. 28 (heading to Argument B.6), all of which address whether *Farm Bureau* and MCL 500.3012 allow for reformation of "an out-of-state policy."

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Plaintiff did raise and has litigated throughout this case. Accordingly, independent of any potential merit the argument might have, Plaintiff's belated attempt to inject into these proceedings an entirely different legal theory of recovery against Defendant should be disallowed.

The theory, in any event, is without merit. Based on Waller's address in Michigan appearing on the GEICO policy's declarations page, Plaintiff posits that a copy of the policy likely was mailed to that address. If so, Plaintiff contends that the policy would be deemed to have been "delivered or issued for delivery" in Michigan. It then follows, Plaintiff argues, that the GEICO policy would be a "Michigan auto insurance policy" and thus deemed to provide Michigan no-fault PIP coverage. There are weak links, however, throughout this argument chain.

First, even if a copy of the policy was mailed to Waller's mother at his address in Grass Lake, Michigan, it does not follow that the policy was "delivered or issued for delivery" in Michigan.[2] Defendant submits that where the person purchasing the policy was located in North Carolina, and the covered motor vehicle–the risk being insured–likewise was garaged, regularly driven and duly registered in North Carolina as in this case, the resulting contract of insurance is a North Carolina policy. On this key point, Waller's testimony confirms North Carolina as the state in which the policy was issued and delivered:

> Q: It's my understanding you had an insurance policy on the vehicle at the time of this accident.
>
> A: [WALLER] **Yes**.
>
> Q: And with who – what company was that?

[2] The Grass Lake address shown on Waller's policy (***Appellant's Apx, 56a*** – policy declarations), is the home of his mother, Debra Snell, and her husband. It is the home where Waller assumed he would be returning after his 4 year term of service in North Carolina – at least that was his assumption until he got married two years into his term and before the accident happened. (***Id., 135a-136a*** – dep. of Z. Waller, pp. 14-16, 19; ***155a-156a*** – dep. of D. Snell, pp. 5-7).

Importantly, however, the policy declarations also make clear that the subject motor vehicle insured by the policy is garaged at Camp Lejeune, North Carolina 28542 (***id., 58a-59a***).

A: **Geico**.

Q: And where did you take this insurance – *where did you get the insurance policy*? What state?

A: ***In North Carolina***.

(***Appellant's Apx, 134a*** – dep. of Z. Waller, p. 12).

Proceeding nevertheless on the assumption that a copy of the policy might have been mailed to Michigan, Plaintiff asserts the following as a key component of her new argument for subjecting the GEICO policy to Michigan no-fault coverage requirements: "It is national hornbook law that an insurance policy is made and is subject to the laws of the state where it is delivered." (Plaintiff-Appellee's Supplemental Brief, p. 4). Offered as support for this proposition Plaintiff cites only 2 Couch on Ins §24:8, which does not come close to making such a blanket pronouncement. Instead, the cited treatise merely states, "In a number of cases, *one of the elements considered* in determining the place of the contract, for the purpose of determining *by what law its construction and effect should be governed*, is the place of delivery of the contract." *Id*. (emphasis added).

And here, the law by which the GEICO policy's construction and effect must be governed, as it turns out, is *not* the Michigan no-fault automobile insurance act or even Michigan's Insurance Code of 1956 generally, but "the laws of North Carolina," as the parties to the instant contract specifically agreed:

> **CHOICE LAW**
> This policy is issued in accordance with the laws of North Carolina and covers property or risks principally located in North Carolina. Any and all claims or disputes in any way related to this policy shall be governed by the laws of North Carolina.

(***Appellant's Apx, 81a*** – GEICO policy issued to Z. Waller, page 22 of 22). "It is undisputed that Michigan's public policy favors the enforcement of ... choice-of-law provisions." *Turcheck v*

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Amerifund Financial, Inc, 272 Mich App 341, 345-346; 725 NW2d 684 (2007), citing *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 126-127; 528 NW2d 698 (1995) (Michigan courts will enforce contractual choice-of-law provisions if certain conditions are met).

As has been detailed with precision by proposed Amicus Curiae MemberSelect Insurance Company (motion and proposed Brief of Amicus Curiae filed December 17, 2019), the choice of law rules of both Michigan *and* North Carolina irrefutably dictate–consistent with the "CHOICE LAW" provision contained in the policy itself–that North Carolina law and *not* Michigan law must apply to determine the scope of coverage and interpretation of the GEICO policy in this case. See *Chrysler Corp*, *supra*, analyzing and applying 2 Restatement Conflict of Laws, §§ 187-188 and 193; and *Collins & Aikman Corp v Hartford Acc & Indem Co*, 335 NC 91; 436 SE2d 243, 246 (1993), applying NC Gen Stat §58-3-1 to conclude that North Carolina law applied to the parties' insurance contract since North Carolina was the state in which the insured interests were located, notwithstanding that the policy was mailed to the insured's broker's office in California.[3]

Likewise in the case at bar it is beyond dispute that the interests GEICO insured by the policy it issued to Waller were located in North Carolina. The accident vehicle, a 2002 GMC Sierra 2500 pickup truck, was principally garaged in North Carolina and thus likewise was registered in North Carolina pursuant to the dictates of North Carolina law. NC Gen Stat §20-50(a) and 20-52(a)(1a)b.2 and b.4. And since this was a vehicle principally garaged in North Carolina, duly registered in North Carolina and bearing a North Carolina license plate, Waller was

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[3] All contracts of insurance on property, lives, or interests in this State [North Carolina] shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.

NC Gen Stat §58-3-1. See *Collins & Aikman Corp*, 335 NC at 94; 436 SE2d at 245.

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required under North Carolina law to insure the vehicle under the financial responsibility law of North Carolina. NC Gen Stat §20-309(a) and (b); *Hendrickson v Lee*, 199 NC App 444; 459 SE2d 275, 282 (1995).

In short, there is no substantive merit to Plaintiff's eleventh hour suggestion that the GEICO policy issued to Zachary Waller in North Carolina should, by virtue of a copy possibly having been mailed to Michigan, be deemed a *Michigan* auto insurance policy rather than a North Carolina policy. The principal argument raised in Plaintiff-Appellee's Supplemental Brief, therefore, must be rejected, whether on the merits or on grounds that the question simply is not before the Court.

II. Where Plaintiff-Appellee's Supplemental Brief does address the questions posed by the Court, it fails to provide any legitimate rationale for *Farm Bureau*'s §3012-based reformation rule or offer any compelling reason why such an illegitimate ruling should not be overruled.

In Arguments II and III of her Supplemental Brief, Plaintiff accepts the established premise that the North Carolina auto insurance policy GEICO issued was indeed a "non-Michigan insurance contract" as referenced in the Court's Order of July 26, 2019. Plaintiff thus purports to advance a defense of the *Farm Bureau* reformation rule, based ostensibly on MCL 500.3012, by which an out-of-state auto policy is transformed into a policy providing coverages uniquely required by the Michigan no-fault act.

The argument Plaintiff advances in this regard, built on component suppositions which themselves are either incorrect or overstated, leads to a glaringly *unfounded* conclusion:

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

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(Plaintiff-Appellee's Supplemental Brief, p. 19) (emphasis added). One is able to follow Plaintiff's argument (notwithstanding questionable assumptions underlying some of its component parts), insofar as Michigan insurance contracts are concerned. But Plaintiff offers no support whatsoever for applying the analysis to a *non-Michigan insurance contract*. Apart from the precedent of *Farm Bureau Ins Co v Allstate Ins Co* itself (the flawed ruling Plaintiff is attempting to defend), there simply is no support. Certainly the text of the statutes provides none. As Defendant has shown, §3012 and the provisions it incorporates by reference ("sections 3004 through 3012") specify precisely the insurance policies to which they apply, and they do *not* include auto insurance policies issued in other states.

Plaintiff suggests briefly that MCL 500.3163 somehow supports her position (Plaintiff-Appellee's Supplemental Brief, p. 20), but the point is nonsensical. Nothing in or about §3163 speaks to a Michigan certified insurer's responsibilities in connection with its coverage of Michigan residents. Again, without offering tenable support, Plaintiff simply *asserts* that "GEICO was required to tender Zach Waller mandatory coverage under the no-fault act." *Id*. Defendant's previous briefs have demonstrated that this simply is not so.

But Defendant must also take issue with some of the component parts of Plaintiff's analysis. Plaintiff puts much stock in the notion that MCL 500.3009(4) mandates that insurance policies include PIP coverage, and accordingly, under §3012, any policy not containing such coverage will be deemed to include it. Yet Plaintiff's analysis is flawed– although again the whole debate is academic since §3012 applies only to Michigan policies and this case involves a non-Michigan contract.

Some of the sections referenced in §3012 do include substantive content requirements (that is, "provisions required to be contained [in a policy] by such sections"), but §3009(4) is not one

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of them. Unlike §§ 3006 and 3008, for instance,[4] §3009(4) does not identify any provision required to be in a policy. It merely imposes on the insurer a written notification duty when, pursuant to MCL 500.3101, coverages are deleted from a policy. Notably,§3101 does allow for such deletions,[5] but it contains no affirmative directive that policies *include*, from the outset, all of the coverages vehicle owners are required to maintain. It contained no such affirmative directive, that is, until June 11, 2019, when the statute was amended by 2019 PA 21:

> Except as provided in section 3107d, all automobile insurance policies offered in this state must include benefits under personal protection insurance, and property protection insurance as provided in this chapter, and residual liability insurance. ...

MCL 500.3101(2) (as amended). From this it can be inferred that *there was no such affirmative requirement previously*, since "[c]ourts must give meaning to a legislative amendment. A change of phraseology in a statute raises the presumption that a change of meaning was intended." *English v Saginaw County Treasurer*, 81 Mich App 626, 631; 265 NW2d 775 (1978), citing *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich 198, 205; 13 NW2d 260 (1944); accord, *Sam v Balardo*, 411 Mich 405, 431; 308 NW2d 142 (1981).[6]

Another component part of Plaintiff's argument–asserted as being "undisputed"–is the proposition that "because Zach Waller was a Michigan resident who would drive his vehicle on

---

[4] MCL 500.3006 ("In such liability policies there shall be a provision that the insolvency or bankruptcy of the person insured shall not release the insurer..."); MCL 500.3008 ("In such liability insurance policies there shall be a provision that notice given ... to any authorized agent ... shall be deemed to be notice to the insurer...").

[5] "Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved upon a highway may allow the insured owner ... to delete a portion of the coverages ..." MCL 500.3101(1). The provision was modified and moved to §3101(2) by 2019 PA 21, effective June 11, 2019.

[6] While again it is perhaps an academic point, this legislative addition to §3101 lends support to the majority's conclusion in *Johnson v USA Underwriters*, *supra*, and undermines Plaintiff's advocacy of the dissenting opinion in that case.

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Michigan highways, he was required to insure the vehicle with a Michigan PIP policy." (Plaintiff-Appellee's Supplemental Brief, p. 19). The point is *not* undisputed, it is simply immaterial. To be sure, an owner of a vehicle required to be registered in Michigan must maintain Michigan no-fault coverages, §3101(1); and it is likewise true that the Michigan vehicle code does render any motor vehicle operated on a street or highway subject to Michigan's registration requirements. MCL 257.216. There is an express exception, however, for a "nonresident" whose vehicle (a) is duly registered in another state and (b) is not operated in Michigan for more than a period of 90 days. MCL 257.216(a); MCL 257.243(1) and (4).

Here, while this case has established Zach Waller as being legally *domiciled* in Michigan, it does not necessarily follow that he was *not* a "nonresident" within the meaning of these registration provisions where, at all times pertinent, he manifestly was not *residing* in Michigan but in North Carolina, and his vehicle was duly registered in North Carolina, not in Michigan.[7] In other words, it is not a foregone conclusion that Waller was, in fact, required to maintain Michigan no-fault insurance, since it is not a foregone conclusion that he was required to register his vehicle in Michigan. Defendant does not concede these points, but submits that they are immaterial. As Defendant has previously argued:

> *If* Waller was also obligated under Michigan law to register and insure his vehicle in Michigan–notwithstanding that he *properly* registered and insured it in North Carolina–then it was incumbent on him to do so; <u>and, indeed, he could just as well have done so</u>

[7] "Residence" is defined as "the act or fact of dwelling in a place for some time" and "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn." *Merriam-Webster Collegiate Dictionary* (11th ed). This Court has confirmed that residence and domicile have distinct meanings, *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 494-495; 835 NW2d 363 (2013); and while a person may have more than one residence at a given time, *id*., it does not necessarily follow that one is deemed at all times to be "residing" in, or a resident of, the place of his or her legal domicile.

separately, as nothing compelled him to purchase his no-fault coverage from GEICO or include it on his North Carolina policy.

(Defendant-Appellant GEICO's Brief in Reply to Plaintiff-Appellee's Answer to the Application for Leave to Appeal, 1/29/2019, p. 7) (emphasis in original).

Defendant ultimately stands by its contention, detailed in its previous application briefs and highlighted in its supplemental brief, that the reformation rule announced in *Farm Bureau Ins Co v Allstate Ins Co*, *supra*, is legally insupportable and must be disavowed. The arguments advanced in Plaintiff's supplemental brief should be rejected both on grounds that they substantively lack merit and, in large part, are non-responsive to the questions posed by the Court's Order.

RELIEF REQUESTED

For all the foregoing reasons and those more fully detailed in its previous 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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PROOF OF SERVICE

DANIEL S. SAYLOR, certifies that he is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for GEICO Indemnity Company; and that on **December 18, 2019**, he served a copy of the **Defendant-Appellant GEICO's Brief in Reply to Defendant-Appellee's Supplemental Brief**, and this **Proof of Service**, upon counsel for Plaintiff-Appellee by directing the Court's *MiFile* system to deliver true copies via "e-Service" to **Donald M. Fulkerson, Esq.**, P.O. Box 85395, Westland, MI 48185, at donfulkerson@comcast.net, and **Nicholas S. Andrews, Esq.**, Liss, Seder & Andrews, P.C., 39400 Woodward Avenue, Ste. 200, Bloomfield Hills, MI 48304, at nandrews@lissfirm.com; upon **James G. Gross, Esq.**, 615 Griswold Street, Ste. 723, Detroit, MI 48226, at jgross@gnsappeals.com; and upon **Robert G. Kamenec, Esq.**, Plunkett Cooney, 38505 Woodward Ave., Ste. 100, Bloomfield Hills, MI 48304, at rkamenec@plunkettcooney.com.

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