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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Stephen L. Borrello, Jonathan Tukel, and
Douglas B. Shapiro (concurring in part and dissenting in part)

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 No. 157951
Court of Appeals No. 340370
Circuit Court No. 17-108637-NF

/

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THE INSURANCE ALLIANCE OF MICHIGAN'S AMICUS CURIAE BRIEF

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STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant State Farm Mutual Automobile Insurance Company ("State Farm") seeks leave to appeal from the May 8, 2018 published Court of Appeals opinion in *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 340370). Amicus Curiae, the Insurance Alliance of Michigan ("IAM"), concurs in State Farm's explanation of why its Application satisfies MCR 7.305(B)(3) and (B)(5). (State Farm's Application, pp 1-4.)

Whether or not insurers can enforce the anti-assignment language contained in their policies is a question "of major significance to the state's jurisprudence," MCR 7.305(B)(3). 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,[1] 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.* While this Court seems to have granted leave in *Covenant* in part to address this problem, the Court of Appeals' holding in *Shah* threatens to re-open the floodgates of provider litigation, leaving the State's jurisprudence in more or less the same place as it would be if *Covenant* had never been decided.

Moreover, the Court of Appeals' ruling is "clearly erroneous and will cause material injustice," MCR 7.305(B)(5). The *Shah* panel relied chiefly upon a 138-year old Michigan

[1] *Covenant Medical Center v State Farm Mut Ins Co*, 500 Mich 191; 895 NW2d 490 (2017).

Supreme Court decision[2] and two non-binding federal trial court decisions.[3] *Shah*, ___ Mich App at ___; slip op at 8-9. The enforcement of policy provisions that unambiguously prohibit post-loss assignments – such as the provision contained in State Farm's policy here – is compelled by more recent decisions of this Court. See *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359; 817 NW2d 504 (2012); *Rory v Cont'l Ins Co,* 473 Mich 457; 703 NW2d 23 (2005).

INTRODUCTION AND STATEMENT OF THE AMICUS CURIAE

In this first-party no-fault action, the question before this Court is whether - in light of *Covenant*, 500 Mich at 191 – providers can rely upon assignments from the insured, in order to have standing to sue no-fault carriers directly, when there is policy language prohibiting such assignments. *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. However, this Court noted that its holding was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider…." *Id.* at 218 n 40.

In *Shah,* ___ Mich App at ___; slip op at 1, the Court of Appeals held that anti-assignment clauses in automobile insurance policies are unenforceable on public policy grounds.

[2] *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), which – as State Farm's Application explained in detail – interpreted a now-repealed statute.

[3] "[F]ederal decisions interpreting Michigan law are not binding on Michigan courts." *G C Timmis & Co v Guardian Alarm Co,* 468 Mich 416, 428 n 9; 662 NW2d 710, 717 (2003).

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More specifically, the *Shah* panel found "that enforcing the anti-assignment clause in this circumstance to prohibit an assignment of an accrued claim after the loss has occurred is against Michigan public policy as stated by our Supreme Court one hundred and thirty-eight years ago" in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880). *Shah,* ___ Mich App at ___; slip op at 6. The *Shah* panel reached this conclusion even while acknowledging precedent from this Court holding that "[u]nambiguous contracts are not open to judicial construction and must be enforced as written," that the "judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties," and that a "mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions…." *Shah,* ___ Mich App at ___; slip op at 5, citing *Rory*, 473 Mich at 457.

IAM takes a great deal of interest in the issue presented by State Farm's Application, as it affects dozens if not hundreds of pending cases involving IAM's member insurers, and also affects no-fault premiums and how claims are adjusted throughout the State. While State Farm's Application points out that *Shah* affects "1.1 million" of State Farm's "active no-fault policies" (State Farm's Application, p 4), this issue is by no means limited to State Farm. Indeed, at the time *Shah* was released, the undersigned was arguing the same issue in the Court of Appeals on behalf of at least four different carriers:

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Hastings Mutual,[4] The Harford/Trumbull,[5] Progressive,[6] and GEICO.[7]

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 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

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[4] *Michigan Head and Spine (Potocki) v Hastings*, Court of Appeals Docket No. 340656. (See Ex. A, p 4.) The "policy Ms. Potocki purchased from Hastings states, under 'Part F – General Conditions,' that '[y]our rights and duties under this policy may not be assigned without our written consent.'" (Id.)

[5] *The Pain Center USA, PLLC and Interventional Pain Center, PPC (Hendrix) v Hartford*, Court of Appeals Docket No. 342437. (See Ex. B, p 1.) "The Trumbull policy covering Ms. Hendrix states – under a clause entitled 'Transfer of Your Interest in This Policy,' included within 'Part F – General Provisions' – that '[y]our rights and duties under this policy may not be assigned without our written consent.'" (Id.)

[6] *Northland Radiology (Moore) v Progressive,* Court of Appeals Docket No. 341271. (Ex. C.)

[7] *Rehab R Us, LLC and Wellness Transportation, LLC (Marcos) v GEICO,* Court of Appeals Docket No. 341271. (See Ex. D, p 8.) "GEICO's policy states, at Paragraph 4 under 'Section V – General Conditions,' that '[y]our rights and duties under this policy may not be assigned without our written consent.'" (Id.)

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 curaie 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).

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STATEMENT OF THE QUESTION PRESENTED

I. WAS THE COURT OF APPEALS' DECISION TO INVALIDATE THE ANTI-ASSIGNMENT CLAUSE IN STATE FARM'S NO-FAULT POLICY ON PUBLIC-POLICY GROUNDS – WHICH BY WAY OF *STARE DECISIS* [8] INVALIDATED THE ANTI-ASSIGNMENT CLAUSES IN THOUSANDS OF SIMILAR POLICIES – CONSISTENT WITH THIS COURT'S CONTROLLING PRECEDENT?

Plaintiffs-Appellees Jawad A Shah, MD, PC, et al. ("Plaintiffs") answer **"Yes."**

Defendant-Appellant State Farm answers **"No."**

*Amicus Curiae Insurance Alliance of Michigan answers **"No."***

[8] Because the Court of Appeals published its *Shah* decision, it "has precedential effect under the rule of *stare decisis*" unless and until this Court reverses or otherwise modifies it. MCR 7.215(C)(2).

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STATEMENT OF FACTS

IAM adopts the Statement of Facts contained in State Farm's Application for Leave to Appeal. (State Farm's Application, pp 5-8.)

STANDARD OF REVIEW

There are two standards of review applicable to the instant Application for Leave to Appeal. The first standard of review relates to whether the Application should be granted. As noted above, MCR 7.305(B) sets out specific criteria for the granting of an application for leave to appeal to this Court. State Farm thoroughly addresses those criteria (State Farm's Application, pp 1-4), and IAM concurs that those standards are satisfied here for reasons set forth there, and discussed below.

The second standard of review relates to the actual decision of the court below that is the subject of the Application. The decision of the Court of Appeals denied State Farm's Motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10). *Shah,* ___ Mich App at ___; slip op at 12-13. Decisions to grant or deny motions for summary disposition are reviewed on appeal *de novo*. *Id.* at 12, citing *Rory,* 473 Mich at 464. This Application also involves "the proper interpretation of a contract or the legal effect of a contractual clause," which is likewise "reviewed *de novo*." *Shah,* ___ Mich App at ___; slip op at 7, citing *Rory,* 473 Mich at 464.

Where the standard of review is *de novo*, appellate courts should not consider themselves "bound to any degree by the opinions of the trial courts on questions of law." Martineau, *Fundamentals of Modern Appellate Advocacy* (Rochester, NY: Lawyers Cooperative Publishing, 1985), § 7.27, p 138. This is because "[o]ne of the purposes in having appellate courts, i.e., to ensure uniformity in the application of the law, would be lost if the appellate courts had to give substantial deference to the trial court's views.... The almost universal rule is ... that the appellate

court is free to come to its own conclusions on questions of law." *Id.* See also *Dep't of Civil Rights ex rel Johnson v Silver Dollar Café,* 441 Mich 110, 115-116; 490 NW2d 337 (1992), noting that the "very concept of '*de novo*' means that all matters therein are to be considered anew; afresh; over again…."

"*De novo* review is sometimes referred to as 'plenary review,' no doubt because it allows the court to give a full, or plenary, review to the findings below." Beazley, *A Practical Guide to Appellate Advocacy* (New York: Aspen Law & Business, 2002), § 2.3.1(b), p 15. Courts applying this standard "look at the legal questions as if no one had as yet decided them, giving no deference to any findings made below." *Id.* "When this standard is applied, the reviewing court is permitted "to substitute its judgment for that of the trial court…." *Id.*

ARGUMENT

I. THE COURT OF APPEALS' DECISION TO INVALIDATE THE ANTI-ASSIGNMENT CLAUSE IN STATE FARM'S NO-FAULT POLICY ON PUBLIC-POLICY GROUNDS – WHICH, BY WAY OF *STARE DECIS,* INVALIDATED THE ANTI-ASSIGNMENT CLAUSES IN THOUSANDS OF SIMILAR POLICIES – WAS INCONSISTENT WITH THIS COURT'S CONTROLLING PRECEDENT, PARTICULARLY *RORY.*

Historically, Michigan courts have held that non-assignment clauses in insurance contracts are unambiguous and enforceable. *Employers Mut Liability Ins Co v Michigan Mut Auto Ins Co,* 101 Mich App 697, 701; 300 NW2d 682 (1980). See also *Detroit Greyhound Emp Fed Credit Union v Aetna Life Ins Co*, 7 Mich App 430, 439; 151 NW2d 852 (1967), rev'd on other grounds, 381 Mich 683; 167 NW2d 274 (1969). And while "an assignment is a contract

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between the assignor and the assignee…,"[9] a third party may "challenge an assignment if that challenge would" render the "assignment absolutely invalid or ineffective, or void."[10]

"[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory,* 473 Mich at 461. "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id.* "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties…." *Id.* "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract." *DeFrain*, 491 Mich at 372, quoting *Rory,* 473 Mich at 468-469. "[T]he construction and interpretation of an insurance contract is a question of law for a court to determine…." *Henderson v State Farm*, 460 Mich 348, 353; 596 NW2d 190 (1999).

"It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party…." *Id.* "[I]n reviewing an insurance policy dispute [courts] must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction. *Id.* "First, an insurance contract must be enforced in accordance with its terms." *Id.* at 354. "A court must not hold an insurance company liable for a risk that it did not assume." *Id.* "Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and

[9] *Macomb Interceptor Drain Drainage Dist v Kilpatrick,* 896 F Supp 2d 650, 658 (ED Mich 2012) (applying Michigan law in diversity).
[10] *Conlin v Mortg Elec Registration Sys, Inc,* 714 F3d 355, 361 (6th Cir 2013) (applying Michigan law in diversity).

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precise." *Id.* "Thus, the terms of a contract must be enforced as written where there is no ambiguity." *Id.*

"[A]n insurance contract should be read as a whole and meaning should be given to all terms." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 715; 706 NW2d 426 (2005). "An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Id*

It is "[a] fundamental tenet of our jurisprudence … that unambiguous contracts are not open to judicial construction and *must be enforced as written*." *Dawson v Farm Bureau*, 293 Mich App 563, 569; 810 NW2d 106 (2011)*,* citing *Rory,* 473 Mich at 468 (emphasis in *Rory*). Further, "[a] mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions." *Rory,* 473 Mich at 470. "The reason is clear: It is not the province of the judiciary to rewrite contracts to conform to the court's liking, but instead to enforce contracts as written and agreed to by the parties." *Dawson,* 293 Mich App at 569. See also *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212-213; 737 NW2d 670 (2007).

"[T]he freedom of contract" is "deeply entrenched in the common law of Michigan." *Id.* at 212. The United States Supreme Court has listed the "right to make and enforce contracts" among "those fundamental rights which are the essence of civil freedom." *Id.* (citation omitted). Courts "respect the freedom of individuals freely to arrange their affairs via contract by upholding the fundamental tenet of our jurisprudence ... that unambiguous contracts are not open to judicial construction and must be enforced as written," unless a contractual provision "would violate law or public policy." *Id.* (citation omitted). "Courts do not make contracts for parties.

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Parties have great freedom to choose to contract with each other, to choose not to do so, or to choose an intermediate course that binds them in some ways and leaves each free in other ways." *Id.* (citation omitted). "Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains...." *Id.* at 213 (citation omitted).

The *Covenant* majority specifically stated that the decision "was not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Covenant,* 500 Mich at 218 n 40. So no new right of action based on an assignment has been created.

In *Employers Mutual*, 101 Mich App at 701-702, the panel specifically addressed the validity of a non-assignment clause in an insurance contract, holding that it was unambiguous and enforceable. And in *Detroit Greyhound*, 7 Mich App at 439, the panel found "[n]o Michigan cases or statutes stating a public policy against enforcing non-assignment of benefit clauses in insurance policies…." Therefore, the clause at issue was valid and enforceable. The panel found support for this conclusion in *Bankers' Life Co v Miller*, 219 Mich 161; 188 NW 503 (1922). Although this Court subsequently reversed in *Detroit Greyhound,* 381 Mich at 683, this Court did so because it found the particular non-assignability clause in that case to be ambiguous – not because such clauses are categorially unenforceable.

And thirty years later in *Edwards v Concord Dev Corp,* unpublished opinion per curiam of the Court of Appeals, issued September 17, 1996 (Docket No. 174487) (App 14 at 190a-194a), the panel noted: "The general presumption then is that a contractual right may be assigned, … but conversely *that assignment may also be precluded by agreement*: 'A contractual right can be assigned unless ... *assignment is validly precluded by contract*.'" (Emphasis added,

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citing Restatement Contracts 2d, § 317(2).) See also *Keller Foundations, Inc v Wausau Underwriters Ins Co,* 626 F3d 871, 874 (5th Cir 2010) ("Texas courts … enforce non-assignment clauses even for assignments made post-loss"); *Dwayne Clay, MD, PC v Gov't Employees Ins Co,* 356 Md 257; 739 A2d 5 (1999) (nonassignability clause in automobile insurance policy was consistent with public policy and enforceable against a physician who treated the insured in return for an assignment; the intended direct beneficiary of coverage is the accident victim, not health care providers or other creditors of the insured); *Williams v Mayflower Ins Co*, 238 Ga App 581, 583; 519 SE2d 506 (1999) ("Georgia law expressly provides that insurers may limit the assignability of rights under policies through the use of non-assignability clauses").

The Court of Appeals relied upon *Roger Williams*, 43 Mich at 253 in finding that public policy favoring the free assignment of "accrued cause[s] of action" precludes the enforcement of this type of policy language. *Shah*, ___ Mich App at ___; slip op at 8-10. And in opposing State Farm's Application, Plaintiffs maintain that *Roger Williams* is good law. (Answer to Application, pp 27, 34, 37, 38, 40.) State Farm has already thoroughly explained why *Roger Williams* is a "shucked shell of a" precedent (State Farm's Application, p 3), and those arguments need not be repeated here. However, even assuming the continued validity of *Roger Williams,* a closer look at that decision reveals that it simply does not say what the Court of Appeals and the Plaintiffs thought it does. In *Roger Williams*, the insured tried to void the policy on the basis of the assignment, rather than trying to void the assignment itself. The *Edwards* panel distinguished *Roger Williams* twenty years ago on this basis (App 14 at 190a-194a):

> Although plaintiff cites *Roger Williams* … to support its contention that non-assignment clauses are invalid, that case is distinguishable from the present case. In *Roger Williams*, the insurance company was attempting to avoid payment of its contract, whereas here, Hastings did not attempt to avoid its obligation under the contract; rather Hastings paid the full amount

> owed under the contract **to plaintiffs**. Thus, the provision requiring Hastings' written consent to assignment by plaintiffs was valid and, since Hastings did not give its written consent to plaintiffs' assignment of insurance proceeds **to Concord,** that assignment was not binding on Hastings.

Edwards, unpub op at 2 (emphasis added).

Here there is no indication that State Farm attempted to void its policy because of the assignments. There is nothing in the record to suggest that State Farm's insured, Mr. Hensley, is in any way limited[11] in the no-fault benefits he may recover. If Mr. Hensley were to timely present bills from this accident to State Farm, there is every indication in this record that State Farm would adjust them for reasonableness, necessity, and relatedness, just like any other claim for benefits. The fact that Mr. Hensley granted assignments has never been asserted as a basis for denying coverage under the policy full stop, which was what the insurer tried (unsuccessfully) to do in *Roger Williams.* This was all the *Roger Williams* decision ever stood for – rejecting the insurer's argument that a post-loss "assignment without the company's consent" resulted in a *forfeiture of the entire policy. Roger Williams,* 43 Mich at 254. That has never been State Farm's position here, nor is the undersigned aware of any other post-*Covenant* case where a no-fault carrier has taken that position. In other words, even if *Roger Williams* were somehow still good law, it is irrelevant to the questions presented here.

Indeed, given Michigan's established rules of insurance policy interpretation, the Minnesota Supreme Court's recent decision in *Stand Up Multipositional Advantage MRI, P.A. v Am Family Ins Co,* 889 NW2d 543, 551 (Minn 2017) is far more instructive than the 138-year old *Roger Williams* decision (which interpreted a now-repealed statute). In *Stand Up*

[11] Except perhaps by the No-Fault Act itself for reasons that were never developed below.

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Multipositional, the Court held that an anti-assignment clause in an automobile no-fault policy was valid, and the provider's assignment was invalidated:

> We acknowledge that our decision may unsettle the expectations of medical providers that have been relying on assignments of no-fault benefits. Indeed, Stand Up contends that a decision in American Family's favor will cause medical providers to refuse to treat accident victims without prior payment. This refusal, in turn, would, according to Stand Up, undermine a key purpose of the No-Fault Act: ensuring that automobile accident victims obtain appropriate medical treatment by assuring prompt payment for such treatment….
>
> But, as discussed above, there are valid policy considerations on both sides. …[When] there are countervailing policies at issue and the statutory scheme does not resolve the question … it is for the legislature, rather than this court, to weigh the competing policies at issue and determine the appropriate balance. Should the Legislature desire a different outcome, it could amend the No-Fault Act to effectuate that intent…. *Id.* at 551 (citations omitted).

The *Stand Up* Court noted that "freedom of contract principles" support its holding that "anti-assignment clauses in no-fault automobile insurance policies are enforceable." *Id.* at 548 (citation omitted). Those are the same principles that this Court has repeatedly emphasized over the last twenty years, in the decisions discussed above.

Even those jurisdictions that find non-assignability clauses unenforceable when the assignment is made after the loss[12] nonetheless apply a different rule for provider suits. For example, Colorado's Supreme Court noted in *Parrish Chiropractic Centers, P.C. v Progressive Cas Ins Co,* 874 P2d 1049, 1053 (Colo 1994) that generally, "assignments of post-loss benefits are usually found to be valid regardless of any non-assignment clause in the policy." *Id.* at 1053. But the Court noted "an important exception" for "non-assignment clauses in group health care contracts." *Id.* In this specific context, the non-assignment clauses "are enforceable against post-loss assignments to health care providers of the insured's right to receive benefits under the

[12] An approach that had no support in Michigan precedent prior to *Shah*.

policy." *Id.* The Court cited decisions from Connecticut, Delaware, Kansas, Nebraska, Pennsylvania, among other jurisdictions. *Id.* "The cases upholding non-assignment clauses conclude that the strong policy of freedom of contract and the fact that non-assignment clauses are valuable tools in persuading health care providers to keep their health care costs down override the general policy favoring the free alienability of choses in action." *Id.* "Accordingly, purported assignments of benefits to a health care provider, in the face of a non-assignment clause in a group health care policy, are considered to be void and unenforceable against the insurer." *Id.* at 1053-1054.

The Court of Appeals engaged in no such balancing here, and simply assumed that the only relevant public policy consideration was that favoring the free assignment of "accrued cause[s] of action." See *Shah*, ___ Mich App at ___; slip op at 9. But cost-containment is, of course, also a paramount public policy consideration in applying the No-Fault Act. "Although the no-fault system is administered through insurance companies, premiums paid by the owners of motor vehicles to no-fault automobile insurers are governmentally mandated exactions that socialize the cost of providing work-loss benefits and medical payments to all persons injured in automobile accidents." *Thompson v DAIIE,* 418 Mich 610, 622; 344 NW2d 764 (1984) (opinion by Levin, J). "No-fault premiums, then, like social security taxes, do not reflect only the cost expected to be imposed on the system by the person making the payment, but include amounts for costs expected to be imposed on the system by persons who do not contribute thereto or do so in amounts inadequate to provide the benefits they receive." *Id.* at 623. "The no-fault automobile liability act may thus provide the most comprehensive and generous 'social welfare program' yet enacted." *Id.* at 624. In order to carry out this "social welfare program" in a way that does not bankrupt the private corporations that administer it, no-fault carriers must be protected from

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multiple lawsuits based upon the same accident. Otherwise, no-fault carriers would be unable to "accomplish the goal of providing an equitable and prompt method of redressing injuries in a way which [makes] the mandatory coverage affordable to all motorists." *MacDonald v State Farm,* 419 Mich 146, 154; 350 NW2d 233 (1984). Indeed, our Supreme Court has noted that "due to the mandatory nature of no-fault insurance, the Legislature intended that its cost be affordable." *McCormick v Carrier,* 487 Mich 180, 282; 795 NW2d 517 (2010) (Markman, J., dissenting) (citation omitted). "The Legislature has ... fostered the expectation that no-fault insurance will be available at fair and equitable rates." *Id.* (citation omitted). "Indeed, because it is mandatory, it must be affordable." Id. "Fair and equitable" rates cannot be maintained if no-fault carriers must defend suits in multiple courts, brought by multiple parties (the injured person plus whatever providers have assignments), for each accident.

Moreover, the providers' reliance upon the Michigan Uniform Commercial Code ("UCC"), as an alternative basis for affirming the Court of Appeals, is similarly misplaced. (See Answer to Application, pp 20-21.) Generally, Article 9 of the Michigan UCC does not apply to a "transfer of an interest in or an assignment of a claim under a policy of insurance…." MCL 440.9109(4)(h). Admittedly, this subpart contains an exception for an assignment "by or to a health-care provider of a health-care-insurance receivable[[13]] and any subsequent assignment of the right to payment…." *Id.* But Plaintiffs cite no case law applying the UCC to a no-fault provider claim. To the contrary, case law indicates that Article 9 does not apply unless the assignment in question gives the assignee a security interest. See *Riley v Hewlett-Packard Co,* 36 Fed App'x 194, 196 (6th Cir 2002). Here, there is no indication that Mr. Hensley's

[13] MCL 440.9102(1)(ss) defines a "health-care-insurance receivable" as "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided."

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assignments to Plaintiffs created "an interest in personal property or fixtures which secures payment or performance of an obligation." *Id.* at 196,

In addition, Article 9 does not apply to "[a]n assignment of accounts, chattel paper, payment intangibles, or promissory notes that is for the purpose of collection only." MCL 440.9109(4)(e). This is precisely what Mr. Hensley has done here – he assigned his right "to payment for health care services, products or accommodations" that he "is or may be entitled under … the No Fault Act" to the Plaintiffs. *Shah*, ___ Mich App at ___; slip op at 2 n 2. Each Plaintiff received an assignment "for the right to payment of Assignee's charges…." *Id.*

Also, Article 9 does not apply to "[a]n assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness." MCL 440.9109(4)(g). Since George Hensley assigned his no-fault claim to these Plaintiffs in order to satisfy his own contractual obligation to them,[14] this would also remove the assignment from the scope of Article 9.

Moreover, MCL 440.9408(5) states that the prohibition on anti-assignment clauses set forth at MCL 440.9408(1) *does not apply* when the assignment pertains to "a claim or right to receive an amount that would be excluded from gross income under section 104(a)(1) or (2) of the internal revenue code, 26 USC 104." MCL 440.9408(5). Internal Revenue Code § 104(a)(2) excludes from gross income any damages received on account of physical injuries or physical sickness. In determining what is a "physical injury" within the meaning of § 104(a)(2), the Supreme Court explained in *C.I.R. v Schleier*, 515 US 323, 329-330; 115 S Ct 2159 (1995):

[14] See *Covenant*, 500 Mich at 217 ("a provider that furnishes healthcare services to a person for injuries sustained in a motor vehicle accident may seek payment from the injured person for the provider's reasonable charges").

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> Consideration of a typical recovery in a personal injury case illustrates the usual meaning of "on account of personal injuries." Assume that a taxpayer is in an automobile accident, is injured, and as a result of that injury suffers (a) medical expenses, (b) lost wages, and (c) pain, suffering, and emotional distress that cannot be measured with precision … The medical expenses for injuries arising out of the accident clearly constitute damages received "on account of personal injuries."

Any damages received by Mr. Hensley for medical expenses would be excluded from his gross income under § 104(a)(2). And these Plaintiffs, as his assignees, stand in Mr. Hensley's shoes. See *Burkhardt v Bailey,* 260 Mich App 636, 653; 680 NW2d 453 (2004) ("[a]n assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses"). Therefore, the assignments relied upon here – if they fall within Article 9 at all – are governed by MCL 440.9408(5) and the prohibition on anti-assignment clauses set forth at MCL 440.9408(1) *does not apply* under the plain language of the statute.

And the anti-assignment clause is not an impermissible contractual restraint on statutory benefits. The No-Fault Act at MCL 500.3143 says that future assignments are void; nowhere does it say that other assignments must be permitted. "[A]n exclusionary clause is not *per se* invalid simply because it is not specifically provided for in the no-fault act." *Husted v Auto-Owners Ins Co,* 213 Mich App 547, 555; 540 NW2d 743 (1995). See also *Bahri v IDS Prop Cas Ins Co,* 308 Mich App 420, 424; 864 NW2d 609 (2014). Moreover, the anti-assignment clause has no effect on the benefits available *to the injured person.*

Enforcing contractual prohibitions on assignments is also consistent with the broader rule in Michigan prohibiting the splitting of causes of action. "In this state the rule against splitting of causes of action is strictly enforced to prevent vexation and expense to a defendant." *Gen Acc Fire & Life Assur Corp v Sircey,* 354 Mich 478, 482; 93 NW2d 315 (1958) (citations omitted).

“It is a rule of justice that one shall present his whole cause of action in one suit.” *Id*. (citation omitted).

Indeed, the multiplicity of no-fault claims was a significant public policy concern that, presumably, led this Court to grant leave in *Covenant*.[15] If claimants can do what Mr. Hensley has done here – dividing his claim for PIP benefits among at least three different providers while presumably keeping any remaining claims to himself, see *Shah*, ___ Mich App at ___; slip op at 2 n 2 – then we are back to where were before *Covenant*. All providers need are *pro forma* assignments from their patients, in order to restore the pre-*Covenant* status quo. If that is the case, the *Shah* panel will have simply reinstituted *Lakeland Neurocare,* 250 Mich App at 35. That simply is not how *stare decisis* works. “Serious rule of law costs would follow if lower courts were free to ignore precedent established by a higher court of appeal.” *In re Nestorovski Estate,* 283 Mich App 177, 209-210; 769 NW2d 720 (2009) (Saad, C.J., dissenting) (citation omitted). “Moreover, to ignore the rule of *stare decisis* would inevitably grant to all lower courts, including trial courts, the authority to circumvent higher court rulings under the guise of anticipating that the higher court will change its position.” *Id.* “This is a very dangerous, slippery slope.” *Id.*

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

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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. E, 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. F, 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.) If claimants can do what Mr. Hensley has done here – dividing his claim for PIP benefits among at least three different providers while presumably keeping any remaining claims to himself, see *Shah*, ___ Mich App at ___; slip op at 2 n 2 – then we are back to where were before *Covenant*. The *Shah* panel will have simply rearranged the deck chairs from *Lakeland Neurocare,* 250 Mich App at 35, merely adding the nominal requirement that providers obtain a *pro forma* assignment.

Perhaps more concerning is that there is no precedential basis for this result. As State Farm has thoroughly explained, the 138-year old *Roger Williams* decision (which interpreted a now-repealed statute) is a "shucked shell of a" precedent. (State Farm's Application, p 3.) And even if *Roger Williams* still carried the weight of precedent, it simply does not say what the Court of Appeals and the Plaintiffs believe it does. A far more compelling, and relevant, analysis is provided by the Minnesota Supreme Court's 2017 decision in *Stand Up Multipositional,* 889 NW2d at 551. There, the Court balanced the public policy favoring the free assignment of accrued claims against the public policy favoring "freedom of contract," and found that "anti-assignment clauses in no-fault automobile insurance policies are enforceable." *Id*. at 548.

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Moreover, Plaintiffs' other arguments – such as those based on MCL 500.3143 and Article 9 of the Michigan UCC – are unavailing for reasons set forth above. For these reasons, the IAM respectfully requests that this Honorable Court grant State Farm's Application for Leave to Appeal.

SECREST WARDLE

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

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INDEX OF EXHIBITS

Exhibit A	Excerpts from Hastings' Brief on Appeal in *Michigan Head and Spine (Potocki) v Hastings*, Court of Appeals Docket No. 340656
Exhibit B	Excerpts from Hartford's Brief on Appeal in *The Pain Center USA, PLLC and Interventional Pain Center, PPC (Hendrix) v Hartford*, Court of Appeals Docket No. 342437
Exhibit C	Excerpts from Progressive's Brief on Appeal in *Northland Radiology (Moore) v Progressive,* Court of Appeals Docket No. 341271
Exhibit D	Excerpts from GEICO's Brief on Appeal in *Rehab R Us, LLC and Wellness Transportation, LLC (Marcos) v GEICO,* Court of Appeals Docket No. 341271
Exhibit E	IIM & MIC's Amicus Brief from *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*
Exhibit F	IIM & MIC's Amicus Brief from *Chiropractors Rehab Group, PC v State Farm Mut Auto Ins Co*