STATE OF MICHIGAN
IN THE SUPREME COURT

JAWAD A. SHAH, M.D., PC, INTEGRATED HOSPITAL SPECIALISTS, PC, INSIGHT ANESTHESIA, PLLC, and STERLING ANESTHESIA, PLLC,

Plaintiffs/Appellees,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Appellant.

Supreme Court Case No. 157951

Court of Appeals Case No. 340370

Genesee County Circuit Court
Case No. 17-108637-NF

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I. This Court's Review Is Warranted Because the Court of Appeals' Decision Affects Over a Million Contracts and Hundreds of Cases in the Lower Courts

The Court of Appeals rewrote a million contracts. State Farm's standard no-fault policy—its contract with its insureds—unambiguously precludes any and all assignment of benefits or transfer of rights without State Farm's approval. (App 4 at 055a, the Assignment Clause.) The Court of Appeals recognized that this contract provision by its terms barred both pre-loss and post-loss assignments and thus would bar Plaintiffs' alleged post-lost assignments here. The Court of Appeals nonetheless invalidated this unambiguous contract provision on public-policy grounds. The court thereby rewrote State Farm's standard no-fault policy: before this case, the policy barred all assignments without State Farm's approval; now it does not.

State Farm urges this Court to grant leave to appeal to reverse. With a million no-fault policies rewritten and hundreds of cases in the lower courts hanging in the balance, State Farm respectfully submits that this is precisely the sort of consequential and jurisprudentially significant case that warrants the attention of the highest court in the State. See MCR 7.305(B).

II. *Roger Williams* Is No Longer Good Law

The Court of Appeals and Plaintiffs here rely almost entirely on *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW2d 303 (1880) for the proposition that contractual restrictions of post-loss assignment violate Michigan public policy. But *Roger Williams* (1) by its terms was based on a statute that no longer exists, and (2) is inconsistent with this Court's modern precedent and the public policy set by the Legislature in the No-Fault Act. Simply put, *Roger Williams* is no longer good law, particularly in no-fault cases, and this Court should grant leave to make this clear or to overrule the case altogether.

A. The statute referred to in *Roger Williams* no longer exists, and neither the No-Fault Act nor any other modern statute provides an "absolute" right to assign.

The *Roger Williams* decision was expressly based on an unidentified nineteenth century statute that secured an "absolute" right to assign. See 43 Mich at 252 ("It is the absolute right of every person—secured in this state by statute—to assign such claims, and such a right cannot be thus prevented."). But there is no such statute on the books today, and neither the Court of Appeals nor Plaintiffs have identified one. Thus the very predicate for the *Roger Williams* decision no longer exists, and the Court of Appeals erred by relying on that decision.

For the first time in this case, Plaintiffs argue in their answer that *Roger Williams* relied on CL 1871, § 5775, which is a predecessor to the modern real-party-in-interest rule. (See Answer at 38-40.) But Plaintiffs failed to make this argument at any point in the lower courts, and thus they have forfeited the argument. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). At any rate, there is no indication that the *Roger Williams* Court was actually referring to this statute. The Court did not quote or cite that statute anywhere in the opinion, and neither the parties' briefs nor the official record in the case contain a single citation or reference to it. (See App 11 at 116a-168a.) Moreover, nothing in CL 1871, § 5775 establishes an absolute right to assign a cause of action. The statute simply says that the "assignee of any bond, note, or other chose in action . . . may sue and recover the same in his own name" and "avail himself of any defense he may have." That's it. The statute says nothing about anti-assignment provisions or securing an absolute right to assign, or anything of the like. See *Draper v Fletcher*, 26 Mich 154, 154-55 (1872) (the statute was a rule of pleading "intended to remove the old indirect method of suing in the name of the nominal, for the use of the real, owner" of a cause of action).

On top of that, even the reference to an "assignee" in CL 1871, § 5775 no longer exists in modern law. The statute was rewritten in 1915, and the new statute no longer mentioned

assignment.[1] Thus, even if *Roger Williams* relied on this statute to (wrongly) infer an "absolute" right to assign solely because it happened to mention assignment, the reference to assignment is now long gone. Modern real-party-in-interest-law, including MCL 600.2041 and MCR 2.201(B)(1), neither mentions assignment nor creates an "absolute right" to assign a cause of action. Tellingly, none of the modern cases addressing contractual anti-assignment provisions hint, much less hold, that such provisions conflict with MCR 2.201(B) or MCL 600.2041.[2] In fact, *no* law currently on the books provides an "absolute right" to assign a cause of action.

Plaintiffs argue that the Court should divine such a law inferentially. Plaintiffs point to Section 3143 of the No-Fault Act, which bars any "assignment of a right to benefits payable in the future" (MCL 500.3143), and argue that this means the Act "implicitly allow[s] assignment of all claims for *presently due or past due* benefits." (Answer at 17.) From there, Plaintiffs jump to the conclusion that "insurance policy provisions purporting to restrict such assignments are invalid." (*Id.*) But this does not follow. Section 3143 says nothing about contractual restrictions of assignment. The No-Fault Act is silent on the matter. Section 3143 simply says that no matter what—even in the *absence* of a contractual provision addressing assignment—assignment of future benefits is never permitted. Even assuming that it can be inferred from that provision that other assignments are permissible, the provision does not support the further inference that such other assignments may not be restricted contractually. A contractual provision restricting

[1] CL 1871, § 5775 was recodified as CL 1897, § 10054. (See App 15 at 196a-199a, Statutory Compilation.) By 1915, however, the statute had been fundamentally rewritten to state what is recognizably the modern rule. (See *id.* at 200a-202a.) That provision was recodified as MCL 612.2 in 1948 and again in 1961 as MCL 600.2041 (with the only change being the deletion of the word "expressly"), which remains on the books in that form today. (See *id.* at 203a-205a.)

[2] See *Detroit Greyhound Employees v Aetna Life Ins*, 381 Mich 683; 167 NW2d 274 (1969); *Burkhardt v Bailey*, 260 Mich App 636; 680 NW2d 453 (2004); *Kreindler v Waldman*, No. 265045, 2006 WL 859447 (Mich App, Apr 4, 2006); *Edwards v Concord Dev Corp*, No. 174487, 1996 WL 33358104 (Mich App, Sept 17, 1996).

assignment of past or presently due benefits—like State Farm's Assignment Clause—is entirely *consistent* with MCL 500.3143. And where the Legislature has not barred a particular contractual provision in an insurance policy, it is not against public policy to include the provision. See *Rory v Cont'l Ins Co*, 473 Mich 457, 472; 703 NW2d 23 (2005) (holding that a contractual limitations period was not against public policy, despite a more lenient period in the Act, because "there is no Michigan statute explicitly prohibiting contractual provisions that reduce the limitations period in uninsured motorist policies"); *Husted v Dobbs*, 459 Mich 500, 512; 591 NW2d 642 (1999) ("[B]ecause the no-fault act does not mandate residual liability coverage . . . it would not void an otherwise valid and unambiguous exclusion, like the business-use exclusion here.").

Plaintiffs also argue that another statute—Article 9 of the Uniform Commercial Code—provides an absolute right to assign, but this argument fails as well. First, Plaintiffs failed to make this argument in the trial court and have therefore forfeited the argument. See *Grant*, 455 Mich at 546. The Court of Appeals agreed and thus refused to consider the argument (App 9 at 099a), and this Court should do the same. Second, as State Farm addressed in detail in its Court of Appeals brief, UCC Article 9 simply does not apply in the no-fault context or to the sort of assignments here. Plaintiffs do not cite a single case where any court has held otherwise. Article 9 by its terms does not apply to "[a]n assignment of accounts . . . that is for the purpose of collection only," MCL 440.9109(4)(e), which is exactly the kind of assignment Plaintiffs rely on here. Indeed, Plaintiffs' entire case is based on trying to collect payment for the services they provided to Mr. Hensley. See MCL 440.9109, cmt 12. Third, although Article 9 prohibits anti-assignment clauses from being used to prevent the creation or attachment of a security interest, it also provides that such assignments are not enforceable against the account debtor (which here

would be State Farm). See MCL 440.9408(1)(a), (4). Simply put, UCC Article 9 has no applicability in this case.[3]

In short, unlike in the *Roger Williams* days, no statute today gives parties an "absolute right" to assign a cause of action. Since *Roger Williams* was expressly conditioned on there being such a statute, see 43 Mich at 252, *Roger Williams* does not control here.

B. The *Roger Williams* Court's policy judgment is no longer good law under the No-Fault Act.

The only other rationale the *Roger Williams* Court offered for voiding an anti-assignment provision (other than the unidentified statute) was that assignment of an accrued cause of action "cannot concern the debtor, and it is against public policy." 43 Mich at 252. The Court did not cite anything for this proposition—not a single case, statute, treatise, or anything else. See *id.* The Court simply made its own judgment that such an assignment "cannot concern the debtor," and thus invalidated the anti-assignment provision as against public policy. See *id.*

But this Court has since made clear that this sort of "judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions."

[3] Plaintiffs also point to the Worker's Disability Compensation Act and the Uniform Motor Vehicle Accident Reparations Act, but they failed to preserve these arguments below, and neither act applies here anyway. The WDCA does not apply because Plaintiffs have not "ma[de] an advance or payment to an employee under a group disability or group hospitalization insurance policy," MCL 418.821(2), and because its purpose is not to privilege assignments but to encourage certain insurers to make interim payments while a worker's compensation claim is being processed, see *Aetna Life Ins Co v Roose*, 413 Mich 85, 93; 318 NW2d 468 (1982). Plaintiffs' reliance on UMVARA fails because "[t]his Court has previously expressed disapproval of relying on model acts to interpret existing statutes rather than on the clear language of the actual statutes at issue." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 530; 821 NW2d 117 (2012). Moreover, the commentary to UMVARA § 29 does not state that it was intended to guarantee the assignability of past or presently due benefits. Finally, unlike MCL 500.3143, UMVARA § 29(2) *permits* the assignment of future benefits, and the commentary to a section that was rejected by the Legislature cannot be reasonably construed to reflect Michigan public policy.

Rory, 473 Mich at 470. This is because the "determination of Michigan's public policy 'is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law'" as "reflected in our state and federal constitutions, our statutes, and the common law.'" *Id.* at 470-71, quoting *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002).

The *Roger Williams* Court did not identify any basis for its public-policy conclusion (other than the unidentified statute that no longer exists), much less a "clearly rooted" one. Moreover, the *Roger Williams* Court's assessment of the reasonableness of an anti-assignment provision in a fire policy and its conclusion that an assignment should not "concern the debtor" (43 Mich at 254) is not a basis for invalidating an insurance policy provision that does not contravene Michigan's detailed statutory provisions governing no-fault auto-insurance policies. Nor is it a basis for finding that the insurer does not have an interest, protected by Michigan public policy favoring the freedom to contract, in including such a provision in its policies. Nor does *Roger Williams* provide a basis for judicially amending the No-Fault Act by inserting a prohibition on anti-assignment clauses into that statute "to make it 'better.'" See *Johnson v Recca*, 492 Mich 169, 187 (2012). "That is an authority reserved solely to the Legislature." *Id.*[4]

As this Court has held, the No-Fault Act itself "is the most recent expression of this state's public policy concerning motor vehicle liability insurance." *Citizens Ins Co of Am v Federated Mut Ins Co*, 448 Mich 225, 232; 531 NW2d 138 (1995). As shown above, the No-Fault Act does not prevent a party from contractually restricting assignment. Thus, just like in

[4] Plaintiffs cite *Marion v Vaughn*, 12 Mich App 453; 163 NW2d 239 (1968), and a handful of federal district court cases to argue that *Roger Williams* is still good law. (See Answer at 40-41.) But the only mention of *Roger Williams* in *Marion* came from the dissent. The remaining cases are all federal cases that blindly followed *Roger Williams* without regard to *Rory*, *Detroit Greyhound*, or the fact that the statute on which *Roger Williams* was based no longer exists.

Rory, where there was "no general policy or statutory enactment . . . which would prohibit private parties from contracting for shorter limitations periods than those specified by general statutes," here there is no general policy or statutory enactment that would prohibit private parties from contracting for restrictions on assignment. *Rory*, 473 Mich at 471. And just like in *Rory*, the Commissioner of Insurance has approved the policy form at issue, and "the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government." *Id.* at 474. Thus the courts have a "very limited scope of review": they can consider only an Administrative Procedures Act challenge showing that the Commissioner's decision was "arbitrary, capricious, or a clear abuse of discretion." *Id.* That is not Plaintiffs' challenge here, and thus it fails.

Plaintiffs argue that *Rory* only applies when a lower court invalidates a policy provision based on "reasonableness," not based on "public policy." (Answer at 3-4; 30-33.) But *Rory* would be all but meaningless if lower courts could evade its application simply by relabeling a "reasonableness" determination as one grounded in "public policy." *Roger Williams* is a good illustration. That decision was based on one of two things: (1) a statute securing an "absolute right" to assign that no longer exists and therefore provides no continuing support for the decision; or (2) a judicial assessment that post-loss assignment "cannot concern" the defendant. 43 Mich at 252. Whatever the labels, this latter conclusion is a judicial assessment of the reasonableness of an anti-assignment provision: the court made its own assessment that post-loss assignment shouldn't concern the defendant and that a contract provision restricting post-loss assignment is therefore unreasonable, unfair, unwarranted, against public policy, etc. But this is precisely the sort of judicial determination of reasonableness that this Court now forbids. See *Rory*, 473 Mich at 474. The *Roger Williams* decision is therefore squarely inconsistent with

Rory, and *Rory* controls here.[5]

III. Plaintiffs' Remaining Arguments Fail

A. The Assignment Clause is consistent with the No-Fault Act.

Although the text of the No-Fault Act does not prohibit anti-assignment clauses, Plaintiffs point to more general "aims" and "purposes" of the Act. (See Answer at 7.) Plaintiffs argue, for example, that permitting State Farm to enforce the Assignment Clause post-loss will discourage providers from providing treatment "because they cannot be assured of payment." (See *id.*) But Plaintiffs' attempt to infer a policy against post-loss assignments not from the text of the Act but from their own view of its "purposes" is improper. See *Garg v Macomb Cty Cmty Mental Health Servs*, 472 Mich 263 n 11; 696 NW2d 646 (2005). "The words of any statute can be effectively undermined by a sufficiently generalized statement of 'purpose' that is unmoored in the actual language of the law." *Id.* That is why "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." See *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999). The No-Fault Act is silent on the enforceability of anti-assignment clauses, and courts may not infer from that silence a policy against them. See *id.*

In any event, enforcing the Assignment Clause here does not thwart the goals of the No-Fault Act because it does not affect the insured's right to recover benefits under the Act. When a provision of a no-fault insurance policy is "harmonious with the Legislature's no-fault insurance regime," it must be enforced as written. See *Cruz v State Farm*, 466 Mich 588, 598; 648 NW2d 591 (2002). That was the basis for this Court's conclusion in *Cruz* that examination-under-oath

[5] Plaintiffs devote several pages of their Answer to discussing champerty and legal malpractice. (See Answer at 24-26.) Plaintiffs failed to preserve this argument, and it misses the mark. Just because public policy prohibits the assignment of one particular cause of action does not mean it guarantees the right to assign all other causes of action.

(EUO) provisions "are only precluded when they clash with the rules the Legislature has established for such mandatory insurance policies." *Id.* Thus, "a no-fault policy that would allow the insurer to avoid its obligation to make prompt payment upon the mere failure to comply with an EUO provision would run afoul of the statute and accordingly be invalid." *Id.* On the other hand, when a provision is "harmonious with the Legislature's no-fault insurance regime . . . it should be viewed no differently than in other types of policies." *Id.*

The Assignment Clause is consistent with the No-Fault Act since it does not affect an insured's right to benefits under the Act. The clause does not "clash" or conflict with any term of the Act, and it is not being used to forfeit the Policy or deprive Mr. Hensley of the benefits to which he is entitled under the Act. Mr. Hensley remains fully entitled to whatever benefits the Policy and the No-Fault Act entitle him to (subject to all of State Farm's defenses)—even if he executed an invalid assignment. Healthcare providers, in contrast, do not have rights under the No-Fault Act that could be constrained or affected. See *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 218; 895 NW2d 490 (2017). And providers remain free to "seek payment from the injured person for the provider's reasonable charges." *Id.* To the extent Plaintiffs believe this is "bad" policy, it is for the Legislature, not the courts, to revise. See *Johnson*, 492 Mich at 196-97.

B. State Farm's arguments are consistent with its arguments in *Covenant*.

Finally, Plaintiffs argue that State Farm should be judicially estopped from relying on the Assignment Clause because of comments made by its counsel during oral argument in *Covenant*. (See Answer at 41-44.) Once again, Plaintiffs failed to make this argument below, in either the trial court or the Court of Appeals, so they have forfeited the argument. See *Grant*, 445 Mich at 546. The argument also mischaracterizes the statements made by State Farm's counsel, which

were consistent with State Farm's position here. Judicial estoppel therefore does not apply.

"[I]n order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent," and the party must have succeeded on the inconsistent claim in the prior case—"the court in the earlier proceeding [must have] accepted that party's position as true." *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994). State Farm's position in this case is not "wholly inconsistent" with its counsel's statements during oral argument in *Covenant*, and this Court did not accept any inconsistent position as true in *Covenant*. See *id*. State Farm's position here is that its Assignment Clause bars any assignment of benefits or transfer of rights without State Farm's approval. State Farm took no position in *Covenant* on the validity of its Assignment Clause, and this Court did not reach this issue in its opinion—the validity of the Assignment Clause was simply not at issue in *Covenant*, either in the briefs or at oral argument. Speaking generically, counsel for State Farm in *Covenant* stated that providers "could seek" an assignment, (see Pls' App at 314), which is true: many insurers do not have anti-assignment provisions in their policies, and thus providers could seek assignments from insureds seeking benefits under those policies. But counsel for State Farm *never* stated that such assignments could not be precluded by contract. In fact, counsel expressly foreshadowed that the validity of such an assignment could be a future issue: "whether or not the assignment is always valid is gonna be a question." (*Id.* at 327.) State Farm's position in *Covenant* is therefore consistent—not "wholly inconsistent"—with its position in this case, and judicial estoppel does not apply. See *Paschke*, 445 Mich at 509.

CONCLUSION AND RELIEF REQUESTED

For all of these reasons and the ones in its application, State Farm asks the Court to grant leave to appeal and reverse the Court of Appeals' decision invalidating the Assignment Clause.

Respectfully submitted,

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