STATE OF MICHIGAN

IN THE SUPREME COURT

W A FOOTE MEMORIAL HOSPITAL,
d/b/a ALLEGIANCE HEALTH,

Plaintiff-Appellant,

v.

MICHIGAN ASSIGNED CLAIMS PLAN
and MICHIGAN AUTOMOBILE INSURANCE
PLACEMENT FACILITY,

Defendants-Appellees,

and

JOHN DOE INSURANCE COMPANY,

Defendant.

Supreme Court No. 156622
Court of Appeals No. 333360
Kent County CC No. 15-008218-NF

MICHIGAN DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Michigan Defense Trial Counsel (MDTC) is a statewide attorney association that primarily focuses on civil-defense representation. MDTC was established in 1979 to enhance and promote the civil-defense bar, and it accomplishes that goal by facilitating dialogue among and advancing the knowledge and skills of civil-defense lawyers. MDTC appears before this Court as a representative for Michigan's civil-defense lawyers and their clients, a significant portion of which could be affected by the issues involved in this case.[1]

[1] After reasonable investigation, MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief or their law firms or employers, made direct or indirect financial contribution to the preparation or submission of this brief.

ORDER APPEALED FROM AND JURISDICTIONAL STATEMENT

MDTC relies on both parties' Order Appealed From and Jurisdictional Statements in their briefs before this Court.

STATEMENT OF QUESTIONS PRESENTED

I. Should this Court's decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), be applied to this case?

II. Did the Court of Appeals correctly conclude that this Court's decision in *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), has been "effectively repudiated" in the context of judicial decisions of statutory interpretation?

III. If *Pohutski* has not been effectively repudiated, should the *Pohutski* framework have been applied in *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012)?

STATEMENT OF FACTS

MDTC relies on both parties' Statement of Facts sections in their briefs before this Court.

STANDARD OF REVIEW

MDTC also relies on both parties' Standard of Review sections in their briefs on appeal.

ARGUMENT

In *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 195; 895 NW2d 490 (2017), this Court held "that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act." In reaching that holding, this Court was specifically persuaded by what the no-fault act says—and what it does not. It summarized as follows:

> A thorough review of the statutory no-fault scheme reveals no support for an independent action by a healthcare provider against a no-fault insurer. In arguing that healthcare providers may directly sue no-fault insurers, plaintiff primarily relies on MCL 500.3112, which provides, in pertinent part, that "[p]ersonal protection insurance benefits are payable to or for the benefit of an injured person or, in the case of his death, to or for the benefit of his dependents." While this provision undoubtedly allows no-fault insurers to directly pay healthcare providers for the benefit of an injured person, its terms do not grant healthcare providers a statutory cause of action against insurers to recover the costs of providing products, services, and accommodations to an injured person. Rather, MCL 500.3112 permits a no-fault insurer to discharge its liability to an injured person by paying a healthcare provider directly, on the injured person's behalf. And further, no other provision of the no-fault act can reasonably be construed as bestowing on a healthcare provider a statutory right to directly sue no-fault insurers for recovery of no-fault benefits. We therefore hold that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act. [*Id*. at 195-196.]

The issues before this Court in this case focus on how this Court's opinion in *Covenant* should be applied going forward.[2] Although this Court has tasked the parties with addressing three issues, MDTC is focused on the ultimate one, which is, in reality, straightforward: Should this Court's opinion in *Covenant* control cases, like this one, that were pending when it was issued, *or* should the Court of Appeals' opinion in *Covenant*—that this Court reversed—control instead?[3]

[2] *W A Foote Memorial Hosp v Mich Assigned Claims Plan*, 501 Mich 1079; 911 NW2d 470 (2018).
[3] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 313 Mich App 50; 880 NW2d 294 (2015).

MDTC submits that the former is the correct answer to that question. This Court's opinion in *Covenant* should be applied retroactively because no legal authority allows, much less requires, the judiciary to create an otherwise-nonexistent statutory cause of action. In deciding not to judicially create this nonexistent statutory right, the Court of Appeals' majority did not repudiate *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), and, to the extent it needed to, it did so correctly. Finally, as this Court aptly noted in *Covenant*, such a conclusion does not mean that healthcare providers are left empty-handed. Accordingly, this Court should affirm the Court of Appeals' opinion affirming summary disposition in defendants-appellees' favor.

A. *Covenant* should be applied retroactively because no legal authority, including the doctrine of stare decisis, allows—much less requires—the judiciary to create otherwise-nonexistent statutory rights.

In reaching its decision in *Covenant*, this Court recognized that the no-fault act controlled the issue whether healthcare providers have a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits. See *Covenant Med Ctr, Inc*, 500 Mich at 204-218. Specifically, this Court emphasized that "the no-fault act does not, in any provision, explicitly confer on healthcare providers a direct cause of action against insurers," *id*. at 204-205, nor is there anything "in the language of [MCL 500.3112] that can reasonably be interpreted as vesting a healthcare provider with a right to demand reimbursement from a no-fault insurer for services the provider rendered to an insured." *Id*. at 213. Stated simply, this Court concluded, "a review of the plain language of the no-fault act reveals no support for [the] argument that a healthcare provider possesses a statutory cause of action against a no-fault insurer." *Id*. at 217.

This Court also emphasized that any analysis on the no-fault act itself was completely missing from Court of Appeals' opinions that purportedly supported the idea that healthcare providers maintained such a statutory cause of action to file so-called "provider suits." "It bears

repeating," this Court explained, "that completely absent from the analysis in the Court of Appeals cases discussed . . . is a meaningful explanation of what language in the no-fault act creates a cause of action for healthcare providers against insurers." *Covenant Med Ctr, Inc*, 500 Mich at 204. Specifically, this Court was referring to *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577; 543 NW2d 42 (1995), *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375; 554 NW2d 49 (1996), and *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35; 645 NW2d 59 (2002).

This Court carefully examined those three (and other) cases and concluded that *none* analyzed the relevant no-fault provisions:

> None of these cases decided whether healthcare providers possess a statutory cause of action against no-fault insurers. Despite this, subsequent panels of the Court of Appeals have, in published and unpublished cases alike, consistently relied on one or more of the cases just discussed as if they had decided the issue, generally failing to engage in any statutory analysis of their own to ground a healthcare provider's cause of action in the text of the no-fault act. [*Covenant Med Ctr, Inc*, 500 Mich at 202-204.]

After emphasizing what the Court of Appeals failed to do and should have done—turn to the no-fault act—this Court made it very clear that the statutory cause of action the plaintiff-healthcare provider was pursing, i.e., its own direct cause of action against a no-fault insurer for personal protection insurance benefits under the no-fault act, did not exist:

> The Court of Appeals' opinion in this case is premised on the notion that an injured person's healthcare provider has an independent statutory right to bring an action against a no-fault insurer for payment of no-fault benefits. *This premise is unfounded and not supported by the text of the no-fault act*. A healthcare provider possesses no statutory cause of action under the no-fault act against a no-fault insurer for recovery of PIP benefits. Plaintiff therefore has no statutory entitlement to proceed with its action against defendant.[*Covenant Med Ctr, Inc*, 500 Mich at 218 (italics added).]

Despite this Court's clear holding that *nothing* in the no-fault act supports the idea that healthcare providers have a direct cause of action for personal protection insurance benefits against

no-fault insurers, plaintiff-appellant W A Foote Memorial Hospital, doing business as Allegiance Health, argues in this case that this Court's decision in *Covenant* should not apply in this case (or retroactively in general). Specifically, W A Foote argues that retroactive application of *Covenant* is "radical" and would "rewr[i]te the entire doctrine of prospective application of judicial decisions in Michigan[.]"[4] W A Foote even goes so far as to argue that, if this Court were to determine that *Covenant* applies retroactively, it would require the "reopening [of] every closed case to correct the results in accordance with the law [and] would unleash chaos and instability in our legal system."[5] Michigan Defense Trial Counsel disagrees with this dramatic characterization.

At the outset, what W A Foote is asking this Court to do is extraordinary. It is asking this Court to judicially create a "temporary" statutory cause of action—that this Court has already held the Legislature did not create—that healthcare providers, who happened to have lawsuits pending when *Covenant* was decided, can pursue. The Legislature, not the judiciary, creates laws. See, e.g., *Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 359; 685 NW2d 221 (2004) (explaining that "the legislature creates the law"). Creating the temporary statutory cause of action that W A Foote is asking for is directly at odds with this very basic concept. And no legal authority—including the doctrine of stare decisis—allows, much less requires, this Court to do something extraordinary like that.

Yet, to support its claim that applying *Covenant* retroactively would "rewr[i]te the entire doctrine of prospective application of judicial decisions in Michigan," W A Foote posits that *Covenant* created new law. Capitalizing on an apparent disparity in caselaw regarding retroactive application of statutory-interpretation issues, i.e., *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d

[4] Plaintiff/Appellant Allegiance Health's Supplemental Brief in Support of its Application for Leave to Appeal, p 1.
[5] *Id*. at p 14.

219 (2002), versus *Spectrum Health Hosp v Farm Bureau Gen Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), W A Foote takes the position that applying *Covenant* retroactively—or, stated differently, refusing to apply the Court of Appeals' incorrect decision in *Covenant* to temporarily create a nonexistent statutory cause of action—"is diametrically at odds with" "the very doctrine of stare decisis[.]"[6] Indeed, according to W A Foote, that is the very purpose of stare decisis in the first place: "permit[ting] incorrect interpretations to continue as the law . . . ."[7] MDTC understands stare decisis much differently.

"Stare decisis means 'To abide by, or adhere to, decided cases." *Robinson v Detroit*, 462 Mich 439, 463 n 20; 613 NW2d 307 (2000), quoting Black's Law Dictionary (rev 4th ed), p 1577). "Stare decisis dictates that a decision of the majority of the justices of our Supreme Court is binding upon lower courts. A decision of four or more of our Supreme Court justices on a specific point of law is binding upon [lower courts] with regard to that point of law." *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992) (citations omitted). "Despite its importance, stare decisis is neither an 'inexorable command,' nor 'a mechanical formula of adherence to the latest decision[.]' " *McCormick v Carrier*, 487 Mich 180, 210; 795 NW2d 517 (2010) (citations omitted). "Ultimately," when analyzing statutory-interpretation issues in light of the doctrine of stare decisis, this Court is tasked with "balance[ing] two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors." *Id*. (citation and internal quotation marks omitted).

But the doctrine of stare decisis has no bearing on the ultimate issue in this case for one very simple reason: There was never a decision of four or more of our Supreme Court justices on

[6] Plaintiff/Appellant Allegiance Health's Supplemental Brief in Support of its Application for Leave to Appeal, p 13.
[7] *Id*.

the specific issue of law whether a healthcare provider possesses a statutory cause of action against a no-fault insurer to recovery personal protection insurance benefits for allowable expenses incurred by an insured under the no-fault act. Without such a decision, there is no decision of this Court for it to abide by or adhere to. See, e.g., *Okrie v Michigan*, 306 Mich App 445, 454; 857 NW2d 254 (2014) (explaining that the Michigan Supreme Court is "the lone constitutional court in Michigan"). And this is especially true in light of the fact that *none* of the Court of Appeals' opinions that assumed healthcare providers could bring their own statutory causes of action include any substantive analysis of the no-fault act's provisions at issue. Consequently, the doctrine of stare decisis has no bearing on—and certainly would not be undermined by—this Court's decision whether to apply *Covenant* retroactively here.

The only way that W A Foote can bring the doctrine of stare decisis into this case is through the other two broader issues this Court asked the parties to address. That is, stare decisis arguably comes into play when deciding whether the Court of Appeals' majority should have applied the *Pohutski* framework instead of the holding from the more recent *Spectrum Health*. As discussed more below, the Court of Appeals' majority did do that (albeit after commenting that it believed *Spectrum Health* actually controlled). More fundamentally, though, W A Foote's argument in this regard is nothing more than a form-over-substance smokescreen. That is, the argument addresses *how* this Court should decide whether *Covenant* applies retroactively, not whether it actually should. And, no matter what framework this Court uses to decide whether *Covenant* applies retroactively, and no matter which way it decides that issue, the doctrine of stare decisis will remain untouched as it has for decades.

Finally, even if this Court were to get past the stare-desisis smokescreen and decide that it could judicially create the temporary statutory cause of action that W A Foote is asking for, this

Court should keep in mind the peculiar consequences of doing so. Perhaps most obviously would be Covenant Medical Center, Inc., and its attorneys asking, "Why us?". In *Covenant*, after holding "that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act," this Court "reverse[d] the judgment of the Court of Appeals and remand[ed] this case to the Saginaw Circuit Court *for entry of an order granting summary disposition to defendant*." *Covenant Med Ctr, Inc*, 500 Mich at 218-219 (italics added). If this Court were to decline to apply *Covenant* retroactively, it would be giving every healthcare provider with a pending "provider suit" a statutory cause of action *except* for the healthcare provider in *Covenant*. That is, *Covenant* would apply retroactively for all healthcare providers *except* the *Covenant*'s healthcare provider. If anything, the doctrine of stare decisis might come in handy to stop this Court from doing something like that.

B. The Court of Appeals' majority did not hold that *Pohutski* was "effectively repudiated" despite its comments about it, and, to the extent it needed to, its decision to do so was correct in light of more recent caselaw.

In addition to addressing whether *Covenant* should apply retroactively, this Court has also asked the parties to address how it should make that decision. Specifically, this Court directed the parties to address whether its "decision in *Pohutski* . . . has been 'effectively repudiated' in the context of judicial decisions of statutory interpretation." This issue is actually a two-part question. First, did the Court of Appeals actually decide that *Pohutski* had been "effectively repudiated" and, thus, decide not to apply it? And second, assuming it did, was its decision to do so correct? MDTC submits that, although the Court of Appeals' majority did comment that this Court's more recent caselaw indicates that *Pohutski* has been effectively repudiated, it did not rely on that comment in reaching is decision. Instead, following *Pohutski*, the majority decided that *Pohutski*'s "threshold question" was not met, thereby ending the *Pohutski* framework's analysis in this case.

1. The Court of Appeals' majority did not hold that Pohutski was "effectively repudiated" despite its comments about it.

The majority began its analysis with the undisputed general rule that judicial decisions apply retroactively: "The one constant is that the general rule is, and always has been, that judicial decisions apply retroactively." *W A Foote Memorial Hosp*, 321 Mich App at 180. The majority then elaborated on why, in light of more recent caselaw from this Court and the United States Supreme Court, the *Pohutski* framework was no longer dispositive in the prospective-versus-retroactive debate. *Id*. at 179-191. It is this analysis that led the majority to ultimately comment that the more recent caselaw, "without so much as a mention of *Pohutski*, effectively repudiated the application of the 'threshold question' and 'three-factor test,' at least in the context of judicial decisions of statutory interpretation." *Id*. at 191.

But, in the very next sentence, the Court of Appeals' majority made it clear that its comment that *Pohutski* had been "effectively repudiated" did not impact its decision: "Even if we were to consider them [the threshold question and the three-factor test], however, *the result would be unchanged*." *W A Foote Memorial Hosp*, 321 Mich App at 191 (italics added). And a close reading of the analysis that followed shows why: "First, and for the reasons we have already articulated, we would not get past the threshold question. Plainly and simply, and for the reasons already noted, *the law did not change*." *Id*. (italics added). Under *Pohutski*, that ends the analysis. *Pohutski*, 465 Mich at 696.

The reason why that ends the analysis makes sense: The judiciary cannot create statutory cause of actions that the Legislature did not. The majority below explained it—perfectly—like this:

> We particularly reach that conclusion under the circumstances of this case because the law at issue concerns the very existence of a right of action. In other words, we are not merely being asked to decide whether a judicial decision of

> statutory interpretation should be given retroactive effect; we are being asked to decide whether a judicial decision of a statutory interpretation *concerning the existence of a righty of action* should be given retroactive effect. We conclude that it would be particularly incongruous for us to decide that *Covenant* effected a change in the law such that it should not be applied retroactively, because **we would effectively be creating law that does not otherwise exist and thereby affording to plaintiff a right of action that the Legislature saw fit not to provide**. In effect, **we would not only be changing the law from that which the Legislature enacted, but in doing so we would be create a cause of action that does not exist**; for the reasons noted in this opinion, that is outside the proper role of the judiciary. [*W A Foote Memorial Hosp*, 321 Mich App at 192 (bolding added; italics in original; footnote omitted).]

What the Court of Appeals' majority did in this case is exactly what step one the *Pohutski* framework requires: address the "threshold question whether [this Court's decision in *Covenant*] clearly established a new principle of law." *Pohutski*, 465 Mich at 696. The answer to that threshold question is no. So, regardless of whether *Pohutski* is "effectively repudiated" or not, the Court of Appeals' opinion affirming summary disposition in the defendants-appellees' favor must be affirmed.

2. *But, even if the Court of Appeals' majority did hold that Pohutski was "effectively repudiated," its decision to do so was correct in light of more recent caselaw.*

However, if we assume that the Court of Appeals' majority did, in fact, hold that *Pohutski* was "effectively repudiated" by this Court's and the United States Supreme Court's more recent case, its decision to do so falls neatly in line with more recent caselaw. To understand why that decision was correct, it is instructive to turn to the United States Supreme Court's decisions upon which the 16-year-old *Pohutski* decision is based—all of which have been departed from, criticized, and limited based on the confusion and inconsistent results they have created.

For example, in *Pohutski*, this Court recognized that it adopted the three-factor test set forth above from *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965). *Pohutski*, 465 Mich at 696. However, *Linkletter* is a half-century old opinion that, ironically, has since been

departed from for the exact same reasons that are at issue here. See *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987) (holding, albeit in the criminal-prosecution context, "that a new rule . . . is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exceptions for cases in which the new rule constitutes a 'clear break' with the past").

Similarly, again in *Pohutski*, this Court relied on its earlier reliance, albeit in a plurality (and thus not binding or precedential under the doctrine of stare decisis) the United States Supreme Court's decision in *Chevron Oil v Huson*, 404 US 97, 106-107; 92 S Ct 349; 30 L Ed 2d 296 (1971), to support the "threshold question" discussed above. *Pohutski*, 465 Mich at 696. But *Chevron Oil*, like *Linkletter*, certainly has been subject to its fair share of criticism for encouraging inconsistency and confusion. See, e.g., *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1993) (holding that *James B Beam Distilling Co v Georgia*, 501 US 529; 111 S Ct 2439; 115 L Ed 2d 481 (1991), not *Chevron*, controlled the retroactivity dispute at issue). Specifically, in *Harper*, the United States Supreme Court confirmed the following rule: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law *and must be given full retroactive effect in all cases still open on direct review* and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* (italics added).

Likewise, it is instructive to turn to this Court's decisions regarding *Pohutski* since it was decided. Most notably, as this Court, the Court of Appeals, and all the parties appreciate, is *Spectrum Health Hosp v Farm Bureau Gen Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012). There, this Court began by appreciating the go-to general rule: "The general principle . . . 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." *Id*. at 536 (citations and internal quotation marks omitted). And it explained that the only exception to this principle applies only when a statute "has received a given construction *by the court of last resort* and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision." *Id*. (citations and internal quotation marks omitted; italics added).

Under *Spectrum Health*, which is this Court's most recent analysis involving the retroactive application of statutory-interpretation issues, it cannot be disputed that, according to the general principle, *Covenant* applies retroactively. And, in the same way, it also cannot be disputed that the only exception to that general principle does not apply in this case. The issue before this Court in *Covenant*, i.e., "whether a healthcare provider possesses a statutory cause of action against a no-fault insurer to recovery personal protection insurance benefits for allowable expenses incurred by an insured under the no-fault act," was an issue of first impression for this Court. Although the Court of Appeals had (inadequately) considered it on numerous occasions, this Court—a court of last resort—had not. Accordingly, it simply cannot be said that the no-fault act "had received a given construction by the court of last resort" that changed.

Nevertheless, no matter whether this Court continues with the *Pohutski* framework, adopts *Spectrum Health* as controlling in prospective-versus-retroactive disputes, or goes in an entirely different direction, its starting point remains the same. Retroactivity is the general rule, and prospectivity is a departure that is only appropriate in "exigent circumstances." See, e.g., *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 473 NW2d 539 (2005) (citations omitted) ("Typically, our decisions are given retroactive effect, 'applying to pending cases in which a challenge . . . has

been raised and preserved.' Prospective application is a departure from this usual rule and is only appropriate in 'exigent circumstances.' "). The circumstances here—where lower courts and attorneys erroneously assumed a nonexistent statutory cause of action into existence—are not exigent. Frankly, they are frustrating and, finally, being adequately addressed.

C. Finally, this Court's decision in *Covenant*, even if applied retroactively, does not leave healthcare providers empty-handed like W A Foote and the Michigan Health & Hospital Association would have this Court believe.

An overwhelming theme through W A Foote's and *Amicus Curiae* Michigan Health & Hospital Association's briefing in this case (and in *Covenant* for that matter) relies on a relatively ordinary question: How will we get paid? The Michigan Health & Hospital Association, for example, claims that "attorneys, medical providers, and no-fault insureds alike have for decades relied upon the old law, and thus have provided services to injured no-fault patients secure in the knowledge that they would be paid for those services, even if it meant by way of a lawsuit."[8] Then it posits the bleak possibility of what might happen if providers do not have the "secure" knowledge that they would be paid: "And the reality is that if medical providers cannot recoup the cost for providing treatment, then it's a slippery slope to the day when they are unable to provide care at all, thereby severely compromising care to the injured."[9]

MDTC actually shares this concern as well. Indeed, as this Court is well aware, there long has been and likely will be well into the future a contentious debate about how to ensure the availability of uncompromised healthcare while also paying for it. But it is very difficult to imagine how applying *Covenant* prospectively instead of retroactively might make this slippery slope a little less slippery. The reality is that the ability of healthcare providers to be compensated for their

[8] *Amicus Curiae* Brief of the Michigan Health & Hospital Association, p 11.
[9] *Id*. at p 12.

services by a no-fault insurer, before and after *Covenant*, has always been and will likely always be entirely dependent on the insured, injured person. Although the Court of Appeals incorrectly assumed that "the providers may bring an independent cause of action against a no-fault insurer" in the past, it has correctly recognized that "the providers' claims against [a no-fault insurer] are completely derivative of and dependent on [the insured]'s claim . . . ." *Moody v Home Owners Ins Co*, 304 Mich App 415, 440; 849 NW2d 31 (2014). This is the way, for whatever reason, the Legislature intended it. And the Legislature, again for whatever reason, can certainly change it, too. But the desire for uncompromised-but-paid-for healthcare does not allow this Court to judicially create a temporary statutory cause of action that the Legislature never created.

CONCLUSION

The ultimate question before this Court is straightforward: Should this Court judicially create a statutory cause of action that has never existed simply because some of Michigan's lower-court judges and attorneys assumed the nonexistent statutory cause of action existed? No. There is no legal authority that allows, much less requires, this Court to do something extraordinary like that. Although the broad question before this Court is less straightforward—Has the *Pohutski* framework been "effectively repudiated" and was doing so correct?—the answer to that question, no matter what it is, does not change the outcome in this case. The Court of Appeals' majority got it right, and this Court should affirm that decision.

Respectfully submitted,

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