THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0156

KEENE AUTO BODY, INC.
Plaintiff / Appellant

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Defendant / Appellee

REPLY BRIEF OF *AMICI CURIAE* NEW HAMPSHIRE AUTOMOBILE DEALERS ASSOCIATION FILED IN CONNECTION WITH MOTION FOR LEAVE TO FILE REPLY

Appeal Pursuant to Supreme Court Rule 7 from
8th Circuit – District Division – Keene, Small Claims Division
Docket No. 449-2021-SC-00079

Attorneys for New Hampshire Automobile Dealers Association

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September 13, 2021

Oral Argument by Edward J. Sackman, Esq.

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ARGUMENT

I. *Margolis* does not control.

State Farm argues that the Court should not adopt the post-loss assignment rule on account of *Margolis v. St. Paul Fire & Marine Ins. Co.*, 100 N.H. 303 (1956). In that case, this Court enforced an anti-assignment clause contained in a fire insurance policy. *Id.* at 308. *Margolis* is distinguishable for two reasons. First, in *Margolis* the entire policy had been assigned for the benefit of creditors in a bankruptcy proceeding. *Id.* at 304. Here, by contrast, the owner of the vehicle at issue assigned only the right to collect proceeds on a single claim post-loss, not the entire policy. (App. at 5, 100). Second, the policy at issue in *Margolis* was subject to a statutory provision that rendered it "void and inoperative" if assigned absent the insurer's consent. *Id.* at 305 (*citing* R.S.A. 407:23). The decision explicitly relied on that language when reaching its conclusion. *See id.* at 308. ("The assignment of the policies rendered them *void and inoperative* unless and until the insurers assented thereto.") (emphasis supplied). The legislature has since amended R.S.A. 407:23 and it now addresses "nuclear perils." *See* R.S.A. 407:23. The assignability of the fire insurance contract provision was moved to R.S.A. 407:20, which does not contain the "void and inoperative" language cited in *Margolis*. Indeed, none of the text in Title XXXVII on Insurance contains that phrase. Moreover, R.S.A. 407:20 only requires the carrier's assent when the entire policy is transferred or assigned, and does not apply where the right to collect on a single claim is transferred post-loss. *See id.* (Beginning with the phrase "[i]f a policy has been transferred or assigned….") Thus, *Margolis* and the now amended statute it relies upon need not prevent this Court from adopting the post-loss assignment rule.

II. The Insurance Commissioner has not specifically approved the clause in question.

State Farm overstates the nature of the New Hampshire Insurance Commissioner's "approval" of the provision in the subject policy. R.S.A. 412:5 requires an insurer to submit its policies for approval, but it contains a self-executing approval provision such that "[a] filing shall be deemed to meet the requirements of this chapter unless disapproved by the commissioner within the [30-day] waiting period or extension thereof." Thus, as written the statute contemplates that the Insurance Commissioner might not even review the policy before it is deemed approve. Other than citing the statute, State Farm makes no suggestion that anyone in the Insurance Commissioner's office actually reviewed the policy, much less the anti-assignment provision. Thus, the fact that the Insurance Commissioner did not object to the policy within the proscribed 30-day waiting period does not cloak the State Farm policy with the protection afforded by an agency finding as State Farm suggests.

III. State Farm's Ohio authority misreads the law of the Ohio Supreme Court.

State Farm cites an intermediate appellate case, *Mercedes-Benz of West Chester v. American Family Ins.*, 2010 WL 2029048 (Ohio Ct. App. 2010), for the proposition that allowing post-loss assignment will increase the risk to insurers. *Mercedes-Benz* used that argument to justify its enforcement of an anti-assignment clause, but the decision is contrary to *Pilkington North America, Inc. v. Travelers Cas. & Surety Co.*, 861 N.E.2d 121 (Ohio 2006). In *Pilkington*, the Ohio Supreme Court explicitly stated that "[i]nsurance contracts receive unique treatment post-loss," wherein "assignment of an interest is valid *after*

the occurrence of the loss insured against." *Id.* at 128 (emphasis in original). Thus, *Pilkington* held "that the chose in action as to the duty to indemnify is unaffected by the anti-assignment provision when the covered loss has already occurred." *Id.* at 129. *Mercedes-Benz* attempted to distinguish *Pilkington* by noting that *Pilkington* was an "operation of law" assignment case whereas *Mercedes-Benz* involved assignment to a third-party service provider. 2010 WL 2029048, at *2. But that is a distinction without a difference. *Pilkington* did not limit its holding to operation of law cases. Quite the opposite, it explained that "[t]he issue of permitting assignment after loss in avoidance of the anti-assignment provision is an easier concept when dealing with life insurance or casualty insurance" because the "insured['s] loss has already occurred [and] is clearly defined, and the insurer's liability is fixed and established." *Id.* at 128-29. That passage from *Pilkington* renders it indistinguishable from *Mercedez-Benz* while underscoring that post-loss assignments in the casualty insurance context do not increase the risk of the insurer. Moreover, as explained in NHADA's Brief, at least one New Hampshire court has approved application of the post-loss assignment rule in an operation of law assignment case. *See Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152 (D.N.H. 1994). Thus, *Mercedes-Benz* provides no persuasive authority for the result State Farm seeks.

CONCLUSION

For these reasons, the Court should reverse the Trial Court's Order, dated April 5, 2021, granting State Farm's Motion to Dismiss and remand for further proceedings in the Trial Court.

ORAL ARGUMENT

The NHADA requests fifteen (15) minutes for oral argument. Edward J. Sackman, Esq. will argue on behalf of the NHADA.

Respectfully Submitted,
New Hampshire Automobile Dealers Association

By and through its counsel,

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September 13, 2021

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 819 words, which is fewer than the 3,000-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Hilary Holmes Rheaume, Esq.
Hilary H. Rheaume, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 13th day of September, 2021 through the electronic-filing system on the Appellant and counsel of record for the Appellee.

/s/ Hilary Holmes Rheaume, Esq.
Hilary H. Rheaume, Esq.