STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Mark T. Boonstra, Brock A. Swartzle, and Amy Ronayne Krause (concurring)

W.A. FOOTE MEMORIAL HOSPITAL, d/b/a ALLEGIANCE HEALTH, a Michigan nonprofit corporation,

Plaintiff-Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN, and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

Supreme Court No. 156622
Court of Appeals No. 333360
Circuit Court No. 15-08218-NF

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THE INSURANCE ALLIANCE OF MICHIGAN'S AMICUS CURIAE BRIEF

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STATEMENT OF APPELLATE JURISDICTION

Plaintiff-Appellant W.A. Foote Memorial Hospital d/b/a Allegiance Health ("Allegiance Health") seeks leave to appeal from the August 31, 2017 Court of Appeals opinion in *W A Foote Memorial Hospital v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017). On May 25, 2018, this Court directed the Clerk to schedule oral argument on whether to grant the Application or take other action in this matter. (Allegiance Health's Supplemental Brief, p 1.) That Order further directed the parties to submit supplemental briefs addressing the retroactive application of *Covenant Medical Center v State Farm Mut Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). Amicus Curiae, the Insurance Alliance of Michigan ("IAM"), agrees that this Application satisfies MCR 7.305(B)(3) and (B)(5), although IAM disagrees with the relief requested by Allegiance Health for reasons explained below.

INTRODUCTION AND STATEMENT OF THE AMICUS CURIAE

In this first-party no-fault action, the question before this Court is whether *Covenant*, 500 Mich at 191 applies retroactively. *Covenant* held that – as a matter of first impression for this Court, but contrary to what multiple Court of Appeals panels had found – there is no provision in the No-Fault Act that confers standing upon healthcare providers to bring independent causes of action against no-fault carriers. In *Covenant*, this Court found that "the notion that a healthcare provider possesses a statutory cause of action against a no-fault insurer for payment of no-fault benefits" originated "not from the text of the no-fault act, but from previous decisions of the Court of Appeals that are … devoid of the statutory analysis necessary to support that premise." *Covenant*, 500 Mich at 204.

Shortly after this Court issued *Covenant*, the Court of Appeals released an exhaustive opinion in *W A Foote*, 321 Mich App at 159, holding that *Covenant* applies retroactively to all pending cases. As noted by the concurring Court of Appeals judge, "the general rule [is] that decisions from our Supreme Court should be given retroactive effect by default." *W A Foote*, 321 Mich App at 197 (Ronayne Krause, J., concurring).

IAM takes a great deal of interest in the issue presented this Application, as it affects dozens if not hundreds of pending cases involving IAM's member insurers. Between 2002 – following the Court of Appeals' decision in *Lakeland Neurocare v State Farm*, 250 Mich App 35; 645 NW2d 59 (2002) – and *Covenant's* release last year, there had been an "explosion of first-party actions filed by health insurance providers…." Frasier, *No-fault dominated by threshold instability*, 25 Mich LW 880 (June 27, 2011). The apparent recognition of independent provider suits "basically split the [no-fault] cause of action," so that "for every accident, you'd have an injured person and any number of providers that would be eligible to sue." *Id.* For this

reason, in the years leading up to *Covenant*, "the so-called provider suits far outnumber[ed] the claimant suits." *Id.* This explosion of litigation led to confusion with respect to the application of claim and issue preclusion, and made the settlement of suits more complicated. Brown, *No Fault Report*, 28 Michigan Defense Quarterly 32, 33 (July 2011). This "explosion" of no-fault claims was a significant public policy concern that, presumably, led this Court to grant leave in *Covenant*.[1] Denying *Covenant* retroactive effect would mean years of continued litigation over these issues, as the thousands of provider suits pending as of May 25, 2017 make their way through the trial and appellate courts.

IAM represents the 2017 merger of The Insurance Institute of Michigan ("IIM") with the Michigan Insurance Coalition ("MIC"). IAM is a government affairs and public information association proud to represent more than 80 property/casualty insurance companies and related organizations operating in Michigan.

IAM member companies provide insurance to approximately 75% of the automobile, 65% of the homeowner, 42% of the workers' compensation and 26% of the medical malpractice markets in Michigan. IAM's purpose is to serve the Michigan insurance industry and the insurance consumer as a central focal point for educational, media, legislative and public information on insurance issues. IAM serves as the official spokesperson for the property/casualty insurance industry in Michigan.

IAM formulates its policy analyses on insurance issues in a consistent and deliberate manner. In conducting its policy analyses, IAM consistently applies the following core principles: (A) the legitimate role of the courts is the interpretation and application of the law as

[1] See Ex. A, IIM and MIC's Amicus Brief from *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co,* 497 Mich 1029; 863 NW2d 54 (2015); Ex. B, IIM and MIC's Amicus Brief from *Chiropractors Rehab Group, PC v State Farm Mut Auto Ins Co,* 501 Mich 875; 902 NW2d 414 (2017).

written, not the creation of new policy to augment, alter or conflict with statutes, regulations or contracts; (B) the natural commercial order arising out of consensual transactions between or among individuals and businesses is generally preferable to the imposition of government authority, regulation and laws designed to control commerce, limit choice, or effect preferred outcomes; and (C) commerce conducted by private individuals and businesses is generally preferable to commerce conducted by a governmental body.

This Court very recently invited an amicus curiae brief from the IAM in *Home-Owners Ins Co v Jankowski*, 911 NW2d 469 (Mich 2018). And this Court has historically either invited or accepted amicus curiae briefs from the former IIM. See *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562, 565 (2012); *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co,* 885 NW2d 475 (Mich 2016); *Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Ass'n,* 860 NW2d 631 (Mich 2015); *Admire v Auto-Owners Ins Co*, 820 NW2d 914 (Mich 2012) *United States Fid & Guar Co v Michigan Catastrophic Claims Ass'n*, 759 NW2d 356 (Mich 2008). This Court similarly accepted amicus curiae briefs from the former MIC. See, for example, *Coalition Protecting Auto No-Fault,* 860 NW2d at 631; *Admire,* 820 NW2d at 914; *Devillers v ACIA,* 695 NW2d 65 (Mich 2005).

STATEMENT OF THE QUESTION PRESENTED

I. WAS THE COURT OF APPEALS' DECISION TO GIVE *COVENANT* FULL RETROACTIVE EFFECT CORRECT, WHERE *COVENANT* TURNED ENTIRELY ON A QUESTION OF STATUTORY CONSTRUCTION, *COVENANT* DID NOT OVERTURN ANY DECISION OF THIS COURT, AND THE *COVENANT* COURT APPLIED ITS RULING RETROACTIVELY TO THE PARTIES THEN BEFORE IT?

Plaintiff-Appellant W.A. Foote Memorial Hospital d/b/a Allegiance Health ("Allegiance Health") answers **"No."**

Defendants-Appellees, the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility ("Defendants") answer **"Yes."**

Amicus Curiae Insurance Alliance of Michigan answers ***"Yes."***

STATEMENT OF FACTS

IAM adopts the Statement of Facts contained in Defendants' November 15, 2017 Answer to Allegiance Health's Application for Leave to Appeal. (Answer to Application, pp 1-8.)

STANDARD OF REVIEW

The decision of the Court of Appeals affirmed the trial court's granting of Defendants' Motion for Summary Disposition under MCR 2.116(C)(10). *W A Foote*, 321 Mich at 168. Decisions to grant or deny motions for summary disposition are reviewed on appeal *de novo*. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012). This Application also involves questions of statutory interpretation, particularly MCL 500.3112. This Court also reviews questions of law involving statutory interpretation *de novo. Joseph*, 491 Mich at 205.

ARGUMENT

I. THE COURT OF APPEALS' DECISION TO GIVE *COVENANT* FULL RETROACTIVE EFFECT WAS CORRECT, REGARDLESS OF *POHUTSKI'S* STATUS, WHERE *COVENANT* TURNED ENTIRELY ON A QUESTION OF STATUTORY CONSTRUCTION, *COVENANT* DID NOT OVERTURN ANY DECISION OF THIS COURT, AND THE *COVENANT* COURT APPLIED ITS RULING RETROACTIVELY TO THE PARTIES THEN BEFORE IT. PUT ANOTHER WAY, ALL OF THIS COURT'S HISTORICALLY ARTICULATED TESTS FOR RETROACTIVITY FAVOR THE COURT OF APPEALS' HOLDING.

People v Shami, 501 Mich 243, 257 n 34; 912 NW2d 526, 534 (2018) very recently – and unanimously[2] – stated that "[t]his Court's decisions are generally given full retroactive effect…." Only in "exigent circumstances" does this Court invoke the "extreme measure" of prospective-only application. *Id.* "Complete prospective application has generally been limited to decisions which *overrule clear and uncontradicted case law*." *Id.* (citation omitted, emphasis in *Shami*). A "threshold criterion for prospective-only application" is that the decision must "clearly

[2] The decision was 6-0 with Justice Wilder not participating because he was on the Court of Appeals panel.

establish[] a new principle of law…." *Shami,* 501 Mich at 257 n 34, quoting *Trentadue v Buckler Lawn Sprinkler,* 479 Mich 378, 401; 738 NW2d 664, 676 (2007). And "[e]ven when a decision meets [this] threshold," the Court must – before deviating from the default rule of full retroactive application – still consider "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Trentadue,* 479 Mich at 400-401, quoting *Pohutski v City of Allen Park,* 465 Mich 675, 696; 641 NW2d 219 (2002).

Moreover – in addition to describing prospective application as an "extreme measure" – this Court has expressed serious concerns about "whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions." *Wayne County v Hathcock,* 471 Mich 445, 484 n 98; 684 NW2d 765 (2004). "The only instance in which [this Court is] constitutionally authorized to issue an advisory opinion is upon the request of either house of the Legislature or the Governor – and, then, only 'on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.'" *Id.*, quoting Const 1963, art 3, § 8.

One of the issues this Court's May 25, 2018 "MOAA" Order directed the parties to address was whether *Pohutski* has been "effectively repudiated" in the "context of judicial decisions of statutory interpretation" in decisions such as *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich,* 492 Mich 503; 821 NW2d 117 (2012). (Allegiance Health's Supplemental Brief, p 1.) And if not, "whether the *Pohutski* framework should have been applied in *Spectrum Health*…." (Id.) But IAM respectfully suggests that the dispositive issue here is not whether *Pohutski* still controls in the "context of judicial decisions of statutory interpretation." Rather, IAM submits that the critical inquiry is whether the "threshold criterion for prospective-only

application"[3] can ever be met – and in turn, whether *Pohutski's* three-part test ever comes into play – when *no precedent of this Court has been overruled*. This explains why the *Spectrum Health* Court did not mention *Pohutski* – the "rule" that *Spectrum Health* rejected was supported only by a plurality opinion of this Court and a series of Court of Appeals decisions. *Spectrum Health*, 492 Mich at 535-536. There is no "new principle of law" announced in such situations and therefore the analysis never gets past the *Pohutski* threshold, leaving the Court without occasion to apply the three-part test.

The *Pohutski* opinion itself supports this interpretation: immediately after articulating the aforementioned three-part test, the Court noted that "[i]n the civil context … [there is] an additional threshold question whether the decision clearly established a new principle of law." *Pohutski*, 465 Mich at 696. More was not said about this threshold question in *Pohutski* because no one questioned that there was a "new rule set forth in this opinion." *Id.* at 697. So all of the discussion that followed presupposed that the threshold had been met. When that threshold is not met, there is no consideration of the three factors.

The idea that *Pohutski's* three factors are not applicable, when no new rule of law is announced, is consistent with this Court's analysis in *Hathcock*, 471 Mich at 484. There, this Court specifically noted: "Our decision today *does not announce a new rule of law*, but rather returns our law to that which existed before *Poletown*[4] and which has been mandated by our Constitution since it took effect in 1963." *Hathcock*, 471 Mich at 484 (emphasis added). This also explains why the Court did not mention the three *Pohutski* factors in the third case referenced in the May 25, 2018 "MOAA" Order, *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). In *Devillers*, this Court overruled *Lewis v DAIIE*, 426 Mich 93;

[3] *Shami*, 501 Mich at 257 n 34.
[4] *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981).

393 NW2d 167 (1986) and did so retroactively. This Court explained: "prospective-only application of our decisions is generally limited to decisions which overrule clear and uncontradicted case law." *Devillers,* 473 Mich at 587. "*Lewis* is an anomaly that, for the first time, engrafted onto the text of [MCL 500.3145(1)] a tolling clause that has absolutely no basis in the text of the statute." *Devillers,* 473 Mich at 587.[5] "*Lewis* itself rests upon case law that consciously and inexplicably departed from decades of precedent holding that contractual and statutory terms relating to insurance are to be enforced according to their plain and unambiguous terms." *Id.* "Thus, *Lewis* cannot be deemed a 'clear and uncontradicted' decision that might call for prospective application of our decision in the present case." *Id.* Therefore, like *Spectrum Health,* the "threshold criterion" put in place by *Pohutski* was not present. The *Devillers* Court found that it was not announcing any new principle of law. So the *Pohutski* factors were overlooked in these cases not because *Pohutski* has been "effectively repudiated," but because the *Pohutski* threshold could not be satisfied.

Just like *Spectrum Health, Hathcock,* and *Devillers,* the key aspect of *Covenant* – as it relates to retroactivity – is not that it was a statutory construction case but rather, it is that *Covenant* did not announce a new rule of law. As *Covenant,* 500 Mich at 201 noted, "[t]here [were] three cases on which the Court of Appeals ha[d] frequently relied when concluding that a healthcare provider may directly sue a no-fault insurer": *LaMothe v Auto Club Ins Ass'n,* 214 Mich App 577, 586; 543 NW2d 42 (1995), *Munson Med Ctr v Auto Club Ins Ass'n,* 218 Mich App 375, 381; 554 NW2d 49 (1996), and *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co,* 250 Mich App 35; 645 NW2d 59 (2002). But as noted in *Covenant,* 500 Mich at 202-203, "[n]one of these cases decided whether healthcare providers possess a statutory cause

[5] Just like *Lewis,* the line of Court of Appeals cases allowing provider suits engrafted language onto MCL 500.3112 that had no basis in the text of the statute. *Covenant,* 500 Mich at 202-204.

of action against no-fault insurers." But subsequent panels of the Court of Appeals continued to rely upon them "as if they had decided the issue, generally failing to engage in any statutory analysis of their own…." *Id.* at 203.

So what this Court rejected in *Covenant* was a line of Court of Appeals decisions that were "devoid of the statutory analysis necessary to support" the premise that "a healthcare provider possesses a statutory cause of action against a no-fault insurer for payment of no-fault benefits." *Id.* at 204. No precedent *from this Court* was overruled, and the Court of Appeals' precedents that were overruled were not in any sense "clear and uncontradicted." In the years leading up to *Covenant*, the aforementioned line of Court of Appeals cases was challenged in at least five applications for leave to appeal to this Court, on the grounds that they were wrongly decided and irreconcilable with canons of statutory construction. See *Chiropractors Rehab Group, PC v State Farm Mut Auto Ins Co*, 501 Mich 875; 902 NW2d 414 (2017) (addressing two consolidated applications); *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 497 Mich 1029; 863 NW2d 54 (2015); *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 495 Mich 866; 843 NW2d 144 (2013); *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 493 Mich 930; 825 NW2d 79 (2013). The same basic arguments that a majority of this Court ultimately found persuasive in 2017 were being advanced at least as far back as 2012.[6]

And the fact that the Court of Appeals published its decision in *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 396–397; 864 NW2d 598 (2014) reflected *an absence of* "clear and uncontradicted" precedent. MCR 7.215(B) provides "Standards for Publication" for the Court of Appeals. That subpart directs the Court of Appeals

[6] See Ex. C, Auto-Owners' Bypass Application from *Wyoming Chiropractic*, 493 Mich at 930.

to publish an opinion when it "(1) establishes a new rule of law; (2) construes as a matter of first impression a provision of a … statute…; (3) alters, modifies, or reverses an existing rule of law; (4) reaffirms a principle of law or construction of a … statute … not applied in a reported decision since November 1, 1990; (5) involves a legal issue of significant public interest; (6) criticizes existing law; or (7) resolves a conflict among unpublished Court of Appeals opinions brought to the Court's attention…." MCR 7.215(B)(1).

Indeed, the argument for retroactively applying *Covenant* is far stronger than the arguments were for retroactivity in *Spectrum Health, Hathcock,* or *Devillers. Hathcock* and *Devillers* both rejected a decision of this Court (albeit to "correct" a textually incorrect construction of a Constitutional provision or statute – which is why the Court in both cases found that it was not announcing a new rule of law). And in *Spectrum Health*, only a plurality opinion of this Court supported the family joyriding exception (in addition to a series of Court of Appeals decisions). But in all three cases, this Court gave its holding retroactive effect.

Moreover, *Covenant* itself ends with the following statement: "we reverse the judgment of the Court of Appeals and remand this case to the Saginaw Circuit Court *for entry of an order granting summary disposition to defendant.*" *Covenant,* 500 Mich at 219 (emphasis added). Clearly, the decision applied retroactively to the plaintiff in *Covenant,* as this Court ordered that Covenant Medical Center's case be dismissed on remand. Moreover, prior to the Court of Appeals holding here, federal courts applying Michigan law in diversity repeatedly predicted that *Covenant* would apply retroactively. See *Health Call of Detroit, Inc v Farmers Ins Exch,* unpublished opinion of the Eastern District of Michigan, issued September 12, 2017 (Docket No. 16-CV-11345) (Ex. D); *Advanced Surgery Ctr LLC v Allstate Prop & Cas Ins Co,* unpublished

opinion of the Eastern District of Michigan, issued September 11, 2017 (Docket No. 17-10130) (Ex. E).

Although these decisions are only of persuasive value at most to this Court, Senior U.S. District Judge Bernard Friedman took a close look at this issue and found that this Court already had, "in light of *Covenant*, vacated and remanded cases to the Michigan Court of Appeals for reconsideration." (Ex. D, p 2, citing *Spectrum Health Hosps v Westfield Ins Co*, 500 Mich 1024; 897 NW2d 166 (2017) and *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, 500 Mich 1024; 897 NW2d 735 (2017). This, in Judge Friedman's view, "demonstrate[d] that the Michigan Supreme Court considers *Covenant* retroactive…. (Ex. D, p 2.)

And in *Advanced Surgery*, Judge Nancy Edmunds examined the question in even more detail and reached the same conclusion:

> Consistent with the application of *Covenant* in these state court decisions, Defendant points out that t]he general rule in Michigan is that judicial decisions are given complete retroactive effect. Prospective application is given only to decisions that overrule clear and uncontradicted case law. Defendant further argues that *Covenant* is not the "declaration of a new rule, but ... a vindication of controlling legal authority."[7]
>
> The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. There is, however, an exception … [w]hen a "statute … has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction….[8] (Ex. E, p 3.)

Judge Edmonds then turned her attention to *Pohutski* and found:

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[7] Quoting *Rowland v Washtenaw Co Rd Com'n*, 477 Mich 197, 222; 731 NW2d 41 (2007).
[8] Citing *Spectrum Health*, 492 Mich at 536.

> In *Pohutski*, the court recognized that "[a]lthough this opinion gives effect to the intent of the Legislature that may be reasonably be (sic) inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in [prior decisions]. Yet in *Pohutski*, the prior decisions that were overruled were both from the Michigan Supreme Court, not the court of appeals. The *Covenant* decision itself states that the prior court of appeals decision was "premised on the notion that a healthcare provider possesses a statutory cause of action against a no-fault insurer for payment of no-fault benefits," yet this premise was "gleaned ... not from the text of the no-fault act, but from previous decisions of the Court of Appeals that are likewise devoid of the statutory analysis necessary to support that premise." *Covenant*, 895 N.W.2d at 498. According to *Covenant*, the basis for a construction of the no-fault statute that allowed standing by healthcare providers was founded in previous court of appeals decisions, not the courts of last resort. **By finding that the *Covenant* decision did not establish a new principle of law, the Court need not consider the remaining factors as to whether the new rule should be retroactive.** (Ex. E, p 3, emphasis added, internal citations and quotations omitted.)

But even if *Covenant* met the *Pohutski* "threshold criterion"[9] of establishing a new principle of law, retroactive application is proper under the second part of the *Pohutski* three-part framework. Again, *Pohutski*, 465 Mich at 696 calls for an inquiry into (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. Here, the Court of Appeals correctly noted that even when *Pohutski's* threshold is met, prospective application remains an "extreme measure" invoked only in "exigent circumstances." *W A Foote*, 321 Mich App at 195. Because "providers have always been able to seek reimbursement from their patients directly or to seek assignment of an injured party's rights to past or presently due benefits, we do not find a level of exigency that would justify contravening the general rule of full retroactivity." *Id.*

[9] *Shami*, 501 Mich at 257 n 34.

With regard to the first factor, Judge Boonstra found that the purpose of *Covenant* was to "conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law." *W A Foote*, 321 Mich App at 193, citing *Covenant*, 500 Mich at 201. "[A] rule of law that is intended to give meaning to the statutory language and to clarify the state of the law weighs in favor of retroactive application…." *Foote*, 321 Mich App at 193 (citation omitted). "[T]he law requires consistency … and prospectivity undermines rather than advances that objective." *Id*., citing *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). "Instead, the law becomes subject to divergent interpretations depending on the particular tribunal that is then interpreting it." *Foote*, 321 Mich App at 193.

Addressing the second factor, Judge Boonstra acknowledged that there had been heavy reliance on Court of Appeals case law recognizing independent suits by no-fault providers. *Foote*, 321 Mich App at 193. "Yet, complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Id.* at 193-194 (citation omitted). The pre-*Covenant* case law simply was not "clear and uncontradicted." *Foote*, 321 Mich App at 194. This raised the question of how reasonable this reliance was. *Id*. "[T]he mere fact that insurers and healthcare providers may have acted in reliance on the caselaw that *Covenant* overturned is not dispositive of the question of retroactivity; every retroactive application of a judicial decision has at least the potential to upset some litigants' expectations concerning their pending suits." *Id.* The fact that *Covenant* represented a "vindication of … the plain language of a statute" supported "the conclusion that the overruled caselaw was not 'clear and uncontradicted.'" *Foote*, 321 Mich App at 195, citing *Devillers*, 473 Mich at 587 and *Hathcock*, 471 Mich at 484.

Finally, addressing the third factor, Judge Boonstra noted that the administration of justice is furthered, and the legitimacy of the legal system "in the eyes of our society is advanced by demanding consistency in the law, which can only be attained in perpetuity if judicial decisions applying statutory law as enacted by our Legislature are applied retroactively." *Foote*, 321 Mich App at 195.

Although the undersigned submits that Judge Boonstra could have more accurately explained that a case like *Covenant* is incapable of satisfying the *Pohutski* threshold – instead of treating *Pohutski* as having been in some way overruled or abrogated by *Spectrum Health* – the core of Judge Boonstra's analysis remains sound. Ultimately, the Court of Appeals correctly concluded that the *Covenant* decision did not state a new principle of law and, as a result, was correct to conclude that it therefore had to apply retroactively. Put another way, full retroactive application of *Covenant* is warranted under **either** *Pohutski's* threshold **or** its three factors.

CONCLUSION AND REQUEST FOR RELIEF

As IAM has noted previously, pre-*Covenant* Court of Appeals case law "resulted in an explosion of satellite suits by medical providers pertaining to single occurrences," forcing insurers "to pay the legal costs" while courts were "burdened with duplicate litigation." (Ex. A, pp 9-13.) Indeed, as IAM previously noted in another amicus brief, the explosion of provider suits "led to confusion with respect to the application of claim and issue preclusion, and … made the settlement of suits more complicated." (Ex. B, p 13.) "All of this … led to no-fault carriers devoting more of their limited resources to litigation rather than to equitably and promptly redressing injuries." (Id.) Denying full retroactive effect to *Covenant* would mean that the bench, bar, and insurance industry will still be dealing with these problems for years.

Perhaps more importantly, the full retroactive effect of *Covenant* makes jurisprudential sense under every approach articulated by this Court in modern times. This Court need not decide that *Pohutski* has been "effectively repudiated" in order to determine that *Covenant* does not satisfy the threshold criterion required by *Pohutski.* This explains why the *Pohutski* factors were ignored in *Spectrum Health,* and it is consistent with this Court's more recent statement in *Shami,* 501 Mich at 257 n 34 that "a new principle of law" is a "threshold criterion" which must be met before the three *Pohutski* factors come into play. For these reasons, the IAM respectfully requests that this Honorable Court affirm the Court of Appeals.

SECREST WARDLE

BY: **/s/Drew W. Broaddus**

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