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STATE OF MICHIGAN

IN THE SUPREME COURT

ADORA WILMORE-MOODY, Individually,

Plaintiff/Counter-Defendant/Appellee,

and ADORA WILMORE-MOODY as Next Friend of DAIMLER AAKU, a Minor,

Plaintiff,

v.

MOHAMMED ZAKIR,

Defendant/Appellant,

and

EVEREST NATIONAL INSURANCE COMPANY,

Defendant/Counter-Plaintiff,

and

PDB INVESTMENTS & INSURANCE AGENCY, INC. and MICHIGAN ASSIGNED CLAIMS PLAN and/or MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants.

Supreme Court No.: 163116

Court of Appeals No.: 352411

Wayne County Circuit Court
Civil Action No.: 18-002518-NI

REPLY BRIEF OF DEFENDANT-APPELLANT MOHAMMED ZAKIR IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

*** ORAL ARGUMENT REQUESTED ***

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ARGUMENT

I. STATUTORY INTERPRETATION

A. Statutory Interpretation Must Evaluate the Impact of Rescission

The bold statement in Plaintiff/Appellee's Brief that "[t]his case should be resolved purely on principles of statutory interpretation" (Appellee Brief at p. 1; emphasis added) while simultaneously asking this Court to ignore the law of contracts and their rescission is misplaced and misleading. Unquestionably, statutory interpretation is central to this appeal as this Court is asked to construe the Michigan No-Fault Act; however, MCL § 500.3135(2)(c), requires the existence of insurance, which is founded on a contract. More specifically, MCL § 500.3135(2)(c) requires vehicle owners in Michigan to have "the security required by section 3101(1) at the time the injury occurred" in order to maintain a third-party claim. MCL § 500.3101(1) states in relevant part that "the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance and property protection insurance . . .". [1] Consequently, the Act calls for attention to the law of contracts and rescission in equal measure with statutory interpretation.

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[1] MCL § 500.3101 of the Michigan No-Fault Act includes additional details regarding insurance that owners or registrants of vehicles are required to have in effect, further reinforcing the strong interconnection between statutory mandates and contracts of insurance. For example, MCL § 500.3101(4) states, in part, that "[s]ecurity required by subsection (1) may be provided under a policy issued by an authorized insurer that affords insurance for the payment of benefits described in subsection (1). A policy of insurance represented or sold as providing security is considered to provide insurance for the payment of the benefits." Emphasis added. MCL § 500.3101(5) states, in part, that "[s]ecurity required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved on a highway." Emphasis added.

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B. The Michigan No-Fault Act's Reference to "At the Time the Injury Occurred" Cannot be Construed in a Manner Contrary to Legislative Intent and That Would Lead to Absurd Results

Advocating for a statutory interpretation that defies law, logic, and common sense, Plaintiff's Supplemental Brief, p. 6, asserts that Plaintiff satisfied the requirements of MCL §500.3135(2)(c) because she had "the security required by section 3101(1) *at the time the injury occurred*" in order to maintain a third-party claim. *Id.* Emphasizing the statutory phrase "at the time the injury occurred," Plaintiff's Brief argues that the analysis stops – and is frozen in time – at that discrete moment of injury when Plaintiff had no-fault insurance, excluding all consideration of later developments, such as rescission of that insurance coverage due to her fraud. *Id.*, at p. 2. Plaintiff has again misconstrued the letter and spirit of the Act.

Subsequent developments, such as discovery of a fraudulently procured policy and rescission as a consequence, must be considered to accomplish the legislature's intent of preventing third-party recoveries by those who defraud their insurers. Conspicuously absent from Plaintiff's Brief is any supporting law or legislative history that the No-Fault Act somehow freezes consideration only to the particular moment of an accident or claimed injury. This is because no such law exists. In sharp comparison, Defendant/Appellant's Supplemental Brief cited binding authority discussing, among other things, the legislative intent of MCL § 500.3135(2)(c) of correcting the injustice of allowing owners of vehicles who fail to contribute to the no-fault system to recover damages from those who do contribute. (See, Defendant/Appellant's Supplemental Brief at p. 2.) In this case, Plaintiff did not contribute to the no-fault system. As a direct result of her fraud in the application, her no-fault insurance coverage was rescinded and her insurance premium was refunded to her, thus eliminating any contribution. These developments are critical and cannot be conveniently disregarded in an effort to conjure up coverage where none actually exists.

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Plaintiff's Supplemental Brief misconstrues, repeatedly, the effect and significance of rescission. As explained in Defendant/Appellant's Supplemental Brief (at pp. 3-6), the legal principle of rescission is not a "fiction," it is not illusory, and it cannot be ignored. It is a long-standing legal principle that operates retroactively to undo contracts from the beginning as if they never existed. As a result, MCL § 500.3135(2)(c) cannot possibly be satisfied because rescission of a policy, occurring after the time of claimed injury, rendered Plaintiff without coverage.

Finally, Defendant/Appellant's Supplemental Brief explained that as a further indication of the No-Fault Act's legislative intent to impose adverse consequences on those who fail to maintain no-fault coverage, MCL § 500.3113(b), comparable to MCL § 500.3135(2)(c), bars vehicle owners from recovering personal protection insurance "PIP" benefits "for accidental bodily injury if *at the time of the accident*" the vehicle owner failed to maintain no-fault insurance.[2] (Emphasis added.) Plaintiff's Supplemental Brief (p. 2) attempts to distinguish these statutes and argues that subsequent developments, like rescission, *can* be considered in PIP settings under 3113, yet *cannot* be considered in third-party settings under 3135(2)(c), because 3113 "does not freeze the analysis at the time of injury" is specious and, in any event, unsupported. In her zeal to counter Defendant, at best, Plaintiff's Supplemental Brief raises a distinction without a difference; this "time of the *accident*" language in MCL § 500.3113 and "time of the *injury*" language of MCL § 500.3135(2)(c) are not different points in time. Plaintiff's Brief does not detract from the key point that the Act penalizes vehicle owners who have no coverage by barring their recovery for PIP *and* third-party benefits.

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[2] MCL § 500.3113 states: "A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed . . . (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect." (Emphasis added.)

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C. Plaintiff's Interpretation Violates the *In Pari Materia* Rule of Statutory Construction

As this Court has recognized, through the *in pari materia* canon of statutory interpretation, the court endeavors to read statutes concerning the same general subject as harmonious whenever possible. *See, eg, Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014). In similar fashion, this Court has also held that statutes relating to the same regulated subject matter or sharing a common legislative purpose, are deemed *in pari materia* and are to be read together harmoniously as one law. *See, eg, State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998); *Houghton Lake Area Tourism and Convention Bureau v Wood*, 255 Mich App 127, 146; 662 NW2d 758 (2003).

Michigan's No-Fault Act punishes fraud and eliminates recourse by vehicle owners who have no coverage or, as here, who lost their coverage due to their own fraud. This is based on two portions of the Michigan No-Fault Act addressing the issue, MCL § 500.3135(2)(c) and MCL § 500.3101(1). MCL § 500.3135(2)(c) requires vehicle owners to have "the security required by section 3101(1) at the time the injury occurred" in order to maintain a third-party claim. MCL § 500.3101(1) states that "the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance and property protection insurance . . .." The terms and provisions of these statutes should be read *in pari materia*. A plain reading shows that they do not conflict – they are actually in harmony. It is Plaintiff who is wrongly suggesting that they conflict or that one or both can be disregarded by allowing her to pursue a third-party claim, despite the retroactive rescission of her insurance coverage. This Court should not permit such an interpretation. The interpretation Plaintiff advances is not only absurd but would also violate the *in pari materia* rule of statutory construction.

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II. A POLICY RESCINDED IN RESPONSE TO PLAINTIFF'S FRAUD IN THE APPLICATION CANNOT BE RESURRECTED AS A MATTER OF LAW AND PUBLIC POLICY

A. Contrary to Plaintiff's Brief, Rescission is Not Restrictive for Limited Purposes but is All-Encompassing for All Purposes

Advancing another bold, unsupported argument, Plaintiff's Supplemental Brief asserts that rescission of her no-fault policy merely restores the contracting parties, only, to their relative positions while having no effect on non-parties to that insurance contract, such as Mr. Zakir. (Plaintiff's Supplemental Brief at pp. 2-3.) Plaintiff could not be further from the truth.

First, no authority is cited for an argument a rescinded contract is somehow rescinded for the contracting parties yet revived for everyone else. Nor could any such authority exist. Plaintiff was a contracting party who, post-rescission, was restored to her pre-contractual position – thus, her insurance policy never existed and she was uninsured at the time of the accident. Not even the *Esurance* case,[3] which Plaintiff's Supplemental Brief cites extensively, supports Plaintiff's argument here, as this Court recognized in that case that the lack of no-fault coverage resulted in plaintiff having a viable claim under the Michigan Assigned Claims Plan.[4]

Second, Plaintiff's argument blatantly violates the No-Fault Act. As stated earlier in this Reply Brief, MCL § 500.3135(2)(c) and MCL § 500.3101(1) both necessarily require the existence

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[3] *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498; 968 NW2d 482 (2021).

[4] This Court in *Esurance* stated in part: "Again, the operator of the vehicle was Edwards, who, at the time, did not have no-fault insurance of his own and did not live with a resident relative who had no-fault insurance. Thus, Esurance's complaint supports the conclusion that Edwards had a viable claim against defendants under MCL 500.3172(1)(a) [the Michigan Assigned Claims Plan] because there was no policy "applicable to the injury" under the foregoing order-of-priority analysis. As a result, Esurance's equitable-subrogation claim, as pled by Esurance, can proceed." *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498, 516; 968 NW2d 482 (2021).

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of a plaintiff's coverage as a condition for maintenance of a third-party no-fault claim. Based on this statutory language, the legislature intended that Plaintiff's loss of insurance eviscerates her third-party no-fault claim against Defendant.

B. Plaintiff's Argument That Rescission of Coverage Does Not Affect a Third-Party Motorist's Legal Duties to her Wrongly Ignores Michigan's No-Fault Act

Plaintiff's Supplemental Brief also argues that rescission of coverage does not affect a third-party motorist's legal duties to her. (Plaintiff's Supplemental Brief at pp. 3-4). This misses the point. Arguing that loss of insurance coverage does not affect basic duties of other motorists to operate their vehicles safely is not the issue here. Rather, what is at issue is the No-Fault Act. Within it, MCL § 500.3135(2)(c) states that vehicle owners who lack mandatory no-fault insurance coverage are statutorily barred from seeking recourse against other motorists: "[d]amages must not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101(1) at the time the injury occurred." MCL § 500.3135(2)(c); emphasis added. Plaintiff may dislike the harsh effect of this law as to her, but her recourse is to the Michigan legislature – not the courts.

C. Plaintiff's Arguments Based on Equity and "Clean Hands" are Unavailing

Plaintiff's Supplemental Brief argues that a party seeking to avail itself of a remedy of rescission must do so in equity and have "clean hands" (Plaintiff's Supplemental Brief at pp. 4-5), but the "clean hands" doctrine is inapplicable at this stage in the case. Also, Plaintiff has misinterpreted the effect of rescission, considering the procedural posture of this case. Here, rescission of Plaintiff's coverage and associated equities were presented to and decided by the trial and appellate courts. Both of them supported rescission due to her fraud. Plaintiff has not appealed that issue here, and Defendant has not sought to rescind Plaintiff's policy.

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Thus, the questions before this Court are not of an equitable nature, and this Court need not delve into whose hands are cleaner. Instead, the issues before this Court center on the effects of a no-fault insurance policy that was rescinded and premium refunded when Michigan statutes mandate that vehicle owners like Plaintiff must have coverage and, as a consequence of no coverage, remove their recourse against other drivers.

III. PLAINTIFF'S CLAIMS AGAINST A NON-PARTY TO THIS APPEAL THAT ARE NON-RESPONSIVE TO THE QUESTION POSED BY THIS COURT SHOULD NOT BE CONSIDERED

A portion of Plaintiff's Supplemental Brief attacks the insurer who rescinded Plaintiff's no-fault coverage. (Plaintiff's Supplemental Brief at pp. 6-7.) Such argumentation should not be considered as it falls outside this Court's Order limiting supplemental briefs to the issue of "whether the rescission of an insurance policy under the no-fault act, MCL 500.3101 et seq., bars recovery of noneconomic damages under MCL 500.3135(2)(c) on the basis that the claimant "did not have in effect . . . the security required by [MCL 500.3101(1)] at the time the injury occurred." Also, the decision to rescind has already been made and is not at issue here.

CONCLUSION AND RELIEF SOUGHT

The Court of Appeals' decision should be reversed. Its repercussions not only impact third-party no-fault cases, as in this case, but potentially PIP cases, as well. Based on the misguided statement that rescission is a "legal fiction" that can essentially be disregarded for coverage purposes, the Court of Appeals would wrongly allow vehicle owners like Plaintiff who defraud insurers to pursue third-party benefits, despite contrary language in MCL § 500.3135(2)(c), and even pursue first-party PIP benefits, despite contrary language in MCL § 500.3113(b). The letter and spirit of the No-Fault Act would be violated, with tremendous collateral consequences impacting consumers and the courts alike.

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Accordingly, Defendant/Appellant Mohammad Zakir respectfully requests that this Court grant leave to appeal and reverse the Court of Appeals' decision, reinstate the Circuit Court order of dismissal, and enter judgment dismissing Plaintiff/Appellee's third-party no-fault claims against Mr. Zakir with prejudice.

Respectfully submitted,

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Dated: June 7, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, I caused the foregoing paper(s) to be electronically filed with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

/s/Deborah Kales
Deborah Kales