IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CENTRAL MUTUAL INSURANCE COMPANY,

Plaintiff/Petitioner, Supreme Court No. S-1-SC-39715

vs. Ct. App. No. A-1-CA-39306

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Respondent.

REPLY BRIEF

of

Central Mutual Insurance Company, Plaintiff/Petitioner

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
District Court No. D-202-CV-2019-04741
LISA CHAVEZ ORTEGA, District Judge

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ORAL ARGUMENT REQUESTED

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Statement of Compliance

This brief complies with the type-volume limitations set forth in Rule 12-318(F)(2) and 12-318(F)(3) NMRA, as it is prepared in 14-point Times New Roman, and the body of the brief contains 4,236 words, as indicated by Microsoft® Word for Microsoft 365.

I. INTRODUCTION

COMES NOW Plaintiff/Appellant, Central Mutual Insurance Company ("CMIC") and, pursuant to Rule 12-318(C) NMRA, files its Reply Brief in the matter captioned above, in reply to the Answer Brief filed by Defendant/Appellee, State Farm Mutual Automobile Insurance Company ("State Farm") on June 12, 2023.

At [**AB 1**], State Farm claims this case does not present a question of first impression. But it fails to show any prior New Mexico decision in which the primary insurer of a hit-and-run driver denied coverage without investigation, and where medical treatment of the injured victim continued longer than the three-year statute of limitation for the secondary carrier to sue in subrogation. Instead, as did the Court of Appeals, State Farm continues to rely on authorities that, on their face, apply only to "ordinary" or "typical" disputes between insurers. State Farm does not – and neither did the Court of Appeals – rely on authorities that did *not* arise in "ordinary" or "typical" circumstances. Equitable contribution may be an imperfect fit with the unusual facts before the Court, but it is the solution that presents the best starting place for a truly equitable remedy under facts such as those before the Court.

As did the Court of Appeals, State Farm continues its attempt to pound the square peg of this case into the round hole of *Little v. Gill*, 2003-NMCA-103, 134 N.M. 32, 76 P.3d 639. But never does State Farm address the obvious distinctions between *Little* and the case now on appeal. Unlike here, the plaintiff in *Little* was an

injured motorist, suing the at-fault driver for her *own* damages. *Little* did not involve an insurance company suing for *its* right to contribution from the primary carrier on a common risk, which denied coverage on insufficient (or no) grounds. Therefore, *Little* did not involve complications unique to actions by insurers, such as the need to exhaust a medical-treatment period in excess of the statute of limitations for subrogation. *Little* simply does not apply to the parties and claims at issue in this matter.

Moreover, with its citations to *Little*, State Farm implies that its policy requires an adjudication of liability against the tortfeasor. As is discussed below, if its policy does so provide (which remains unknown, since State Farm successfully fought to keep it out of the record), such a provision would be void as contrary to New Mexico law. Under the correct standard, the liability of the tortfeasor need only be "reasonably clear." State Farm cites no authority under which it would be *legally* barred from adjusting Albert Perez's claim absent a judgment against the tortfeasor.

State Farm also fails to address CMIC's observation that, by all indications, State Farm failed to perform an adequate investigation, deeming the at-fault vehicle to have been stolen on apparently no objective basis whatsoever. State Farm resisted CMIC's efforts in the district court to discover what investigation it *did* perform, if any; it cannot now proceed as though it were established that the at-fault vehicle had been taken without permission. State Farm criticizes CMIC's evidentiary showing,

but does not deny that the at-fault vehicle was being driven consistently with its being repaired and returned, exactly as its owner had been told it would be. The at-fault vehicle was never reported stolen, was obviously in running order at the time of the collision, and the collision occurred at the freeway exit leading to the home of the vehicle's owner. If State Farm had evidence that the vehicle had indeed been taken without permission, it could have produced that evidence when it was requested in the district-court proceeding, rather than stalling through discovery, good-faith conferral, and a motion to compel so as to avoid making good on its obligations. State Farm should not continue to profit from its own misconduct in discovery by escaping its burden to show that the at-fault vehicle was stolen.

State Farm also proceeds, despite its stonewalling in discovery, as though CMIC had come to this Court in possession of State Farm's claim-file materials. State Farm complains that CMIC had not placed evidence in the record for inconsequential facts such as the disabled at-fault vehicle being retrieved by a "tow truck" *per se*, or the vehicle having been repaired, although it was clearly operable at the time of the collision. [**AB 4**] Those quibbles ignore CMIC's *caveat* in its Brief in Chief that it was forced to recite certain facts on information and belief, State Farm having successfully resisted its duty to provide meaningful discovery responses in the district court. [**BIC 3, n.1**]

State Farm also ignores CMIC's acknowledgment that its claims do not fit neatly into the textbook definition of equitable contribution, and that more important than labels is the need for justice to be done. [**BIC 12**] State Farm does not echo the Court of Appeals by alleging that New Mexico does not recognize equitable contribution; it simply repeats the mantra that equitable contribution can *only* apply where two carriers share a common named insured. But in so doing, State Farm leaves unanswered the more important question: if not equitable contribution, *then what*? Surely it is not the law of New Mexico that a liability carrier, primary on the shared risk of a hit-and-run collision, may simply deny a timely claim without any investigation, as long as the injured victim must undergo a lengthy course of treatment. By giving their *imprimatur* to State Farm's conduct, and by declining to use their equitable powers as CMIC requested, the district court and the Court of Appeals sent the message that State Farm *was* entitled to deny Albert Perez's valid claim without an investigation. Whether termed "equitable contribution" or under another name, or through the alternate theories of declaratory relief or unjust enrichment, CMIC should be afforded a remedy, for CMIC's own sake and for the sake of every other UM/UIM carrier and insured in the State of New Mexico.

II. ARGUMENT

State Farm proclaims that it "has no duty to [CMIC]," and that "[n]either does State Farm owe any obligation to [CMIC's] insured[,] Mr. Perez." [**AB 14**] Mr.

Perez is a legitimate claimant against State Farm's liability policy and, due to State Farm's professed belief that it owed him no duty, it denied his claim by applying a policy exclusion that appears to be inapplicable. But State Farm *did* owe Mr. Perez the duty to adjust his claim fairly, and it owes CMIC the duty to participate fairly in making Mr. Perez whole. *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 21, 135 N.M. 397, 89 P.3d 69 (noting that "the statutory duty under Section 59A-16-20(E), to attempt reasonable settlement efforts of an 'insured's claims,' includes in the context of automobile liability insurance attempting in good faith to settle the claim of a third party"). As is discussed below, none of the argument or authority in State Farm's Answer Brief entitles State Farm to deny a valid claim, and thrust its primary obligations onto a secondary carrier. The district court erred in dismissing CMIC's Complaint, and the Court of Appeals erred in affirming the dismissal. Both of those courts' decisions should be reversed.

A. State Farm mischaracterizes the claims and authorities at issue, and relies only on authorities that do not apply to CMIC's claims.

State Farm admits that the Court of Appeals' Memorandum Opinion gives "no consideration regarding the duties of a liability insurer of an [at-fault] vehicle to an [uninsured/underinsured-motorist] [UM/UIM] insurer." **[AB 10]** But State Farm claims that omission was made because such a question was not "before the Court." *Id.* State Farm is mistaken; it is obvious from every filing from CMIC's initial Complaint onward that this entire litigation – specifically including the issues brought

before the Court of Appeals – revolves around the duties owed by one who insures an at-fault vehicle to the UM/UIM insurer of an injured driver. *See* Brief in Chief to New Mexico Court of Appeals ([**NMCA BIC**]) at, *e.g.*, p. 6, characterizing the issue before the Court as centered on the fact that "[b]oth CMIC and State Farm are obligated to indemnify or defend the same loss or claim, and CMIC has paid more than its share of the loss without any participation by State Farm" (internal punctuation marks omitted).

State Farm also mischaracterizes the issues where it claims CMIC "failed to join the tortfeasor in its . . . direct action against State Farm for the monies it paid its insured as a result of the accident[, i]nstead of seeking subrogation when [CMIC] had paid its insured in full . . . ." [**AB 11**] As State Farm is well aware, CMIC was unable to "seek[] subrogation [after paying] its insured in full," not only because the at-fault driver was unavailable, but because Mr. Perez's medical treatment was ongoing as of the lapse of the three-year statute of limitations for CMIC to sue in subrogation. [**BIC 9**] (*citing* [**NMCA BIC 23-24**] for its showing that ". . .because Mr. Perez's treatment has taken longer than three years, CMIC would have been unable to wait until such treatment was complete before pursuing its claims against State Farm"). Rather than grappling with the more difficult question of how to proceed in the situation that *does* exist, State Farm ignores the unusual circumstances that gave rise to this litigation in the first instance, and pretends that CMIC had the option simply to sue in subrogation.

Having set up the straw man that CMIC could somehow have sued in subrogation, State Farm topples it by citing – and relying almost exclusively on – *Little*. The Court of Appeals, too, relied on *Little* in holding that "**[t]ypically**, in an action against an insurer for damages resulting from the liability of a tortfeasor, that tortfeasor must be joined," and that "an **injured party** must **generally** join the insured tortfeasor in an action against the tortfeasor's insurer." **[DOA 3]** (*citing Little* at ¶¶ 1, 17, 21) (emphases added). Neither State Farm nor the Court of Appeals acknowledged that – in no small part because CMIC could *not* sue in subrogation while Mr. Perez was still treating – this case is not "typical," and the rules that "generally" apply in actions against liability insurers effect no justice here. Both State Farm and the Court of Appeals also overlook the fact that CMIC is not the "injured party" in the collision.

Just as State Farm fails to acknowledge the ways in which this case is not "typical," it also fails to address the obvious distinctions between this matter and *Little*. *Little* was a suit by an "injured third party," suing for her *own* damages under *Raskob v. Sanchez*, 1998-NMSC-045, 126 N.M. 394, 970 P.2d 580. *Little* at ¶ 1. As CMIC informed the Court of Appeals, this case does not arise under – and is not an attempt to expand the scope of – *Raskob*. **[NMCA BIC 8]** *See Otero v. Hartford Cas. Ins. Co.*, 2014 WL 11497803, at *3 (D.N.M. Feb. 14, 2014) (explaining that *Raskob* "addressed the issue of whether, **in a negligence action by an injured party**

against the tortfeasor who caused the injury, joinder of the defendant tortfeasor's insurance company was permissible") (emphasis added).

Here, unlike *Little* (or *Raskob*), CMIC, a secondary insurer on the risk of a collision, sues State Farm, the primary insurer on the risk, not for the personal injuries caused by the absent hit-and-run driver, but for *reimbursement* of sums expended following the primary insurer's denial of the injured victim's claim based on an inadequate (or nonexistent) investigation. The Court of Appeals disregarded authority it deemed inapposite. *See* [**DOA 6**], distinguishing *Baca v. New Mexico State Highway Dep't*, 1971-NMCA-087, 82 N.M. 689, 486 P.2d 625, cited for one discrete proposition (*i.e.* that an "actual controversy" may be present with respect to insurance coverage despite the lack of an underlying judgment). But *Baca* is a much closer factual fit than is *Little*, which has few if any aspects in common with the case now before this Court. If *Baca* is inapposite, then *Little* is doubly so.

Not only is State Farm off-target in relying on the inapplicable *Little*, but it also mischaracterizes the holding and scope of that decision. *Little* does not, as State Farm claims, hold that "the tortfeasor [is] a necessary party to **any** case seeking damages allegedly resulting from his actions and simultaneously seeking to hold his insurance company liable for those damages." [**AB 11**] (emphasis added). First, *Little* applies, on its face, only to an action by an "injured party." At ¶ 1, the *Little* Court frames the issue before it as asking "[c]an *an injured party* maintain a direct

action against a tortfeasor's insurer without the presence of the tortfeasor . . . in the litigation?" Again, it is Mr. Perez, not CMIC, who is the "injured party" in the collision at issue, analogous to the plaintiff in *Little*, and in part because he was still treating, CMIC was unable to sue "in his shoes" in subrogation.

Further, *Little* arises under a completely different legal regime than does the above-captioned action. *See id.*, framing the question at issue by stating "[w]e address in this appeal an issue *arising from our Supreme Court's opinion in Raskob* . . . ." Again unlike the plaintiff in *Little*, CMIC did not, and could not, sue under *Raskob*. *Little* also lacks the other defining characteristics of CMIC's claims in this matter. An "injured party" suing in tort, such as the *Little* plaintiff, does not need to exhaust a medical-treatment period potentially in excess of the statute of limitations, as would an insurer suing in subrogation. *Little* did not involve an insurer suing for its *own* right to contribution by the primary carrier on a common risk, which denied coverage on insufficient (or no) grounds.

CMIC informed the Court of Appeals of another aspect of this matter – utterly absent from *Little* – which State Farm fails to address in its Answer Brief. *See* [**NMAC AB 23-24**], explaining that "State Farm's denial of Mr. Perez's claim obligated CMIC to pay 'first dollar' on an **un**insured-motorist claim – as opposed to paying *after State Farm* on an **under**insured-motorist claim – and eliminated CMIC's setoff as against State Farm's policy proceeds" (emphases in original). Those

considerations are at the very core of CMIC's claims in this action; no such issues are addressed, let alone resolved, in *Little*. The differences between this action and *Little*, then, are not merely skin-deep distinctions with no effect on the claims and rights at issue. *Little* may be, as State Farm asserts, "well-settled law," [**AB 2**] but it does not apply to the claims before the Court. CMIC's cited authorities present a much closer, if still imperfect, fit with the issues on appeal.

B. State Farm fails to show that a judgment against the tortfeasor was required in order for CMIC's claims to be adjudicated.

A recurring component of State Farm's argument in its Answer Brief is that the liability of the hit-and-run driver who rear-ended CMIC's insured vehicle on an icy freeway has not been taken to a formal judgment. *See, e.g.*, [**AB 13**], baldly alleging that CMIC "cannot recover from State Farm without an adjudication of liability against a tortfeasor-insured." As CMIC pointed out to the Court of Appeals, it is not always necessary to obtain a formal determination of an unknown tortfeasor's fault. Reply Brief to New Mexico Court of Appeals ([**NMCA RB**]) at 12, *citing Bartlett v. New Mexico Welding Supply, Inc.*, 1982-NMCA-048, ¶ 39, 98 N.M. 152, 646 P.2d 579 for the proposition that in "countless other contexts, courts allow actions to proceed when a tortfeasor is unknown," and characterizing *Bartlett* as "finding it an accepted practice to include all tortfeasors in the apportionment of liability, <u>including unknown tortfeasors and phantom drivers</u>."

The Court of Appeals ignored CMIC's citation of *Bartlett* to show that a formal determination of liability is not always required, particularly where the at-fault party cannot be identified. Instead, it simply proclaimed, without citation to authority, that "[w]ithout some judgment of liability against the tortfeasor, there is simply no basis upon which we could conclude that CMIC's payment on Perez's claim constitutes unjust enrichment for State Farm." **[DOA 8]** The Court of Appeals does not explain why it believes that is so, but State Farm is not so circumspect. State Farm states that the reason it is relevant whether "a State Farm 'insured' is responsible for [the] damages" is that the "inquiry between concurrent insurers is simply whether, **under its policy with the insured**, the nonparticipating coinsurer had a legal obligation to provide a defense or indemnity coverage for the claim." **[AB 20]** (*citing Am. Family Mut. Ins. Co. v. Regent Ins. Co.*, 846 N.W.2d 170, at 188 (Neb. 2014)) (emphasis added). State Farm, the "nonparticipating coinsurer," cites no authority that a "legal obligation to pay" under an auto liability policy is synonymous with a *judgment* rendered in a court of law. In any event, State Farm now admits that any requirement for an adjudication of the tortfeasor's liability would arise from the four corners of the State Farm policy. *See also Little* at ¶ 18, stating that "Gill was a necessary party by virtue of the insurance contract."

At **[AB 13]**, State Farm claims ¶ 18 of *Little* stands for the proposition that "[u]nder New Mexico law, an insurance company is not obligated to pay a third-party

claim . . . absent a judgment against its insured" (emphasis added). That interpretation is incorrect. ¶ 18 of *Little* states three times that an adjudication of the tortfeasor's liability was required. All three instances cite the "insurance contract" as the reason; none cites "New Mexico law." On the contrary, New Mexico law does not require an adjudication of the tortfeasor's liability as a basis for fairly adjusting a third-party liability claim. Rather, the Insurance Code defines "unfair claims practices" to include "not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability **has become reasonably clear**." NMSA 1978 § 59A-16-20(E) (emphasis added). *See also Hovet*, *supra*, at ¶ 21, including "the claim of a third party" within the definition of "an 'insured's claims'." Here, the liability of the hit-and-run driver, though not formally adjudicated to a judgment, is unquestionably "reasonably clear." The driver rear-ended the Perez vehicle on an icy freeway, then fled on foot; there is no reason to suspect – and certainly no evidence in the record – that Mr. Perez, or any other motorist, was at fault.

In any event, State Farm cannot now rely on its "policy with the insured," based only on its counsel's mere insinuation that the policy requires more than that the tortfeasor's liability be "reasonably clear." *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104, noting that the Court cannot "rely on assertions

of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence."

C. The tortfeasor was not a necessary or indispensable party to CMIC's claim for declaratory judgment because he or she had no interest that would be affected.

State Farm alleges that the at-fault driver is a necessary party to CMIC's claim for a declaratory judgment because "any person or entity with an existing or potential interest in the outcome of the action must be named." [**AB 22**] State Farm does not explain any way in which the absent driver, even if he or she could be located, might have any "interest in the outcome of the action" before the Court. State Farm cites no authority for the notion that an at-fault permissive[1] motorist in a collision might ever have an "interest in the outcome" of an action to declare the obligation of the primary liability insurer to a secondary coinsurer for the shared risk of the collision. State Farm does not articulate what such an "interest" may be. It simply states that "an interest" is required, then concludes that "[a]s such, the tortfeasor, whose liability for the accident is a required antecedent to invoke State Farm's coverage under its policy, is a necessary party as **he has or could claim any interest [that] would be**

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[1] *See* [**NMCA RB 3**], *citing United Services Auto. Ass'n v. Nat'l Farmers Union Prop. & Cas.*, 1995-NMSC-014, ¶ 16, 119 N.M. 397, 891 P.2d 538 for the proposition that under New Mexico law, the at-fault vehicle was used permissively "whether the at-fault driver was the person to whom Mr. Partin handed his keys, or someone else who was subsequently entrusted with the vehicle."

affected by the declaration as to the coverage provided by his [*sic*] policy." *Id.* (emphasis added; internal punctuation marks omitted).

As is discussed above, State Farm having fiercely resisted CMIC's efforts to obtain its policy, it should not now be heard to invoke the unknown terms of that policy for its own benefit. Even more to the point, although it is unknown who was driving the Partin vehicle at the time of the collision, there is no reason to suspect it was Mr. Partin himself. As such, there is no reason – and State Farm certainly identifies none – why the driver would be someone who "has or could claim any interest [that] would be affected by the declaration as to the coverage provided by his [*sic*] policy."

The Court of Appeals attempted to address this issue as well, but it also missed the mark. At [**DOA 6**], the Court characterized CMIC as "ask[ing] the district court to determine that State Farm's policy covered the unknown driver of the vehicle involved in the crash with Perez," which it stated "would require a conclusion that the unknown driver of the State Farm-insured vehicle was responsible for the crash." While it is true that CMIC sought a declaration as to coverage, it was *not* necessary that such a declaration involve the at-fault motorist. The Court disregarded without comment CMIC's showing that phantom drivers' fault is commonly adjudicated. Again, New Mexico law requires only that liability be "reasonably clear."

Moreover, by belatedly calling into question the fault of the absent tortfeasor only *after* the inception of litigation regarding its claim denial, State Farm is attempting to assert a new basis for the denial after the fact. State Farm denied the claim because it claimed the Partin vehicle had been stolen, not because it believed Mr. Perez was at fault for the collision. The fault of the hit-and-run driver was never contested, and is unrelated to State Farm's stated basis for denying the Perez claim. *See* [**AB 4**], admitting that "State Farm denied [Mr. Perez's] claim on March 7, 2016 because [it claimed] the Partin vehicle was being used outside the scope of its insured's consent and was taken by an unknown individual" (internal punctuation marks omitted). State Farm cannot now assert a new basis for the denial. *See OR&L Constr., L.P. v. Mountain States Mut. Cas. Co.*, 2022-NMCA-035, ¶ 42, 514 P.3d 40, stating that the "mend the hold doctrine precludes an insurer from asserting one reason to deny coverage of a claim and then raising a different reason for denial as a defense once litigation occurs." Even imagining for the sake of argument that the phantom driver *could* be compelled to shed light on the cause of the rear-end hit-and-run collision on an icy freeway, State Farm fails to show that the permissive at-fault driver could have an *interest* in the outcome. No such interest being evident from the record on appeal, the Court would have no basis on which to affirm the lower courts in their dismissal of CMIC's claim for a declaratory judgment.

III. CONCLUSION

Although this case presents a circumstance outside the usual conflict between automobile insurers, its component facts are common. Every day, drivers cause collisions and flee. And every day, motorists sustain injuries that require lengthy treatment. It cannot be the law in New Mexico that when those two common occurrences align, the liability insurer of the at-fault vehicle can simply deem the vehicle "stolen," with no investigation and all evidence to the contrary, and deny all obligation to the victims with impunity. In the world State Farm would create, governed only by *Little*, the liability insurer of every hit-and-run driver would be automatically exonerated of any duty to pay, as long as treatment of the injured victim(s) exceeded three years.

As the insurer of the victim vehicle, CMIC was forced to assume the entire loss at issue as an uninsured-motorist carrier, when it should only have paid second, on underinsured-motorist coverage. The district court and the Court of Appeals gave State Farm free rein to deem any hit-and-run vehicle "stolen," on its mere say-so, and escape all liability, as long as its driver causes severe enough injuries. If that is to be the law of the State of New Mexico, it should be made so by the Legislature, not by the courts.

It is true that the facts of this case are not squarely within the "typical" definition of equitable contribution, but that does not mean the Court cannot – or

should not – effect a fair outcome nonetheless. Whether relief is afforded under the name "equitable contribution" or otherwise, the secondary coinsurer of a common risk in CMIC's position should not be denied a remedy. The Court of Appeals and district court should be reversed, and this matter should be remanded for further proceedings consistent with the principles outlined in CMIC's Brief in Chief, and hereinabove.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2023, a true copy of the foregoing Reply Brief was filed electronically through the Court's electronic filing system and served electronically through that system on all counsel of record, as well as an additional courtesy copy being provided by electronic mail to counsel as follows:

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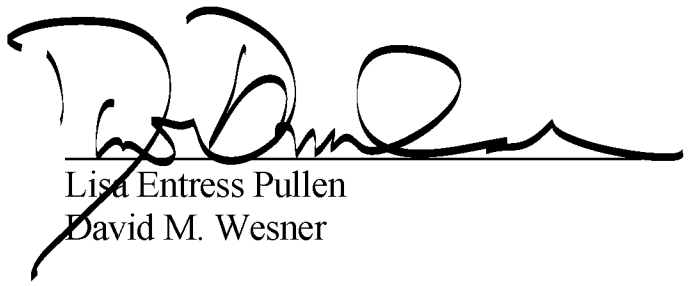

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