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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STATE FARM'S SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF JURISDICTION

Defendant-Appellant State Farm Mutual Automobile Insurance Company seeks leave to appeal the Court of Appeals' May 8, 2018 decision, which reversed the trial court's September 11, 2017 order granting summary disposition to State Farm. (App 6 at 073a; App 9 at 090a.) State Farm timely filed an application for leave to appeal in this Court on June 15, 2018. On October 24, 2018, the Court directed the Clerk to schedule oral argument on the application. (App 16 at 207a.) The Court has jurisdiction under MCR 7.303(B)(1).

QUESTION PRESENTED FOR REVIEW

State Farm's standard Michigan no-fault auto-insurance policy contains an "Assignment Clause" that precludes any assignment of benefits or transfer of rights without State Farm's approval. The Court directed the parties to address "whether the anti-assignment clause in the defendant's insurance policy precludes the defendant's insured from assigning his right to recover no-fault personal protection insurance benefits to the plaintiff healthcare providers."

The circuit court answered yes and enforced the Assignment Clause as written.
The Court of Appeals answered no and rewrote it.
State Farm answers yes.
Plaintiffs answer no.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court of Appeals rewrote a million contracts. State Farm's standard no-fault policy—its contract with over a million active insureds in Michigan—unambiguously precludes any assignment of benefits or transfer of rights without State Farm's approval: "No assignment of benefits or other transfer of rights is binding upon us unless approved by us." The Court of Appeals acknowledged that this Assignment Clause was "perfectly clear" and by its terms barred any and all assignments. But the court rewrote it on public-policy grounds to bar not all assignments but only some. State Farm asks this Court to reverse.

This Court held in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017) that healthcare providers do not have standing to sue insurers for recovery of benefits under the No-Fault Act. Following that decision, many healthcare providers, including Plaintiffs here, sought to proceed against insurers under an assignment of rights from the named insured. The trial court, however, held that the Assignment Clause precluded all assignments and thus granted summary disposition to State Farm. The Court of Appeals reversed, holding that prohibition of post-loss assignments—that is, assignments of an accrued cause of action—"violates Michigan public policy that is part of our common law[.]"

This Court directed the parties to address "whether the anti-assignment clause in the defendant's insurance policy precludes the defendant's insured from assigning his right to recover no-fault personal protection insurance benefits to the plaintiff healthcare providers." The answer is yes. The reason is that this is unambiguously what the Assignment Clause says. It is the most fundamental principle of contract law that courts must enforce unambiguous contract provisions as written. The Assignment Clause here, as written, bars *all* assignments without State Farm's approval, not just pre-loss assignments. Only in the most unusual circumstances

may a court strike or rewrite a contract provision as against public policy. But there is nothing unusual about the Assignment Clause; similar provisions appear in countless other contracts throughout Michigan, including in many other insurers' no-fault policies. And for no-fault policies, the Legislature sets Michigan public policy in the No-Fault Act. This means that if a policy provision does not conflict with the No-Fault Act, it does not violate public policy. The No-Fault Act does not bar anti-assignment provisions, so it follows that State Farm's Assignment Clause does not conflict with the No-Fault Act and thus does not violate public policy. Indeed, the Legislature delegated the task of ensuring compliance with the public policy set forth in the No-Fault Act to the executive branch, through its Commissioner of Insurance. So when—as here—the Commissioner has approved a no-fault policy as conforming with the Act, the policy does not violate public policy. All of these controlling rules mean that the Court of Appeals was required to enforce the Assignment Clause as written, not rewrite it on public-policy grounds.

The Court of Appeals relied entirely on *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880) for its conclusion that the Assignment Clause violates public policy. The *Roger Williams* Court held that an anti-assignment provision voiding a fire-insurance policy in the event of an assignment violated public policy because a post-loss assignment "cannot concern the debtor." But *Roger Williams* does not control here, for several reasons. First, it was based on a 19th-century statute securing an "absolute right" to assign that no longer exists. There is no statute on the books today securing an absolute right to assign a cause of action (certainly not in the No-Fault Act), so parties are free to restrict assignment contractually. Second, *Roger Williams* has been superseded by a century of law, including the No-Fault Act (which does not bar contractual anti-assignment provisions) and this Court's modern caselaw (which expressly allows them). This Court has made clear for decades that, consistent with the

Restatement view, anti-assignment provisions *are* enforceable according to their plain language. Third, *Roger Williams* is distinguishable because the assignment clause at issue there *forfeited the policy*, rather than merely barring the assignment. State Farm seeks only to bar the assignment, not to void the policy with its insured, who remains entitled to pursue all benefits under the policy (subject to all other applicable defenses). Thus, the public-policy concerns in play in *Roger Williams* were very different from the ones here. The public-policy concerns here weigh heavily in favor of upholding freedom of contract, controlling runaway litigation costs, and promoting affordable insurance in Michigan.

This Court can affirm the trial court's judgment without overturning *Roger Williams*. The Court, for example, could leave the *Roger Williams* rule intact for anti-assignment provisions that seek to void the contract or for other contract cases that are not governed by the No-Fault Act. Or the Court could hold that *Roger Williams* has already been superseded by subsequent law: the case was based on a statute securing an "absolute right" to assign that no longer exists, and the Court's modern precedent allows parties to restrict assignment contractually.

But to the extent that *Roger Williams* has any continuing life relevant to this no-fault case, the Court should overrule it. Before the Court of Appeals' decision here, no Michigan court had ever—in 138 years—followed *Roger Williams*' public-policy holding in a published opinion. But now, resurrected, the decision threatens to rewrite over a million contracts in the state. Part of the rationale in *Roger Williams* was the Court's belief that post-loss assignment "cannot concern the debtor." But the Court offered no explanation *why* it thought this was true. That might be the case sometimes, but certainly not always. Under *Roger Williams*' absolute prohibition, even if limiting post-loss assignment were one party's greatest concern in the

world—even if she paid an additional $1 million consideration for an anti-assignment clause—the courts would still strike the clause because it shouldn't "concern" her. And hypotheticals aside, the Assignment Clause here in fact "concerns" State Farm greatly. If the Assignment Clause is enforced as written, State Farm could face, at most, one lawsuit for each accident involving its insured, brought by the insured him- or herself, in one court. But if the Assignment Clause is rewritten on public-policy grounds, then State Farm could face dozens of lawsuits, brought by various healthcare providers seeking recovery of their specific medical bills, in various courts throughout the state. This is not a theoretical possibility; it is reality. It is commonplace for State Farm to have to defend one action in Wayne County Circuit Court, for example, relating to one provider's bills; another in Washtenaw County for another provider based there; and yet another in 52-4 District Court for a smaller bill up that way. The Assignment Clause, by its terms, forecloses this sprawling web of litigation, and thus its enforcement certainly "concerns" State Farm. More to the point, it is simply not the role of the courts to second-guess what should have concerned the parties when they entered into their contract. The courts' role is to enforce the contract as written. *Roger Williams* is fundamentally inconsistent with this foundational principle of contract law, so the Court should overrule it.

For all of these reasons, State Farm asks the Court to reverse the Court of Appeals' decision and reinstate the trial court's judgment below.

MATERIAL PROCEEDINGS AND FACTS

I. The Assignment Clause in State Farm's No-Fault Policy

This case arises from an automobile insurance policy that State Farm issued to George Hensley. (App 4 at 020a, 058a the "Policy.") The Policy unambiguously prohibits the assignment of benefits or other transfer of rights without State Farm's approval: "No assignment of benefits or other transfer of rights is binding upon us unless approved by us." (*Id.* at 055a.)

Plaintiffs are healthcare providers seeking payment of $82,070 for services they rendered for treatment of injuries that Mr. Hensley allegedly sustained in a November 30, 2014 automobile accident.

II. The Trial Court Grants Summary Disposition to State Farm Under *Covenant* and Holds that Plaintiffs' Claims Under the Purported Assignments Are Futile Because of the Assignment Clause

Plaintiffs filed this action against State Farm in the Genesee County Circuit Court on February 24, 2017, asserting a claim for personal insurance protection (PIP) benefits under the No-Fault Act. (See App 1 at 002a.) On July 20, 2017, State Farm filed a motion for summary disposition on the ground that Plaintiffs' claims were barred by this Court's decision in *Covenant*, which held that healthcare providers do not have a direct cause of action against insurers under the No-Fault Act.

In response, Plaintiffs did not argue that their claims were somehow still valid under *Covenant*, nor did they argue that *Covenant* did not apply retroactively. Plaintiffs in fact conceded the "seemingly retroactive holding of *Covenant*." (App 3 at 018a, Pls' Mot for Leave to Amend, ¶ 8.) Instead, Plaintiffs attached to their response purported July 11, 2017 assignments of rights from Mr. Hensley to Jawad A Shah MD PC, Integrated Hospital Specialists PC, Insight Radiologists PC, and Precision Surgical Associates, providing that "Assignor has incurred charges for services provided by Assignee for which the rights, privileges and remedies for payment are hereby assigned." (E.g., App 2 at 011a.)[1] Plaintiffs asked the trial court to grant them leave to amend their complaint to assert claims based on the assignments. Plaintiffs also filed a motion for leave to amend asking for the same relief.

[1] Neither Insight Radiologists PC nor Precision Surgical Associates is a party to this case, and Plaintiffs did not attach any purported assignments relating to Plaintiffs Insight Anesthesia, PLLC or Sterling Anesthesia, PLLC. (See App 2 at 011a-014a.)

Because the Policy unambiguously prohibits the assignment of benefits or other transfer of rights without State Farm's approval, State Farm argued in reply that Plaintiffs' assignments were barred by the Assignment Clause and that Plaintiffs' request to amend should be denied as futile. State Farm also argued that the proposed amendment would be futile because Plaintiffs' claims were barred by the "one-year-back" rule of MCL 500.3145(1), since their claims for payment arose more than one year before the purported assignments and Mr. Hensley could not assign claims he no longer had.

The trial court held a hearing on the motions and agreed with both of State Farm's positions. The court reasoned that the assignments were invalid under the Assignment Clause and that any claims brought based on the assignments would also be barred by the one-year-back rule. (See App 5 at 068a.) The trial court issued an order the same day granting State Farm's motion for summary disposition and dismissing the case. (See App 6 at 073a-074a.) Plaintiffs thereafter appealed of right.

III. The Court of Appeals Reverses and Invalidates the Assignment Clause on Public-Policy Grounds

The Court of Appeals (Borrello, J., joined by Tukel, J., with Shapiro, J. concurring in part) issued a published opinion reversing and remanding. The court recognized that, "[u]nder general contract law, rights can be assigned unless the assignment is clearly restricted." (App 9 at 097a, quoting *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004).) The court also recognized that "[t]he appellate courts of Michigan have previously recognized the enforceability of anti-assignment clauses that are clear and unambiguous." (App 9 at 097a, citing *Detroit Greyhound Employees v Aetna Life Ins*, 381 Mich 683, 689-90; 167 NW2d 274 (1969).) And the court recognized that "because the anti-assignment clause is unambiguous, it

must be enforced unless it violates the law or public policy." (*Id.*, citing *Rory v Continental Ins Co*, 473 Mich 457, 468-69; 703 NW2d 23 (2005).)

The Court of Appeals nonetheless concluded that the Assignment Clause was unenforceable "to prohibit an assignment of an accrued cause of action after the loss has occurred [as] against Michigan public policy as stated by our Supreme Court one hundred and thirty-eight years ago in *Roger Williams*." (App 9 at 098a.) The Court of Appeals stated that there has been "no indication that *Roger Williams* or its holding relating to anti-assignment clauses has been clearly overruled or superseded," and that "if the continued validity of *Roger Williams* is to be called into question, it will have to be by our Supreme Court." (*Id.*) The Court of Appeals therefore concluded that "the trial court's decision was based on a misapplication of the law" and that "the trial court necessarily abused its discretion in denying plaintiffs the opportunity to serve its [sic] supplemental pleading." (*Id.* at 103a.)[2]

On the one-year-back issue, the Court of Appeals concluded that Plaintiffs' claims for any portion of the loss incurred more than one year before the assignments were executed were barred by the one-year-back rule. (*Id.* at 101a.) Because the one-year-back rule did not bar all of Plaintiffs' claims (there were about $4,000 of charges within the year preceding the

[2] The trial court's order states that summary disposition was granted pursuant to MCR 2.116(C)(8). The Court of Appeals, however, applied MCR 2.116(C)(10) on the ground that the trial court considered both the Policy and the assignments, but neither "were attached to or referred to in a *pleading*." (App 9 at 101a, citing MCR 2.110(A).) This conclusion overlooks the fact that the Policy was referenced in the complaint, (App 1 at 003a-004a, ¶¶ 6-7), and is the written instrument on which Plaintiffs' claim is based. Thus, it is "part of the pleading for all purposes." See MCR 2.113(F)(2). The Court of Appeals was correct, however, that the assignments were not attached to or referred to in a pleading, since Plaintiffs never actually submitted a proposed amended complaint.

assignments), the court remanded for further proceedings consistent with its opinion. (*Id.* at 103a-104a.)[3]

Judge Shapiro wrote a separate opinion concurring with the majority's conclusion that the Assignment Clause violates public policy. (App 10 at 106a.) Judge Shapiro dissented from the majority's conclusion that the one-year-back rule runs from the date of the assignments rather than the date the complaint was filed. (*Id.*) Judge Shapiro also believed that the court should have addressed the *Covenant* retroactivity issue, even though Plaintiffs had conceded the issue below, and even though a controlling Court of Appeals decision had already decided it. (See *id.*)

IV. State Farm's Application for Leave to Appeal and this Court's Order Granting Argument

State Farm timely filed an application for leave to appeal in this Court, together with a motion for expedited consideration. State Farm's application was limited to the Court of Appeals' decision to invalidate the Assignment Clause on public-policy grounds.[4]

On October 24, 2018, the Court granted State Farm's motion for expedited consideration and directed the Clerk to schedule oral argument on the application. The Court directed the parties to submit supplemental briefs addressing "whether the anti-assignment clause in the

[3] State Farm does not seek review of this portion of the Court of Appeals' decision. The Court of Appeals also held that Plaintiffs waived a variety of other arguments by not raising them in the trial court, including arguments that *Covenant* is not retroactive, that the Assignment Clause is ambiguous, that there are factual questions about whether the Policy was in force at the time of the accident, that another state's law applies, that State Farm lacks standing to challenge the assignments, that the Assignment Clause conflicts with the No-Fault Act, and that the Assignment Clause is unenforceable under the Uniform Commercial Code. (See App 9 at 093a-095a, 097a n 8, 099a.) State Farm likewise does not seek review of the Court of Appeals' holding that Plaintiffs waived all of these issues.

[4] Because Plaintiffs conceded below the "seemingly retroactive holding of *Covenant*," (App 3 at 018a, ¶ 8), the retroactivity issues presented on leave to this Court in *W A Foote Mem Hosp v Mich Assigned Claims Plan*, No. 156622, COA No. 333360, are not at issue here. For all of the reasons stated in State Farm's Court of Appeals brief, the *Foote* court was correct that *Covenant* applies retroactively. (See App 8 at 084a-087a.)

defendant's insurance policy precludes the defendant's insured from assigning his right to recover no-fault personal protection insurance benefits to the plaintiff healthcare providers." (App 16 at 207a.)

STANDARD OF REVIEW

This Court may grant an application for leave to appeal if, as relevant here, the case "involves a legal principle of major significance to the state's jurisprudence," if the Court of Appeals' decision "is clearly erroneous and will cause material injustice," or if "the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals." MCR 7.305(B)(3), (5)(a)-(b).

This Court reviews de novo the grant or denial of summary disposition, the proper interpretation of a contract, and whether a contractual provision violates public policy. *Rory*, 403 Mich at 464; *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002). The Court reviews a trial court's denial of a request to amend only for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

ARGUMENT

I. THE ASSIGNMENT CLAUSE IS CONSISTENT WITH THE NO-FAULT ACT, DOES NOT VIOLATE PUBLIC POLICY, AND SHOULD HAVE BEEN ENFORCED BY THE COURT OF APPEALS AS WRITTEN

The Assignment Clause in State Farm's policy clearly and unambiguously bars any assignment or transfer of rights without State Farm's approval: "No assignment of benefits or other transfer of rights is binding upon us unless approved by us." (App 4 at 055a.) The Court of Appeals acknowledged that "the language of this provision is perfectly clear." (App 9 at 097a.) The Court of Appeals nonetheless invalidated the Assignment Clause "because such a prohibition of assignment violates Michigan public policy[.]" (*Id.* at 098a.) With the stroke of a

pen, the Court of Appeals rewrote a clear and unambiguous contract provision that appears in over 1.1 million no-fault policies in Michigan.

This Court has repeatedly cautioned the lower courts not to do this. The courts do not "serve as an ombudsman, rewriting contracts and statutes in the name of 'public policy' whenever it appears that the plain terms of the text work some perceived inequity." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 202; 747 NW2d 811 (2008). "[T]his approach replaces the rule of law by the rule of men, which is the very peril we believe that courts are expected to stand against." *Id.* Simply put, "the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations[.]" *Rory*, 473 Mich at 461.

In a footnote in *Covenant*, the Court noted in dicta that its opinion 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." 500 Mich at 217 n 40. This footnote, however, presumes that the insured has the right to assign his or her rights to benefits in the first place. If the insured does have such a right, then *Covenant* does not "alter" that right. See *id*. But this footnote by its terms does not address a situation where a right to assign is validly precluded or limited by contract. That is the situation here: The Assignment Clause unambiguously precludes assignment without State Farm's consent. In short, the *Covenant* footnote does not change the bedrock rule that courts must enforce unambiguous contract provisions as written.

As detailed below, only in "highly unusual" and "narrow," well-defined circumstances may a court substitute its judgment for the contracting parties' and declare a contract provision contrary to public policy. See *Rory*, 473 Mich at 469; *DeFrain v State Farm Mut Auto Ins Co*,

491 Mich 359, 372; 817 NW2d 504 (2012). For no-fault policies, "narrow" becomes nearly non-existent, because the Legislature sets Michigan public policy for no-fault insurance directly in the No-Fault Act. So if a policy provision does not conflict with the No-Fault Act, the provision does not violate Michigan public policy. Moreover, the Legislature delegated the task of vetting and approving the terms of insurance policies—including no-fault policies—to the Commissioner of Insurance, an executive-branch official. "Accordingly, the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government." *Rory*, 473 Mich at 476. In other words, when it comes to no-fault policies, public-policy determinations are up to the Commissioner, not the courts. So when a no-fault policy does not conflict with the No-Fault Act and has been approved by the Commissioner of Insurance, the courts' role is a straightforward one: enforce the policy as written.

A. This Court's modern precedent uniformly requires unambiguous terms in insurance policies to be enforced as written.

Under this Court's controlling precedent, the Court of Appeals was required to enforce as written a clear and unambiguous provision of a no-fault policy. This Court held in *Rory* that "insurance policies are subject to the same contract construction principles that apply to any other species of contract." 473 Mich at 462. This means that insurance contracts, like any other contract, are subject to the "fundamental tenet of our jurisprudence" that "unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Id.* at 468 (emphasis in original). "Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Id.* This principle is "ancient and irrefutable," "draws strength from common-law roots," and "can be seen in our fundamental charter, the United States Constitution, where government is forbidden

from impairing the contracts of citizens." *Id.* at 470, quoting *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003). It is, in short, "an unmistakable and ineradicable part of the legal fabric of our society." *Rory*, 473 Mich at 470.

As the Court recognized in *Rory*, lurking beneath the argument that courts should refuse to enforce some provisions of insurance policies is the idea that insurance policies are "adhesion contracts," where the terms are presented to the insured on a "take-it-or-leave-it" basis. *Id.* at 477. In other words, parties and courts often base these public-policy arguments on the "assumption that 'adhesion contracts' are subject to a greater level of judicial scrutiny than other contracts—and, indeed, that so-called adhesion contracts need not be enforced if the court views them as unfair." *Id.* Plaintiffs here made that argument to the Court of Appeals, asserting that the Assignment Clause was unenforceable because the Policy "smacks of an adhesion contract." (App 7 at 079a-080a.) And Judge Shapiro, at least, was sympathetic to this notion. (See App 10 at 110a n 1.)

This Court, however, expressly rejected that argument in *Rory*. After surveying decades of Michigan law—"a confused jumble of ignored precedent, silently acquiesced to plurality opinions, and dicta, all of which, with little scrutiny, have been piled on each other to establish authority"—the Court rejected the idea that so-called "adhesion" contracts are subject to special interpretive rules. 473 Mich at 488-89, quoting *Wilkie*, 469 Mich at 60. That is because "[a]n 'adhesion contract' is simply that: a *contract*." *Rory*, 473 Mich at 477 (emphasis in original). "It must be enforced according to its plain terms," and "[a] party may avoid enforcement of an 'adhesive' contract only by establishing one of the traditional contract defenses, such as fraud, duress, unconscionability, or waiver." *Id.* at 487, 489. In other words, "it is of no legal relevance that a contract is or is not described as 'adhesive.'" *Id.* at 489. "In either case, the

contract is to be enforced according to its plain language." *Id.* Thus, "[r]egardless of whether a contract is adhesive, a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable." *Id.*

Consistent with these principles, the Court in *Rory* enforced as written a contractual limitations period that barred the plaintiffs' claims, and rejected the plaintiffs' argument that this provision should be stricken or ignored because it was unreasonable or violated public policy. *Id.* The plaintiffs there did "not argue that [the insured was] fraudulently induced to sign [his] agreement with defendant, that [he] entered into the contract under duress, or that any other traditional contract defense applie[d]." *Id.* at 490. The Court therefore held that "irrespective of whether [the] contract [was] labeled 'adhesive,'" the Court had to "enforce the plain language of that agreement." *Id.*

The Court affirmed this holding and these bedrock principles of contract interpretation in *DeFrain*. There, the Court reaffirmed that an insurance policy is construed "in the same manner as any other species of contract, giving its terms their 'ordinary and plain meaning if such would be apparent to a reader of the instrument.'" 491 Mich at 367, quoting *Wilkie*, 469 Mich at 60. The Court therefore "h[e]ld that an unambiguous notice-of-claim provision setting forth a specified period within which notice must be provided is enforceable without a showing that the failure to comply with the provision prejudiced the insurer." *DeFrain*, 491 Mich at 362. The Court reasoned that "[i]n reading a prejudice requirement into the notice provision where none existed, the Court of Appeals disregarded controlling authority laid down by the Court and frustrated the parties' right to contract freely." *Id.* at 368.

In short, this Court's unmistakable command to the lower courts is that clear and unambiguous terms of insurance policies must be enforced as written.

B. The Legislature sets Michigan public policy in the No-Fault Act, so if a policy provision does not conflict with the No-Fault Act, it does not violate public policy.

A court may invalidate a clear and unambiguous term of an insurance policy only in the most exceptional circumstances. "The public policy of Michigan 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." *Terrien*, 467 Mich at 67. "In identifying the boundaries of public policy . . . the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Id.* at 66-67. This is the *only* "means of ascertaining what constitutes our public policy." *Id.* at 67. Thus the "circumstances under which a contract provision can be said to violate law or public policy are [] narrow," *DeFrain*, 491 Mich at 372, and only in a "highly unusual circumstance" does a contract provision violate public policy, *Rory*, 473 Mich at 469.

For no-fault cases, this yields a simple rule: If a policy provision does not conflict with the No-Fault Act, it does not violate public policy. This follows because 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). Courts are "obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute." *Cruz v State Farm Mut Auto Ins*, 466 Mich 588, 599; 648 NW2d 591 (2002). So when a provision of a no-fault insurance policy is "harmonious with the Legislature's no-fault insurance regime," it "should be viewed no differently than in other types of policies" and must be enforced as written. *Id.* at 598. Put another way, "where contract language is neither

ambiguous, nor contrary to the no-fault statute, the will of the parties, as reflected in their agreement, is to be carried out, and thus the contract is enforced as written." *Id.* at 594.

This Court has enforced this rule time and time again. In *Rory*, for example, the plaintiff argued that a contractual limitations period violated public policy because the No-Fault Act set a more lenient period. 473 Mich at 472. As detailed above, the Court rejected that argument. The No-Fault Act did not "explicitly prohibit[] contractual provisions that reduce the limitations period in uninsured motorist policies." 473 Mich at 472. So insurers were free to include these provisions in their policies. See *id.* This was true even though the No-Fault Act specifically included a limitations period, and even though the policy's period was more stringent than the Act's. See *id.* An insurance policy may *add* provisions not provided for in the No-Fault Act, as long as the provisions do not *conflict* with the Act. See *id.* If the policy provision is not "explicitly prohibit[ed]" by the No-Fault Act, the provision does not violate public policy. See *id.*

The Court held the same in *Cruz*. There, the Court considered whether contractual examination-under-oath (EUO) provisions were permitted under the No-Fault Act. *Cruz*, 466 Mich at 590. The Court of Appeals had concluded that "EUO provisions were precluded in the automobile no-fault insurance context because they were not mentioned in the act." *Id.* at 598. But this Court disagreed. *Id.* The Court held that EUO provisions "are only precluded when they *clash* with the rules the Legislature has established for such mandatory insurance policies." *Id.* (emphasis added). 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.* But "an EUO provision designed only to ensure that the insurer is provided with information relating to proof of the fact and of the

amount of the loss sustained—i.e., the statutorily required information on the part of the insured—would not run afoul of the statute." *Id.*

Along the same lines, this Court in *Husted v Dobbs*, 459 Mich 500; 591 NW2d 642 (1999) "granted leave to determine whether the no-fault act's residual liability coverage requirement void[ed] [a] business-use exclusion" in a no-fault policy. *Id.* at 502. After examining the language of the No-Fault Act, the Court concluded that the Act "does not require residual liability insurance to cover an insured's operation of any vehicle." *Id.* at 511-12 (emphasis omitted). In other words, this coverage was not mandatory under the No-Fault Act. The Court noted the rule that "a policy exclusion that *conflicts* with the mandatory coverage requirements of the no-fault act is void as contrary to public policy." *Id.* at 512 (emphasis added). But "because the no-fault act does not mandate residual liability coverage for an insured's operation of any vehicle . . . an otherwise valid and ambiguous exclusion, like the business-use exclusion" at issue, therefore did not violate public policy. *Id.*[5]

These cases make clear two principles: (1) courts must enforce unambiguous policy terms as written unless they violate public policy as set forth in the No-Fault Act, and (2) provisions that do not conflict with the No-Fault Act do not violate public policy.

[5] See also *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582-83; 702 NW2d 539 (2005) ("Statutory—or contractual—language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court. The *Lewis* [*v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986)] majority impermissibly legislated from the bench in allowing its own perception concerning the lack of 'sophistication' possessed by no-fault claimants, as well as its speculation that the average claimant expects payment without the necessity for litigation, to supersede the plainly expressed legislative intent that recovery of PIP benefits be limited to losses incurred within the year prior to the filing of the lawsuit.").

C. The Assignment Clause does not conflict with the No-Fault Act, so it does not violate public policy.

The Assignment Clause does not conflict with the No-Fault Act. Nowhere does the No-Fault Act say that no-fault policies may not contain anti-assignment clauses. Neither the Court of Appeals nor Plaintiffs have identified any such provision. The Legislature sets the public policy governing no-fault policies in the No-Fault Act, and the Legislature in the No-Fault Act chose not to bar insurers from including anti-assignment clauses in their policies. Under this Court's controlling precedent, this means that the Assignment Clause does not violate public policy. See *Rory*, 473 Mich at 472; *Cruz*, 466 Mich at 590; *Husted*, 459 Mich at 512.

The Assignment Clause is in fact entirely consistent with the No-Fault Act. The Act's only mention of assignment is in Section 3143, which bars any "assignment of a right to benefits payable in the future." MCL 500.3143. This provision does not address contractual restrictions of assignment. It simply provides that even in the *absence* of an anti-assignment clause, parties may never assign a right to future benefits. The No-Fault Act is silent about all other assignments: it does not automatically invalidate them, nor does it address an insurer's right to restrict them through contract language.

Plaintiffs argue that Section 3143 means the Act "implicitly allow[s] assignment of all claims for presently due or past due benefits." (Ans to Application at 17; emphasis omitted.) From there, Plaintiffs jump to the conclusion that "insurance policy provisions purporting to restrict such assignments are invalid." (*Id.*) But as just shown, this does not follow. Section 3143 addresses assignment of future benefits only. See MCL 500.3143. It says nothing about contractual restrictions of assignment. See *id.* The No-Fault Act is silent on the matter. See *id.* Even if it could be inferred from Section 3143 that other assignments are permissible in some circumstances, the provision does not support the further inference that other assignments may

not be restricted contractually. This Court is "obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute." *Cruz*, 466 Mich at 599. Plaintiffs' interpretation of Section 3143 does the opposite.

As in *Cruz*, the Assignment Clause can be interpreted "harmoniously" with the No-Fault Act because it does not allow State Farm to escape its mandatory payment obligations *to its insureds* under the No-Fault Act. See *id.* at 598. As the Court noted in *Cruz*, "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 would run afoul of the statute and accordingly be invalid." *Id.* But "an EUO provision designed only to ensure that the insurer is provided with information relating to proof of the fact and of the amount of the loss sustained—i.e., the statutorily required information on the part of the insured—would not run afoul of the statute." See also *Husted*, 459 Mich at 512 ("[A] policy exclusion that conflicts with the mandatory coverage requirements of the no-fault act is void as contrary to public policy."). The Assignment Clause does not contain a forfeiture provision that voids the contract upon an assignment. So State Farm's insureds remain fully entitled to whatever benefits the Policy and the No-Fault Act entitle them to (subject to all of State Farm's defenses), even if they execute invalid assignments. Since there is no conflict between the Assignment Clause and the No-Fault Act, the Assignment Clause does not violate public policy and must be enforced as written. See *Cruz*, 466 Mich at 598.[6]

[6] That the Assignment Clause might foreclose lawsuits by healthcare providers like Plaintiffs does not change this conclusion. Healthcare providers—unlike State Farm's insureds—have no rights under the No-Fault Act that could be constrained or affected. See *Covenant*, 500 Mich at 218. In any event, providers remain free to "seek payment from the injured person for the provider's reasonable charges." *Id.* To the extent that Plaintiffs believe this is "bad" policy, it is for the Legislature, not the courts, to revise. See *Johnson v Recca*, 492 Mich 169, 196-97; 821

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D. The Commissioner of Insurance approved the Policy as "conforming with the requirements" of the No-Fault Act and "not inconsistent with the law," so the courts may not strike any of its provisions as against public policy.

An additional factor confirms that the Assignment Clause does not violate public policy. As this Court held in *Rory*, the Legislature has directed that it is up to the executive branch, not the judiciary, to decide whether a no-fault policy provision is reasonable or violates public policy. The Legislature in the No-Fault Act "provided a mechanism to ensure the reasonableness of insurance policies issued in the state of Michigan" by "enact[ing] a statute that permits insurance contract provisions to be evaluated and rejected on the basis of 'reasonableness.'" *Rory*, 473 Mich at 461, 474 (emphasis omitted). But the Legislature "has explicitly assigned this task to the Commissioner of the Office of Financial and Insurance Services (Commissioner) rather than the judiciary." *Id.* at 461. Thus, as the Court held in *Rory*, "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 476.

Specifically, the Legislature in MCL 500.2236 directed that insurance policies in Michigan (including no-fault policies) are subject to an extensive review and approval process by the Commissioner of Insurance. Under MCL 500.2236(1), "an insurer shall not deliver or issue for delivery in this state a basic insurance policy form . . . unless a copy of the form is filed with the department and approved by the director as conforming with the requirements of this act and not inconsistent with the law." MCL 500.2236(1). A proposed insurance policy form is subject to rigorous review and must meet certain standards to ensure that consumers understand the policy provisions they are accepting. The requirements are so detailed and specific, for

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NW2d 520 (2012) ("[T]he judicial branch cannot amend the no-fault act to make it 'better.' That is an authority reserved solely to the Legislature.").

example, that "[t]he director shall not approve a form . . . if the form fails to obtain" a basic "readability score," which is calculated based on the "number of words and sentences" and "total number of syllables" in the policy. MCL 500.2236(3)(b). The policy form must also contain, for example, "[t]opical captions," an "identification of exclusions," and a table of contents. MCL 500.2236(3)(e).

The statute expressly empowers the Commissioner of Insurance to reject any policy form that does not meet the statute's rigorous formal and substantive requirements. Specifically, "the director may, on a case-by-case review, disapprove, withdraw approval, or prohibit the issuance, advertising, or delivery of a form . . . if the form *violates this act*, *contains inconsistent, ambiguous, or misleading clauses*, or *contains exceptions and conditions that unreasonably or deceptively affect the risk* purported to be assumed in the general coverage of the policy." MCL 500.2236(5) (emphasis added). If the Commissioner disapproves or prohibits the issuance of a policy for any of these reasons, the insurer may not issue or use its policy in Michigan without facing strict civil penalties and enforcement by the Attorney General. MCL 500.2236(7).

"The decision to approve, disapprove, or withdraw an insurance policy form is within the sound discretion of the Commissioner." *Rory*, 473 Mich at 475. So if the Commissioner approves the policy, the courts have a "very limited scope of review[.]" *Id.* Once a policy has been approved, the only proper way to challenge that decision in the courts is "as provided by the Administrative Procedures Act[.]" *Id.* But where the plaintiff has not "challenged in the appropriate forum that this action was an abuse of discretion," the courts must enforce the policy as written and as approved by the Commissioner. *Id.* at 491.

It is undisputed here that "[t]he Commissioner has allowed the [State Farm] insurance policy form to be issued and used in Michigan." See *id.* at 462. The applicable policy form was

submitted to the Commissioner for review on January 28, 2010, and was "APPROVED" with a disposition date of June 3, 2010.[7] By approving the policy form under MCL 500.2236, the Commissioner approved the Policy "as conforming with the requirements" of the insurance act and "not inconsistent with the law," and confirmed that the Policy does not contain *any* provision (including the Assignment Clause) that "violates this act, contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy." See MCL 500.2236(1).

As in *Rory*, Plaintiffs here have not "challenged the decision of the Commissioner to allow issuance of the [] policy, much less shown that the Commissioner's decision was arbitrary, capricious, or a clear abuse of discretion" under the Administrative Procedures Act. See 473 Mich at 476. Thus, under this Court's controlling decisions, the Court of Appeals was required to enforce the Assignment Clause as written. See *id.* The court was not allowed to invalidate the Assignment Clause on public-policy grounds, because the "explicit public policy of Michigan" is that these public-policy determinations are made by the executive branch through its Commissioner of Insurance. See *id.* Nor was the Court of Appeals "free to invade the jurisdiction of the Commissioner and determine de novo whether [the] policy was reasonable."

[7] See https://filingaccess.serff.com/sfa/home/MI (http://www.michigan.gov/difs/0,5269,7-303-13047_34537-265512--,00.html), searching for AV-26040, which shows that Form 9822B was "APPROVED" in full with a disposition date of June 3, 2010. This Court can take judicial notice of the public documents on this government site. See MRE 201(b), (b)(2), (d) ("[A]t any stage of the proceeding," a "court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *LeRoux v Secy of State*, 465 Mich 594, 613; 640 NW2d 849 (2002) (judicial notice of "official government data" permitted under MRE 201); *In re Application of Ind Mich Power Co*, 275 Mich App 369, 371; 738 NW2d 289 (2007) (taking judicial notice of statements on the Department of Energy's website).

Id. The Policy—including the Policy's Assignment Clause—"must be enforced according to its plain terms." See *id.* at 477.

The Court of Appeals did not even *mention* the Commissioner anywhere in its opinion, and brushed aside *Rory* on the ground that it involved only a judicial assessment of "reasonableness" rather than public policy. (See App 9 at 098a: "Defendant's arguments appear to incorrectly conflate the concept of 'reasonableness' with 'public policy.'") But this is not a correct reading of *Rory*. The *Rory* opinion is *all about* public policy. The opinion contains the words "public policy" fourteen times. The Court of Appeals' opinion itself included two quotations from *Rory* that contain the words "public policy" (see *id.* at 097a), so the court could not have missed these repeated references. It is true enough that the lower courts in *Rory* used the word "unreasonable" (and "unfair") in invalidating the policy provision at issue, and that is why this Court targeted that word in its opinion. See *Rory*, 473 Mich at 463. But the holding of *Rory* would be nearly meaningless if the lower courts could evade its effect by choosing the words "public policy" rather than "unreasonable" or "unfair." The Court of Appeals' reasoning therefore would gut *Rory* if allowed to stand.

In sum, by approving the State Farm Policy, the Commissioner of Insurance agreed that the Policy does not conflict with the No-Fault Act and therefore does not violate Michigan public policy. Courts may not, under the controlling holdings of *Rory* and *DeFrain*, strike on public-policy grounds a provision in an insurance contract that has been approved by the Commissioner of Insurance and that does not conflict with the Act. The Court of Appeals erred by failing to follow this controlling law.

II. THE COURT OF APPEALS ERRED BY FOLLOWING *ROGER WILLIAMS* RATHER THAN THE NO-FAULT ACT AND THIS COURT'S MODERN PRECEDENT

To recap, the controlling law regarding the enforceability of no-fault policies is straightforward: Courts must enforce unambiguous policy terms as written unless they violate public policy as set forth in the No-Fault Act. Policy provisions that do not conflict with the No-Fault Act do not violate public policy, and determinations of public policy for no-fault policies are the domain of the Commissioner of Insurance, not the courts. So when a policy is consistent with the No-Fault Act and the Commissioner has approved the insurance policy form, the courts may not strike any of its provisions on public-policy grounds.

The Court of Appeals ignored all of this controlling law and relied instead on *Roger Williams*, a 138-year-old case that had not been cited in a published Michigan decision in over a century. *Roger Williams* involved a fire-insurance policy covering the insured's "livery stable stock." See 43 Mich at 253. "After the property insured was burned up," the policy was assigned to another party, who sought to collect from the insurer. See *id.* The policy, however, contained a provision "forfeiting [the policy] for an assignment without the company's consent[.]" *Id.* at 254. The insurer therefore "repudiated any liability on the ground that no such policy was in force." *Id.* at 253. The Court held that the anti-assignment provision was "invalid, so far as it applie[d] to the transfer of an accrued cause of action" because a post-loss assignment "cannot concern the debtor," and restricting such assignments "is against public policy." *Id.* The Court's only explanation for that holding was that, under a nineteenth-century statute (which was not identified in the opinion), contracting parties had an "absolute right . . . to assign such claims" so "such a right cannot be thus prevented" by contract. *Id.*

Roger Williams does not control here, for several reasons. *First*, the decision was expressly based on a nineteenth-century statute securing an "absolute right" to assign a cause of

action that no longer exists. So the very predicate for the *Roger Williams* decision is long gone. *Second*, this Court has made clear since *Roger Williams* that anti-assignment provisions *are* enforceable. A lot has changed in the last century-plus of Michigan law. Modern precedent from this Court and changes to statutory law (including the No-Fault Act) have long displaced *Roger Williams* as controlling law. *Third*, the case is distinguishable: the *Roger Williams* rule applies only where an insurer seeks to *void* the policy and evade its payment obligations based on an assignment, not where an insurer simply seeks to enforce the anti-assignment provision. Thus, the policy concerns in play here are very different from the ones in *Roger Williams*, and strongly favor enforcing the Assignment Clause as written. The Court of Appeals erred by relying on *Roger Williams* instead of controlling modern-day law.

A. *Roger Williams* does not control because it was expressly based on a statute securing an "absolute right" to assign that no longer exists.

The *Roger Williams* decision was expressly based on a statute securing an "absolute right" of assignment. 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."). This was the entire predicate for the decision: a statute secured an absolute right to assign a cause of action, so the fire insurer's anti-assignment provision was invalid. See *id.*

The *Roger Williams* Court did not cite the statute in question or otherwise explain which statute it was relying on. See *id.* State Farm has reviewed the Court's archival file, retrieved from the State of Michigan Law Library, and the neither the parties' briefs there nor the lower court record identify the statute in question either. (See App 11 at 116a-168a.) At any rate, there is certainly no such statute on the books today. As laid out in detail above, the No-Fault Act does not bar contractual anti-assignment provisions, nor does any other statute. Thus, the very predicate for the *Roger Williams* decision no longer exists. It might have been the case in 1880

that statutory law secured an absolute right to assign a cause of action, and thus that a contractual limitation on assignment violated Michigan public policy at the time. But *without* a similar statutory prohibition in effect today, there was no basis for the Court of Appeals to conclude that State Farm's Assignment Clause violates public policy in 2018. Yet the Court of Appeals did not even acknowledge this fundamental change in statutory law, anywhere in its opinion.[8]

For the first time in this case, Plaintiffs argued in their answer to the application for leave that the *Roger Williams* Court must have relied on CL 1871, § 5775, which is a predecessor to the modern real-party-in-interest rule. (See Ans to Application at 38-40.) But Plaintiffs failed to make this argument at any point in the lower courts, so they have forfeited the argument. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Moreover, 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.) In any event, nothing in that statute establishes an absolute right to assign a cause of action anyway. The statute simply said 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 said nothing about anti-assignment provisions or securing an absolute right to assign,

[8] "The Court of Appeals is bound to follow decisions by this Court except where those decisions have clearly been overruled or superseded." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016) (emphasis omitted). This Court has instructed that when a statute "has [been] entirely repealed," "lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law." *Id.* at 191 n 32. That is exactly what the Court of Appeals should have done here. See also *Covenant*, 500 Mich at 204 ("The panel gleaned this notion [that healthcare providers possess a direct cause of action] not from the text of the no-fault act, but from previous decisions of the Court of Appeals that are likewise devoid of the statutory analysis necessary to support that premise.").

or anything of the like. The statute was simply 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. *Draper v Fletcher*, 26 Mich 154, 154-55 (1872).

In addition, 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.[9] Thus, even if *Roger Williams* relied on this statute to (wrongly) infer an "absolute" right to assign just 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. 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. If there were a statute providing an "absolute right" to assign a cause of action, then there would be *no* cases upholding anti-assignment clauses (as to post-loss assignment *or* pre-loss assignment). But instead, as detailed below, there are many.[10] The reason is that there is no such statute on the books today, and there hasn't been for at least a century.

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.

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[9] 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.)

[10] 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).

B. *Roger Williams* has been superseded by modern law.

Roger Williams has also been superseded by a century of controlling decisions from this Court. The *Roger Williams* Court held that contractual restrictions on post-loss assignments were *never* enforceable because parties supposedly had an "absolute" right to assign. See 43 Mich at 254. But this Court has since held that parties do *not* have an absolute right to assign. See *Detroit Greyhound*, 381 Mich at 689-90. Rather, anti-assignment clauses *are* enforceable, so long as they use "[c]lear language" and "the plainest words" precluding assignment. *Id.* Thus, this Court has already made clear that *Roger Williams* is no longer good law.

The Court's *Detroit Greyhound* decision brought Michigan law in line with the Restatement (Second) of Contracts, which expressly permits contractual restrictions on assignment: "A contractual right can be assigned unless . . . assignment is validly precluded by contract." Restatement Contracts, 2d, § 317(2). The Court of Appeals thereafter adhered to this view as well: "Under general contract law, rights can be assigned unless the assignment is clearly restricted." *Burkhardt*, 260 Mich App at 653. And prior to this case, the Court of Appeals had expressly upheld anti-assignment clauses, even as to post-loss assignments. See *Kreindler v Waldman*, No. 265045, 2006 WL 859447, at *2 (Mich App, Apr 4, 2006) (explaining that "where a clause prohibiting assignments is clear and unambiguous, it must be enforced as written"); *Edwards v Concord Dev Corp*, No. 174487, 1996 WL 33358104, at *1 (Mich App, Sept 17, 1996) ("[T]here is no prohibition against requiring consent to effectuate an assignment. 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.'" (quoting Restatement Contracts, 2d, § 317(2); internal citations omitted)).[11]

In addition, and as set forth in detail above, it is no longer the case that courts can strike at their whim or rewrite or limit contract provisions that they deem unreasonable or contrary to "public policy." Instead, as the Court has held over and over in cases like *Rory* and *DeFrain*, courts must enforce contracts as written, especially no-fault policies that do not conflict with the No-Fault Act and that have been approved by the Commissioner of Insurance. (See the discussion above in Section I.) *Rory* and *DeFrain* set forth the controlling law on whether a court may strike on public-policy grounds a provision in an insurance policy that does not conflict with the No-Fault Act and that has been approved by the Commissioner. *Roger Williams* does not.[12]

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[11] State Farm cites these unpublished cases as examples of the proper application of this Court's modern precedent. See MCR 7.215(C); (App 13 at 187a; App 14 at 191a). In the Court of Appeals, Plaintiffs incorrectly characterized *Kreindler* as involving a "pre-loss assignment to an ineligible attorney, who misrepresented the status of his coverage as continuous." (App 7 at 077-078a.) One plaintiff in *Kreindler*, Goldstone, "acted as an insurance agent" for the other plaintiff, Kreindler, "and allegedly failed to properly advise and maintain a disability insurance policy for plaintiff Kreindler's business. [Goldstone and Kriendler] entered into a settlement agreement that assigned Goldstone's claims against defendant insurance company to plaintiff Kreindler." *Kreindler*, 2006 WL 859447 at *1 n 1. *Kreindler* therefore involved a *post*-loss assignment.

[12] The Court of Appeals cited two federal district-court cases, *Century Indemnity Co v Aero-Motive Co*, 318 F Supp 2d 530 (WD Mich, 2003) and *Action Auto Store v United Capitol Ins Co*, 845 F Supp 417 (WD Mich, 1993), for the proposition that *Roger Williams* is still good law. (See App 9 at 097a-098a.) But those opinions carry no precedential weight, they both predate *Rory*, and neither even acknowledges this Court's holding in *Detroit Greyhound*. Moreover, in *Action Auto* the anti-assignment clause was ambiguous, 845 F Supp at 423, which is not the case here. And *Century Indemnity*'s discussion of *Roger Williams* is dicta because the court ultimately found that the assignments at issue had been made before any claims had accrued. See 318 F Supp 2d at 540; see also *Century Indem Co v Aero-Motive Co*, No. 1:02-CV-108, 2004 WL 5642427, at *2-*5 (WD Mich, March 12, 2004) (denying reconsideration and further explaining that *Roger Williams*, which dealt with a first-party casualty insurance policy, was inapplicable to the third-party liability insurance policies at issue).

C. *Roger Williams* is distinguishable because the public-policy considerations there were very different from the ones here.

Roger Williams is also distinguishable. The insurer there, "after the loss, *repudiated any liability* on the ground that no such policy was in force." See 43 Mich at 253 (emphasis added). In other words, the insurer in *Roger Williams* voided the policy and refused to pay *anyone* because the policy was assigned without the insurer's consent. See *id.* The public policy considerations at play in *Roger Williams*—to the extent that they are still valid—are therefore implicated only when the insurer is trying to avoid its payment obligations under the policy. The Court of Appeals recognized this distinction in *Edwards* when it refused to apply *Roger Williams* to invalidate the anti-assignment clause there:

> Although plaintiff cites *Roger Williams Ins Co v. Carrington*, 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, 1996 WL 33358104, at *2 (internal citations omitted).

The same is true here. State Farm is not "attempting to avoid payment of its contract." See *id.* Unlike the insurer in *Roger Williams*, State Farm is not claiming that the Policy is *voided* by an assignment. The Policy does not contain any forfeiture provision barring the insureds from recovering their benefits if they try to assign the contract. Consistent with the No-Fault Act, insureds are still entitled to recover any and all benefits mandated by the Policy and the Act,

subject to available defenses. State Farm, unlike the insurer in *Roger Williams*, is simply seeking to enforce the Assignment Clause as written.[13]

This highlights the flaw of applying *Roger Williams*' century-old public-policy holding to a modern-day no-fault case. The public-policy considerations in play 138 years ago in *Roger Williams* were very different from the ones here. First, *Roger Williams*' public-policy conclusion does not apply to insurance policies involving ongoing losses, like State Farm's policy here. The loss in *Roger Williams* was a fire loss—damage to the building and loss of the livery stock—and there was no possibility of ongoing losses. An assignment of insurance proceeds relating to fire damage therefore arguably neither placed an additional burden on the insurer in that case—who merely had to change the name on the check it wrote—nor altered the risk the insurer had agreed to bear. Thus, it was at least rational for the *Roger Williams* Court to conclude that a post-loss assignment "cannot concern the debtor" under those circumstances. 43 Mich at 254.

In contrast here, people injured in automobile accidents often seek treatment from many medical providers over an extended period of time. They might go first to the emergency room, then to a specialist, then to a surgeon, then to physical therapy. If State Farm's insureds could assign their rights under the Policy to all of these providers in piecemeal fashion without State Farm's consent, then State Farm could be forced to defend against countless costly lawsuits brought by dozens of providers in various courts. This is a risk that State Farm never agreed to

[13] Judge Shapiro incorrectly suggested that enforcing the Assignment Clause would "deprive insureds [of] the benefits they paid for[.]" (App 10 at 111a.) That is not true. Enforcing the Assignment Clause will not result in any forfeiture, and the Assignment Clause does not affect an insured's entitlement to benefits under the No-Fault Act. And as this Court explained in *Covenant*, this does not "mean that a healthcare provider is without recourse; 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." See Mich at 217.

when it issued the policies. "A court must not hold an insurance company liable for a risk that it did not assume." *Henderson v State Farm Fire & Cas Co.*, 460 Mich 348, 354; 596 NW2d 190 (1999). Disregarding the Assignment Clause would do just that: It would force State Farm to undertake the risk and expense of being sued by several entities under the Policy when it only contractually agreed to suits by its insureds. This would increase State Farm's litigation costs and the overall cost of the Policy to State Farm and its insureds. The trial court rightly rejected that regime by enforcing the Assignment Clause as written

Second, *Roger Williams*' public-policy conclusion that post-loss assignment does not "concern" the insurer does not apply when the insured has ongoing obligations under the contract. No-fault claimants have ongoing obligations that are critical to State Farm's ability to review and consider claims. The insured, for example, must:

- Authorize State Farm to obtain medical records, medical bills, employment information, and "any other information [State Farm] deem[s] necessary to substantiate the claim."
- Submit to an independent medical examination or provide a statement under oath.
- Cooperate with State Farm and, when asked, assist State Farm in securing and giving evidence.
- Provide State Farm all details of the injury, treatment, and other information as soon as reasonably possible.

(App 4 at 052a-055a.) If the insured is the plaintiff in the lawsuit, then he would have every incentive to comply with his obligations under the Policy. After all, it would be his right to payment—not a medical provider's—at issue in the case. But if the insured could disregard the Assignment Clause and avoid involvement in the lawsuit as a party, he would have considerably less incentive to comply with his obligations. He would, in effect, have no skin in the game.

And if State Farm's insureds have no incentive to comply with their ongoing contractual obligations, State Farm's ability to defend against providers' claims would be compromised.[14]

Third, public policy considerations weigh in *favor* of—not against—enforcing anti-assignment clauses in the no-fault context. Modern precedent provides "considerable public policy regarding the freedom of contract that affirmatively supports the enforcement" of the Assignment Clause. See *Terrien*, 467 Mich at 72-73. This Court has repeatedly noted that respecting the freedom of contract is one of the strongest and most fundamental public policies in our law. See *id.* (citing caselaw recognizing the "fundamental policy of freedom of contract"). As the Court explained in *Rory* (and *Wilkie* before it), these principles are "ancient and irrefutable," "draw[] strength from common-law roots and can be seen in our fundamental

[14] Judge Shapiro cited *In re Jackson*, 311 BR 195 (Bankr WD Mich, 2004) and *Wonsey v Life Ins Co of North America*, 32 F Supp 2d 939 (ED Mich, 1998) for the proposition that there is a "modern trend" against enforcing contractual limitations on post-loss assignments, because "once a party performs its obligations . . . the contract is no longer executory," so "the contract may be assigned without the other party's consent, even if the contract contains a non-assignment clause." (App 10 at 107a-109a, quoting *In re Jackson*, 311 BR at 201.) But this argument misses the point—as explained above, Mr. Hensley has many continuing obligations to State Farm. Moreover, even if Mr. Hensley had fulfilled all his obligations to State Farm, the Sixth Circuit rejected *Wonsey*'s "modern trend" analysis in *Riley v Hewlett-Packard Co*, 36 F Appx 194, 199 (CA 6, 2002). First, the Sixth Circuit explained that *Wonsey* was based on a case holding only that agreements were to be interpreted to allow an assignment of rights *unless a different intention was manifested*—and the parties in *Riley*, just like the parties here, had "unambiguously manifested a different intent" by agreeing to an anti-assignment clause. *Id.* Second, the anti-assignment clause in *Wonsey* "was set in place to protect a minor from wasting his assets," whereas the non-assignment language in *Riley* "was for the protection of HP." *Id.* The Sixth Circuit therefore concluded that "*Wonsey* should not be read to hold that a non-assignment clause entered into for the benefit of a party may not be enforced by that party. *Wonsey* holds the direct opposite." *Id.* The same reasoning applies here: the Assignment Clause manifests an intent that an assignment of rights not be permitted and was entered into for State Farm's benefit—to protect it from, among other things, having to defend against several suits brought by various plaintiffs in various courts. *Wonsey* therefore does not apply. *In re Jackson*, in turn, relied on *Wonsey* for its "modern trend" analysis, but overlooked the Sixth Circuit's rejection of that reading of *Wonsey* in *Riley*. See *In re Jackson*, 311 BR at 201. Thus, like *Wonsey*, *In re Jackson* has no bearing here.

charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens," and are, in short, "an *unmistakable and ineradicable part of the legal fabric of our society*." 473 Mich at 470, quoting *Wilkie*, 469 Mich at 60 (emphasis added).

More specifically, courts have recognized that anti-assignment provisions in no-fault policies have *salutary* effects on the no-fault system as a whole because they keep costs down and simplify litigation proceedings. See *Coalition for Quality Health Care v New Jersey Dept of Banking & Ins*, 348 NJ Super 272, 317; 791 A2d 1085 (App Div, 2002) ("Policy forms which require an insurer's written consent, or allow insurers to accept assignments 'at their option,' can help an insurer reduce costs by eliminating fraud and the propensity for overutilization of services."); *Parrish Chiropractic Ctrs, PC v Progressive Cas Ins Co*, 874 P2d 1049, 1053-54 (Colo, 1994) (citing cases from an array of jurisdictions and concluding that "non-assignment clauses are valuable tools in persuading health care providers to keep their health care costs down") (quotation marks omitted).[15]

As courts have noted, for no-fault insurance policies "the public policy in favor of the freedom of contract, and the corollary right of the insurer to deal only with the party with whom it contracted, outweigh the general policy favoring the free alienability of choses in action." *Parrish Chiropractic*, 874 P2d at 1054 (citing several cases). Concluding otherwise would force insurers to deal with parties with whom they have not contracted—including providers an insurer may know often perform medically unnecessary services or charge excessive rates. See *Coalition for Quality Health Care*, 348 NJ Super at 317. This violates the basic tenet and public

[15] Following the Colorado Supreme Court's decision in *Parrish Chiropractic*, the Colorado legislature revised the state's no-fault statute so that policies must now allow an insured to assign "payments due" to the healthcare provider providing services to the insured. See Colo Rev Stat Ann 10-4-634(1). This is simply further proof that public policy debates should be resolved through the democratic process, not by courts striking unambiguous contract provisions.

policy of freedom of contract. See *Parrish Chiropractic*, 874 P2d at 1054. It further would lead to "lack of cooperation" from insureds as insurers try to investigate the validity of the assigned claims. See *Coalition for Quality Health Care*, 348 NJ Super at 318. "By permitting the insurer to consent to an assignment, when justified, the insurer is able to contain costs." *Id.* at 316 (citation omitted). Enforcing assignment clauses "does not cause any forfeiture of benefits, either to the insured or his medical providers. Rather, it serves as a cost-controlling measure whereby insurance premiums are stabilized and hopefully reduced by eliminating unnecessary court proceedings, arbitrations and fraud." *Id.* at 316-17.[16]

Declining to apply the *Roger Williams*' public-policy conclusion in no-fault cases therefore is consistent with the No-Fault Act's stated goal of providing affordable insurance to consumers. See, e.g., *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984) ("Through comprehensive action, the Legislature sought to accomplish the goal of providing an equitable and prompt method of redressing injuries in a way which made the mandatory insurance coverage affordable to all motorists."); *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 539; 697 NW2d 895 (2005) ("Plaintiff's interpretation of M.C.L. § 500.3107(1)(a) stretches the language of the act too far and, incidentally, would largely obliterate cost containment for this mandatory coverage. We have always been cognizant of this potential

[16] Similarly, "the validity of anti-assignment clauses in group health care contracts has been upheld almost uniformly in the courts of other states," because the policy of keeping costs down overrides the general policy favoring free alienability. See *Somerset Orthopedic Assoc, PA v Horizon Blue Cross & Blue Shield of NJ*, 345 NJ Super 410, 417-18; 785 A2d 457 (App Div, 2001) (collecting cases); *Obstetricians-Gynecologists, PC v Blue Cross & Blue Shield of Neb*, 219 Neb 199, 207; 361 NW2d 550 (1985) (noting that the "nonassignment clause is a valuable tool" because it helps "keep[] health care costs down," allowing an insurer to "pass[] that savings on to its subscribers"); *Parrish Chiropractic Ctrs, PC v Rocky Mountain Hosp & Med Servs Co*, 754 P2d 1180, 1182 (Colo Ct App, 1988) ("[T]he courts found that such non-assignment clauses in [a group health care plan] are valuable tools in persuading health providers to keep their health care costs down.").

problem when interpreting the no-fault act, and we are no less so today.").

In sum, *Roger Williams* is distinguishable because State Farm's policy does not contain a forfeiture provision and because the public-policy considerations in *Roger Williams* were very different from the ones here. There is no sound reason for applying *Roger Williams* in no-fault cases. Invalidating anti-assignment clauses in no-fault policies would incentivize insureds to disregard their contractual obligations, result in increased piecemeal litigation, and—contrary to the stated aims of the No-Fault Act—ultimately increase the cost of no-fault insurance policies. The Court should therefore decline to apply *Roger Williams* here.

III. THE COURT CAN ENFORCE THE ASSIGNMENT CLAUSE WITHOUT OVERRULING *ROGER WILLIAMS*, BUT IF *ROGER WILLIAMS* HAS ANY CONTINUING FORCE IN NO-FAULT CASES, THE COURT SHOULD OVERRULE IT

As shown above, the Court can enforce the Assignment Clause as written and affirm the trial court's judgment without overruling *Roger Williams*. That case was based on a statute that no longer exists, has already been superseded by modern law, and is distinguishable anyway. And even if the *Roger Williams*' rule that post-loss anti-assignment clauses violate public policy has survived for contracts *not* governed by the No-Fault Act, it has not survived for contracts governed by the No-Fault Act. See *Clevenger v Allstate Ins Co*, 443 Mich 646, 661; 505 NW2d 553 (1993) ("[T]he no-fault statutory provisions at issue have superseded our previous common law."). The Court could save for another day the question whether *Roger Williams* still applies outside the no-fault context.

But to the extent the Court believes the *Roger Williams* rule has any continuing force relevant to this no-fault case, State Farm asks the Court to overrule the decision once and for all. The *Roger Williams* public-policy holding is, to put it bluntly, a relic of a bygone era of contract interpretation. The *Roger Williams* Court did not explain *why* a contractual prohibition of post-

loss assignment, of all things, should violate Michigan public policy, other than to say post-loss assignment "cannot concern the debtor." 43 Mich at 254. But what if it *does* concern the debtor? What if, as is the case here, an anti-assignment provision is indeed important to one of the contracting parties because it protects the party from runaway litigation costs that affect its ability to provide affordable insurance to its customers? As this Court has repeatedly made clear, courts simply should not be in the business of deciding what's best for competent contracting parties and rewriting their contracts accordingly.

State Farm acknowledges that this Court does not and should not overrule precedent lightly. "[U]nder the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 161; 895 NW2d 154 (2017) (citation omitted). "However, stare decisis is not to be applied mechanically." *Id.* (citation omitted). "Instead, [the Court] should review whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision." *Id.* (citation omitted).

All of these factors favor overruling *Roger Williams*. As set forth in detail above, "changes in the law . . . no longer justify the decision." See *id.* (citation omitted); *Associated Builders*, 499 Mich at 190 n 30 ("While the first inquiry in considering whether to overrule a prior decision . . . is generally whether that prior decision was wrongly decided, in cases such as this where the legal landscape has changed dramatically, it adds little to the inquiry to determine whether the prior decision was correctly decided under obsolete law.") (quotation marks and citation omitted). The *Roger Williams* Court relied on an unidentified statute to conclude that "it is against public policy" to restrict post-loss assignments. 43 Mich at 254. But there is no record

of the statute in question, and the opinion contains no explanation of how the statute provided an "absolute right" to assign a post-loss cause of action. See *id.* *Roger Williams*' statement of public policy "may or may not have been well-grounded in . . . the legal landscape of the time." See *Associated Builders*, 499 Mich at 183. But whatever statute the Court was relying on in 1880 no longer exists, and there simply is no contemporary statute that provides an absolute right to assign a post-loss cause of action. See § II.A above; see also *Detroit Greyhound*, 381 Mich at 689-90 (holding that anti-assignment clauses are enforceable, so long as they use "[c]lear language" and "the plainest words" precluding assignment).

Roger Williams is therefore "incongruent with the state of our law" today. See *Associated Builders*, 499 Mich at 183. As laid out in detail above, *Roger Williams* is incompatible with this Court's holdings that no-fault policy provisions that do not conflict with the No-Fault Act do not violate public policy, and that, under the Insurance Code, the Commissioner of Insurance is responsible for policing the contents of no-fault policies. See *Rory*, 473 Mich at 491; *Citizens Ins*, 448 Mich at 232; *Clevenger*, 443 Mich at 661. Thus, "if [*Roger Williams*'] holding was ever on firm [statutory] ground, it no longer ha[s] sound footing." See *Associated Builders*, 499 Mich at 189; see also *Devillers*, 473 Mich at 585 (overruling *Lewis* because "*Lewis* does not reflect a simple 'misunderstanding' of the statute at issue; the *Lewis* decision demonstrates an act of judicial *defiance* in which this Court substituted its own judgment concerning 'fairness' for the plainly expressed will of the Legislature. Such an act of judicial usurpation of the legislative function should not be permitted to stand."). Thus *Roger Williams* is incongruent with existing law and should be overruled. See *Covenant*, 500 Mich at 201 ("Correcting erroneous interpretations of statutes furthers the rule of law by conforming the caselaw of this state to the language of the law as enacted by the representatives of the people.").

Roger Williams is also not "workable." A precedent is not workable when it creates uncertainty and is "unsound in principle." *Coldwater*, 500 Mich at 161-62. *Roger Williams* is deficient on both counts. With no modern statutory basis to support the *Roger Williams* rule—and with the No-Fault Act and this Court's modern insurance jurisprudence against it—resurrecting the *Roger Williams* rule would mean reverting to the rejected idea that "the personal predilections of the majority of the deciding tribunal about what is reasonable" may determine the enforceability of a contractual provision. See *DeFrain*, 491 Mich at 372-73. The lower courts could then side-step *Rory* simply by couching their decisions in "public policy" rather than "reasonableness" terms—as the Court of Appeals suggested here—thereby giving them free rein to strike insurance-policy terms at their whim. This is not at all workable.

Reliance interests also strongly favor overturning *Roger Williams*. State Farm has issued over a million policies containing the Assignment Clause in reliance on the courts applying the terms of the policy as written and as approved by the Commissioner of Insurance.[17] State Farm's reliance interests therefore loom large. See *Covenant*, 500 Mich at 201 ("[I]t is imperative that this Court aim to conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law."). In contrast, reliance on *Roger Williams* has been nearly non-existent under Michigan law in the past 138 years. The *Roger Williams* rule has not "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." See *Robinson v City of Detroit*, 462 Mich 439, 466; 613 NW2d 307

[17] This is just for State Farm. Since the decision in this case, the Court of Appeals has followed the decision to invalidate anti-assignment clauses in other insurers' no-fault policies. See, *e.g.*, *Henry Ford Health Sys v Everest Natl Ins Co*, No. 341563, 2018 WL 6070704 (Mich Ct App, November 20, 2018); *Michigan Head & Spine Inst, PC v Hastings Mut Ins Co*, No. 340656, 2018 WL 4577282 (Mich Ct App, September 18, 2018).

(2000). *Roger Williams* had never even been cited in a no-fault case—much less relied on by a provider to seek payment from an insurer—until providers began relying on assignments just over a year ago, after *Covenant*. State Farm's insureds did not rely on *Roger Williams* either. The Court "need not, and indeed *should* not, slavishly adhere to the doctrine of stare decisis where no legitimate reliance interest is affected." *Devillers*, 473 Mich at 585

Nor is *Roger Williams* embedded in "everyone's expectations," *Robinson*, 462 Mich at 466, because, whatever the practice in 1880, it has long been the role of the Legislature to set public policy in the No-Fault Act and of the Executive through its Commissioner of Insurance to enforce it. See *Rory*, 473 Mich at 475-76; MCL 500.2236(1). In other words, what is actually "so embedded, so accepted, so fundamental, to everyone's expectations" in this arena is reliance on the Legislature's public policy as set forth in the No-Fault Act and on the Commissioner's approval of an insurance policy conforming to that public policy. See *Robinson*, 462 Mich at 466. State Farm issued more than *1.1 million* active no-fault policies that include the Assignment Clause in reliance on the Commissioner's approval of the policy as reasonable and conforming with the law. And that says nothing of the other insurers that have similar anti-assignment provisions in their standard no-fault policies. By resurrecting an all-but-forgotten 138-year-old fire-insurance case and applying it to modern no-fault law, the Court of Appeals upset legitimate reliance interests. This Court should overrule *Roger Williams* to correct that imbalance.

IV. PLAINTIFFS' REMAINING ARGUMENTS WERE NOT PRESERVED BELOW AND FAIL NONETHELESS

Plaintiffs raised a scattershot of other arguments in opposition to State Farm's application for leave to appeal, including arguments based on Article 9 of the Uniform Commercial Code, the Uniform Motor Vehicle Accident Reparations Act (UMVARA), and judicial estoppel.

Plaintiffs failed to raise any of these arguments below, so the arguments are not properly before the Court. See *Grant*, 445 Mich at 546. But because Plaintiffs relied so heavily on them in their response to the application, State Farm briefly addresses each of them in turn.

A. UCC Article 9 does not apply here.

Plaintiffs argue that Article 9 of the UCC renders the Assignment Clause unenforceable. (See Pls' Answer at 20-22, citing MCL 440.9408(1).) As State Farm understands it, Plaintiffs' argument is that the Assignment Clause is unenforceable under MCL 440.9408(1), which limits the effect of an anti-assignment clause "in an agreement between an account debtor and a debtor that relates to a health-care-insurance receivable." The Court of Appeals held that Plaintiffs waived this argument by failing to make it in the trial court. (See App 9 at 099a.) This Court should do the same. See *Grant*, 455 Mich at 546. In any case, Plaintiffs' argument fails because UCC Article 9 has nothing to do with the No-Fault Act or the regulation of no-fault policies.

Article 9 is titled "Secured Transactions," and exists to "provide[] a comprehensive scheme for the regulation of security interests in personal property and fixtures." MCL 440.9101 cmt 1. In other words, Article 9 is intended to govern "the use of personal property" as collateral for a debt and resulting relationships "between lenders and borrowers," "between lenders and their collateral, and among lenders and other third parties with respect to the collateral." See Hon. Scott W. Dales et al., MICHIGAN SEC INTERESTS IN PERS PROP § 1.1 (ICLE 2010).[18] In short, Article 9 covers just what its title says it does: "Secured Transactions." So if the transaction does not involve a security interest granted as collateral to secure a debt, Article 9 simply does not apply. See *id.*

[18] Available at http://www.icle.org/modules/books/chapter.aspx?lib=business&book=2010551105&chapter=1 (last updated 11/02/2018).

This case has nothing to do with a security interest granted as collateral to secure a debt. This is a no-fault case governed by the No-Fault Act, not a secured-transaction case governed by Article 9. UCC Article 9 just does not apply here.

Indeed, MCL 440.9408(1) by its terms applies to a "health-care-insurance receivable," and Plaintiffs fail to plausibly explain how anyone has anything of the sort here. This case does not involve healthcare insurance or a "health-care-insurance receivable"; it involves no-fault insurance. Moreover, MCL 440.9109(4) expressly excludes certain types of transactions from the scope of Article 9 entirely, "to ensure that Article 9 d[oes] not become entangled with transactions that have nothing to do with commercial financing." *Riley v Hewlett-Packard Co*, 36 F Appx 194, 197 (CA 6, 2002). And because Article 9 addresses only commercial financing involving a security interest granted as collateral to secure a debt, "[a]n assignment of accounts . . . that is *for the purpose of collection only*" is not covered by Article 9. MCL 440.9109(4)(e) (emphasis added). Any assignment here would be for the purpose of collection only: assignments made solely so Plaintiffs could collect payment from State Farm. The assignments themselves say they are intended to allow Plaintiffs "to pursue payment from a person or entity other than [Hensley]," i.e., from State Farm as Hensley's no-fault insurer. (E.g., Pls' App at 170.) Because Plaintiffs' assignments were executed for "collection purposes only," they are outside the scope of Article 9. See MCL 440.9109(4)(e). MCL 440.9408(1) is therefore inapplicable. See *Riley*, 36 F Appx at 196-97 (holding that the predecessor to MCL 440.9408(1) did not apply and a contractual anti-assignment clause was enforceable because the transaction at issue was outside the scope of Article 9).

On top of all of these failures, *even if* Article 9 governed this sort of assignment in general, Plaintiffs' argument would still fail because an assignment authorized by MCL

440.9408(1) cannot be enforced against the account debtor—State Farm. By its terms, MCL 440.9408(1) is limited as "provided in subsection . . . (4)." And subsection (4) provides that an assignment of a health-care-insurance receivable: "is not enforceable against" the account debtor (i.e., State Farm); "[d]oes not impose a duty or obligation" on the account debtor; does not require the account debtor to "pay or render performance to the secured party" (i.e., Plaintiffs); and "[d]oes not entitle the secured party to enforce the security interest" in the health-care-insurance receivable. MCL 440.9408(4)(a)-(c), (f).

Thus, even if MCL 440.9408(1) applied to this sort of no-fault assignment in general, MCL 440.9408(4) would "leave[]" State Farm's "rights and obligations *unaffected in all material respects*." MCL 440.9408 cmt 2 (emphasis added). As Official Comment 6 to MCL 440.9408 puts it: "[T]he effects of" MCL 440.9408(1) "are immaterial insofar as" account debtors such as State Farm are concerned. See 11 Anderson, UNIFORM COMMERCIAL CODE § 9-408:9, p 727 (3d ed) ("[T]he rights and obligations of an account debtor . . . are not affected by the prohibitions on restrictions contained in [MCL 440.9408(1)].").[19]

In sum, Article 9 of the UCC does not apply in this no-fault case or to the assignments at issue. And even if it did apply in some way, the plain terms of Article 9 provide that the assignments could not be enforced against State Farm, would impose no duty or obligation on

[19] This outcome—where subsection (1) of MCL 440.9408 validates covered assignments, but subsection (4) renders them ineffective against the account debtor—"was intentional." Dales, *supra*, § 6.13. "[E]ven though a secured party is not assured of the right to enforce its security interest in collateral that is subject to MCL 440.9408, the secured party may nevertheless have good reasons for obtaining and perfecting such a security interest." *Id.* MCL 440.9408 "could have a substantial effect if the assignor enters bankruptcy." MCL 440.9408 cmt 7. And MCL 440.9408 "enhances the ability of certain debtors to obtain credit," because it "mak[es] available previously unavailable property as collateral," and "a secured party may ascribe value to the collateral to which its security interest has attached, even if [MCL 440.9408] precludes the secured party from enforcing the security interest without the agreement of the account debtor." MCL 440.9408 cmts 1, 8.

State Farm, and could not be used to force a payment by State Farm. Plaintiffs' UCC argument therefore fails.

B. UMVARA is irrelevant to whether the Assignment Clause is enforceable under the No-Fault Act.

Plaintiffs also argue that MCL 500.3143 should be read to guarantee the right to assign no-fault benefits based on UMVARA § 29. It is true that the No-Fault Act "is patterned after" UMVARA. *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1984). But "[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). And on the issue of assignments, UMVARA and the No-Fault Act diverge. UMVARA § 29 provides that "[a]n assignment of . . . any right to benefits under this Act for loss accruing in the future is unenforceable," except as to benefits "for the cost of products, services, or accommodations provided or to be provided by the assignee." MCL 500.3143, however, provides that any "agreement for assignment of a right to benefits payable in the future is void."

In other words, the Legislature in the No-Fault Act *rejected* UMVARA's language on assignment, in favor of more restrictive language. It thus makes no sense to argue, as Plaintiffs do, that the Legislature intended to guarantee a right to assign benefits to providers. See *Husted*, 459 Mich at 509 ("This Court, and the Court of Appeals, have repeatedly held that the Legislature's failure to adopt language contained in the uniform act creates a presumption that the corresponding language was considered and rejected."). It is the "clear language of the actual statute[] at issue" that matters, and the actual statute at issue here—the No-Fault Act—

does not contain any language prohibiting insurers from limiting assignments in their no-fault policies. See *Spectrum Health*, 492 Mich at 530.[20]

C. Judicial estoppel does not apply.

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 it is forfeited. 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

[20] Plaintiffs' response to the application included a one-sentence argument to the contrary based on the Workers Compensation Disability Act (WCDA). This undeveloped argument was not made below, and the Court should not consider it. See *AFT Michigan v State of Michigan*, 497 Mich 197, 213; 866 NW2d 782 (2015). In any case, the WCDA does not apply. *First*, "[t]he no-fault act"—not the worker's compensation statute—"is the most recent expression of this state's public policy concerning motor vehicle liability insurance." *Citizens Ins*, 448 Mich at 232. *Second*, while assignments to certain types of healthcare providers are excluded from the general statutory bar on assignments of worker's compensation benefits, that exception only applies if the provider has "ma[de] an advance or payment to an employee under a group disability or group hospitalization insurance policy"—something Plaintiffs have not done. See MCL 418.821(1), (2). *Third*, the purpose of these provisions of the WDCA is not, as Plaintiffs would have it, to promote a "public policy of allowing for assignments." (See Pls' Answer at 22.) It is 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). The WCDA has nothing to do with the issue here, and certainly does not create a public policy that renders the Assignment Clause unenforceable.

this Court did not accept any inconsistent position as true in *Covenant*. See *id*. State Farm took no position on the validity of its Assignment Clause in *Covenant*, and neither did the Court—the Assignment Clause was simply not at issue in *Covenant*. Speaking generically at oral argument, counsel for State Farm 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 providers can seek assignments from individuals insured under those policies. But counsel for State Farm *never* stated that such assignments could not be precluded by contract. In fact, counsel expressly foreshadowed the issue here by stating that "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

State Farm respectfully requests that this Court grant leave to appeal to reverse the Court of Appeals decision invalidating the Assignment Clause. State Farm submits that the Court can do so without overruling *Roger Williams* because that decision has already been superseded by a century of controlling law and does not apply in this no-fault case. But to the extent that *Roger Williams* has any continuing life, State Farm asks the Court to limit its application outside the no-fault context, or to overrule it once and for all.

Respectfully submitted,

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