STATE OF MICHIGAN
IN THE SUPREME COURT

JAWAD A. SHAH, M.D., P.C., INTEGRATED HOSPITAL SPECIALISTS, P.C., INSIGHT ANESTHESIA, P.L.L.C., and STERLING ANESTHESIA, P.L.L.C.,

Plaintiffs-Appellees,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court No. 157951

Court of Appeals No. 340370

Genesee County Circuit Court
No. 17-108637-NF

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE AUTO CLUB INSURANCE ASSOCIATION

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Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION, contends the answer is, "Yes".

INTRODUCTION

Appellate litigation at this level, on issues like the one presented, does not take place in a vacuum. Certain issues are brought to this Court by no-fault insurers only because the challenged holding is so onerous as to seriously impair the functioning of the no-fault system.

For example, in *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), this Court held that the one-year-back rule of MCL 500.3145(1) was tolled from the time a specific claim for benefits was made until the date the insurer formally denied liability. Although the decision was decidedly not consistent with the statutory language, the rule was workable. Accordingly, for years it remained essentially unchallenged by the insurance industry.

However, in *Johnson v State Farm Mutual Automobile Ins Co*, 183 Mich App 752; 455 NW2d 420 (1990), the Court of Appeals expanded *Lewis* to toll the one-year-back rule so that:

> "**[T]he one-year-back rule should nevertheless be tolled for that period from which defendant knew or reasonably should have known that plaintiff was entitled to benefits** under the automobile policy **until such time as defendant** either formally and explicitly denied liability for benefits or **affirmatively informed plaintiff that she might be entitled to benefits under the policy and requested that she file a formal claim of benefits under the policy**."

Id. at 762-63 (emphasis added).

That holding effectively obliterated the one-year-back rule as to any claim in which the insured person failed to claim benefits. See *Jevahirian v Progressive Casualty Ins Co*, unpublished per curiam opinion of the Court of Appeals, rel'd 4/27/99 (No. 205577) (Appendix A) (*Lewis* invoked to support claim for 16 years of attendant care). The insurance industry reacted, and this Court put an end to that nonsense in *Devillers v ACIA*, 473 Mich 562; 702 NW2d 539 (2005).

In *Geiger v DAIIE*, 114 Mich App 283; 318 NW2d 833 (1982), the Court of Appeals held that the one-year-back limitation on damages was tolled by MCL 600.5851(1), which tolled any

statute of limitations applicable to an action brought by a minor or mentally incapacitated person. Again, although inconsistent with the statutory language, it was not a major problem for years until an extremely lucrative specialty developed: filing suits for family attendant care benefits going back years or decades. *E.g., Bearden v ACIA*, Wayne County Circuit Court No. 02-215852-NF (going back to 1976); *Choate v ACIA*, Wayne County Circuit Court No. 06-614787-NF (going back to 1979); *Converse v ACIA*, Calhoun County Circuit Court No. 05-4426-NO (going back to 1992); *Cooper v ACIA*, Washtenaw County Circuit Court No. 03-367-NF (going back to 1989); *Odeh v ACIA*, Wayne County Circuit Court No. 10-001691-NF (going back to 1998); *Whitman v ACIA*, Gratiot County Circuit Court No. 05-9347-NO (going back to 1991). At that point, the issue was pushed until this Court set things right in *Cameron v ACIA*, 476 Mich 55; 718 NW2d 784 (2006), *overruled, Regents of the University of Michigan v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010), *reaffirmed, Joseph v ACIA*, 491 Mich 200; 815 NW2d 412 (2012).

A third example of a systemic problem coming to a head was spawned by *Lakeland Neurocare Centers v State Farm Mutual Automobile Ins Co*, 250 Mich App 35; 645 NW2d 59 (2002). Although the issue was not even contested in that case, it was cited for the proposition that a healthcare provider has statutory standing to file an independent action against a no-fault insurer. Again, the case was not a problem until the healthcare industry -- trying to maximize its income -- pushed that holding beyond its breaking point.

In one instance, a single motor vehicle accident in which two persons were injured spawned seven separate suits in four different courts.[1] Globally, the picture was even more

[1] *Russell & Young v State Farm*, Wayne County Circuit Court No. 11-009075-NF; *Russell & Young v State Farm*, Wayne County Circuit Court No. 11-010633-NF; *Maple Millennium Medical Center, PLLC v State Farm*, 46th District Court No. 11-3761-GC; *Maple Millennium*

bleak. As of September 2013, two insurers, State Farm and AAA Michigan, had more than 1,000 pending cases filed against them directly by healthcare providers -- in addition to suits by the insureds. (Appendices B, C).

Other data provided a snapshot over time of the torrent of these cases. Rather than rely on anecdotal perception, FOIA requests were sent out in April 2015 to many different district courts throughout southeast Michigan as well as a few circuit courts. While the circuit court numbers proved difficult to obtain, five separate district courts responded. These numbers did not reflect the hundreds of no-fault lawsuits in which medical providers intervene on a daily basis:

- Affiliated Diagnostics of Oakland, LLC: 2012 to the present: **674 lawsuits** filed (44th and 46th District Courts only)
- Mendelson Orthopedics, P.C.: 2011 to the present: **320 lawsuits** filed (37th District Court only)
- Summit Medical Group, LLC: 2011 to the present: **259 lawsuits** filed (19th District Court only)
- Infinite Strategic Innovations, Inc.: 2013 to the present: **190 lawsuits** filed (19th District Court only)
- Northland Radiology, Inc.: 2014 to the present: **101 lawsuits** filed (46th District Court only)
- Doctors Medical, LLC: 2013 to the present: **74 lawsuits** filed (19th District Court only)
- Silver Pine Imaging, LLC: 2013 to present: **57 lawsuits filed** (15th District Court only)

(Appendix D).

The result was a multiplication of the transactional costs to insurers and, ultimately, to the motoring public, as well as an increased burden on the time and resources of the courts of this State. That state of affairs prompted the strenuous reaction of the insurers. This Court again

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Medical Center, PLLC v State Farm, 46th District Court No. 11-3744-GC; *Summit Medical Group, PLLC v State Farm*, 50th District Court No. 12-157483-GC; *Summit Medical Group, PLLC v State Farm*, Wayne County Circuit Court No. 12-008722-NF; *Daudi, PC, Back-In-Line v State Farm*, 31st District Court No. 12-51424-GC.

took the appropriate corrective action in *Covenant v State Farm Mutual Automobile Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). However, the Court of Appeals' decision in the instant case has effectively nullified the systemic effect of that decision. Refusing to enforce anti-assignment provisions in no-fault policies has recreated the same plague of providers suits as did *Lakeland Neurocare*. (Appendix E).

The point of this exposition is to place the issue presented in its proper context.

First, contrary to Judge Shapiro's assumption, *Shah v State Farm Mutual Automobile Ins Co*, ___ Mich App ___ (2018) (Appendix F) (Shapiro, J, concurring/dissenting), p 4-6, the issue is not about an individual's ability to obtain treatment. Precluding an injured person from assigning his rights under the policy has no logical connection whatsoever to the existence of his right to benefits under the policy.

Rather, this issue is about a healthcare provider's ability to maximize its recovery of benefits payable under the No-Fault Act. *See Miller v Citizens Ins Co*, 288 Mich App 424; 794 NW2d 622 (2010), *aff'd in part; vacated in part*, 490 Mich 905; 804 NW2d 740 (2011). That motive *per se* is understandable. What is unacceptable is cynically cloaking it in the mantel of defending the patient's right to medical care. (Plaintiff's Corrected Answer to Application for Leave to Appeal, p 6-7).

Moreover, the provider's argument itself is facially suspect. Auto accident victims have never been able to give assignments in advance of treatment. MCL 500.3143. So there was never a way for a provider to be "assured [in advance] that it can, in fact, get paid".

Furthermore, an assignment itself can never guarantee payment. All that the assignment can possibly accomplish is to permit the particular provider to litigate its portion of the injured person's right to recover. As pointed out above, the reason that the Providers want that option is

to recover more money by reducing the attorney fee they would pay. *See Miller v Citizens, supra*.

The second point to be made is the systemic cost of refusing to enforce the unambiguous policy provision. As pointed out above, the multiplicity of cases generated by separate provider suits is every bit as bad as the glut created by the providers' alleged statutory right to sue prior to *Covenant*.

In short, it is apparently not enough that healthcare providers are paid more by no-fault insurers than by any other payment source. *Munson Medical Center v ACIA*, 218 Mich App 375, 379-80; 554 NW2d 49 (1996).[2] The providers want to squeeze the last possible dollar out of the no-fault system by maximizing their recovery at the expense of the judicial system and no-fault policyholders, who ultimately pay the increased transactional costs created by the provider suits. That point is underscored by the very case that provider Plaintiffs cite to illustrate their "plight". (Plaintiffs/Appellees' Supplemental Brief, p 2).

In *Marsack v Citizens Ins Co*, unpublished per curiam opinion of the Court of Appeals, rel'd 12/6/96 (No. 190356), the injured person accepted a mediation award which included "the full amount of the medical bills owing to the hospital". *Id.*, p 2. Nevertheless, the provider continued the litigation all the way to this Court in order to pay an attorney fee on its recovery which would be less than the one-third agreed upon by the injured party.

Again, it was not enough that the hospital was collecting top dollar for its services. It prolonged the litigation solely to reduce its attorney fee to the lesser amount it had apparently agreed upon with its own attorneys.

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[2]Some idea of the massive impact of rising medical costs on no-fault premiums can be gleaned from the attached 2017 article from Crain's. (Appendix G).

In sum, what is driving the issue for the providers is money. Any pontificating about public policy or the availability of medical care is nothing more than hollow sanctimony.

I. THE COURT OF APPEALS' CONCURRING/DISSENTING OPINION DEMONSTRATES WHY THIS COURT SHOULD REJECT THE PROVIDERS' INVITATION TO REFUSE TO ENFORCE AN UNAMBIGUOUS -- AND LAWFUL -- CONTRACT PROVISION.

Although the legal principles and relevant case law have been presented in other briefs, relatively little attention has been paid to the specifics of Judge Shapiro's concurring/dissenting opinion in the instant case (hereinafter "the Opinion"). The Opinion merits special separate attention, because it spends twice the number of pages on the issue before this Court than the majority opinion, and advances a more detailed argument for abrogating admittedly unambiguous contract language. The deconstruction and analysis of the Opinion will demonstrate that it is ultimately legally and logically unfounded.

The Opinion makes no inquiry into the continued viability of the *Roger Williams* opinion

After demonstrating the unremarkable proposition that contractual rights are generally assignable, the Opinion cites *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), for the proposition that "once the assigning party has performed, her right to assign past benefits cannot be contractually limited." (Opinion, p 2).

That characterization of the holding is a bit of misdirection. *Roger Williams* makes no reference to "past benefits", but rather to an "accrued cause of action". More importantly, the Opinion makes absolutely no reference to the "public policy" referenced in *Roger Williams*.

It may well be that that omission was intended to deflect attention from the fact that the "public policy" in *Roger Williams* was based on a statute that no longer exists. (See Brief of Amicus Curiae ACIA, Issue I., p 6-9). In any event, the failure to make any attempt to determine the continued viability of that "public policy" is a serious analytical omission.

There is no basis in Michigan law for ignorning an unambiguous anti-assignment provision

Having sidestepped the need to undertake the historical research necessary to test the continued viability of *Roger Williams*, the Opinion turns to a common law basis for refusing to enforce the anti-assignment provision -- "the modern trend". As the centerpiece for its argument, the Opinion cites *In re Jackson*, 311 BR 195 (WD Mich 2004), as being "directly on point".

In re Jackson did involve a contractual anti-assignment provision, albeit in an agreement effecting a structured settlement of a tort claim. 311 BR at 200. The Opinion accurately quotes the federal decision:

> "[It is argued] that the anti-assignment clause in the Settlement Agreement renders inapplicable the general rule that contract rights and duties are assignable. We find, however, that Michigan law mandates application of the general rule. This finding is based on the theory that *once a party to a contract performs its obligations to the point that the contract is no longer executory, its right to enforce the other party's liability under the contract may be assigned without the other party's consent,* ***even if the contract contains a non-assignment clause***. [*In re Jackson*, 311 BR at 201 (quotation marks and **citations omitted**) (emphasis added).]"

(Opinion, p 3) (italics in original) (other emphasis added).

The Opinion's omission of the citations on which the federal court relied is unfortunate, because **neither case involved a non-assignment clause**. The issue in both cases was whether the contracts were "personal contracts", which would not be assignable at common law in any event. *Board of Trustees of Michigan State University v Research Corp*, 898 F Supp 519, 521-22 (WD Mich 1995); *Detroit T & I R Co v Western Union Telegraph Co*, 200 Mich 2, 5-6; 166 NW 494 (1918).

So to this point in the Opinion, it cites no viable Michigan case law holding that contractual anti-assignment provisions are unenforceable. That deficiency is particularly noteworthy in that there are Michigan cases enforcing anti-assignment provisions to post-loss assignments.

Kreindler v Waldman, unpublished per curiam opinion of the Court of Appeals, rel'd 4/4/06 (No. 265045) (Appendix C); *Edwards v Concord Development Corp*, unpublished per curiam opinion of the Court of Appeals, rel'd 9/17/96 (No. 174487) (Appendix B).[3]

The rationale underlying the "majority" rule does not apply to first-part no-fault claims

Bereft of any Michigan authority to support its argument, the Opinion turns to secondary sources describing the law in other states. (Opinion, p 3-4). Leaving aside its legal irrelevance to Michigan law, the rationale of the "majority" rule has no application in the context in which the issue arises in this case.

The premise of the "majority" rule is that a post-loss assignment cannot enure to the detriment of the insurer. The cases come to that conclusion by focusing exclusively on the risk assumed by the insurer, which is not affected by a post-loss assignment. That may be true in the context of a single claim for a single loss, which would result in, at most, a single lawsuit.

However, the same is not true in the context of no-fault insurance. As was demonstrated in the Introduction, the substantial harm caused by refusing to enforce anti-assignment provisions in no-fault policies is the spawning of multiple lawsuits arising out of an injury to a single claimant. So the blithe assertion that no-fault insurers will suffer no harm from judicial refusal to enforce the terms of the policy is demonstrably false.

The Opinion's assertion that anti-assignment provisions deny benefits to injured persons is so logically unfounded as to border on irrational

The closest that the Opinion comes to acknowledging the litigation explosion that the anti-assignment provision is intended to avoid, is to mischaracterize the issue as a "public policy" argument advanced to contain "administrative costs". (Opinion, p 4). In a remarkable display of

[3]Those cases are discussed in the Brief of Amicus Curiae ACIA, p 10-12, so they will not be described further here.

judicial myopia, the Opinion dismisses the problem as "not supported by evidence". (Id.). Anyone involved in or aware of the pre-*Covenant* appeals would have to have been asleep not to be aware of the litigation explosion that spawned *Covenant*. Its existence simply cannot be denied. (Introduction, *supra* at p 3-4 and Appendices B-E).

More troublesome are the Opinion's assertions that enforcing anti-assignment provisions "will result in a denial of benefits to injured persons"; that their "result, if not purpose, is to deny benefits to people who qualify under the statute"; that their effect is adverse to "an insured's ability to obtain covered medical treatment"; and that insurers want to "deprive insureds the benefits they paid for". (Opinion, p 4, 5, 6).

Strong stuff! But the line between justifiable outrage and simple calumny is marked by whether the accusations have a basis in fact or logic. The quoted passages are on the wrong side of that line.

Factually, the Opinion gives no clue as to how many auto accident patients have been denied treatment of any kind because of the inability to assign their right to no-fault benefits. One would hope none. But for the moment we will take at face value the Providers' presumed (by the Opinion) assurance that they intend to deny treatment in such circumstances. The question is whether the absence of an assignment of past benefits justifies doing so.

Logically, it may well be customary for patients to assign to the provider the right to pursue the patient's health insurer for claims arising out of future treatment. But such an assignment is unavailable where the person is injured in a motor vehicle accident. MCL 500.3143. The source of that problem is not the policy provision, but the No-Fault Act itself.

In any event, except for the relatively rare case in which a person is disqualified from no-fault benefits, there is always an insurer responsible for payment for the treatment of a motor

vehicle accident victim. MCL 500.3172 *et seq*. Such patients are a healthcare provider's source of the highest payments per service received from any source. *Munson Medical Center, supra*. Indeed, they are preferred patients. So the inability to assign in advance the right to pursue a no-fault insurer for services rendered has never been an obstacle to treatment. Every auto accident victim receives treatment without such an assignment. Hundreds of thousands have done so, to the handsome recompense of the healthcare providers.

What, then, is the logical link between the availability of medical care and the ability to assign the right to benefits after the treatment is rendered? None comes to mind, other than the healthcare providers' desire to squeeze the last cent out of the no-fault system.

Consider that it is the injured person's responsibility to make a claim for no-fault benefits. If she does not do so, she remains responsible to the provider for payment for the treatment rendered. Consequently, the vast majority of insured persons will make such a claim.

To be fair to the providers, there are some motor vehicle accident victims who do not bother to claim or pursue their no-fault benefits. Such people are generally those with few or no assets which can be imperiled by collection efforts, assuming that such persons can even be found. That is an understandable source of frustration to the providers. But it does not logically connect the anti-assignment provision to a **right** to benefits, nor to an inability to obtain medical care for the vast majority of injured patients. The only patients potentially affected are **those whom the provider identifies as a risk not to make a claim**, i.e., the poor.

So the threat that the providers are making is that unless this Court allows them to obtain post-treatment assignments, they will undertake pre-treatment screening to determine those who get "second class" care. As if that were not bad enough, bear in mind that as to such indigent patients, the providers are no worse off than they were before there was a No-Fault Act. So all of

this is not a matter of economic survival, it is a matter of the providers wanting to skew the contract law of this State[4] in order to maximize their pecuniary recovery from the no-fault system.

So anti-assignment provisions do nothing to deprive anyone of the benefits to which they are entitled. Rather, the only impediment to the poor receiving medical care is the providers' insistence on assurances that they can squeeze the last dime from the motoring public. Their attempt to hide that fact in pious sanctimony is unconvincing.

[4]The Opinion makes clear its dissatisfaction with Michigan contract law. (Opinion, p 5 n 1).

Conclusion[5]

In sum, the Opinion's holding that anti-assignment provisions are unenforceable is based on:

(1) A total failure to undertake the inquiry as to whether the "seminal" case in this area is still good law;

(2) A common law rule with no basis in Michigan law;

(3) A "majority" rule which is inapplicable in the context of the litigation explosion created by the providers; and

(4) An unsupportable assertion that anti-assignment provisions deprive injured persons of the benefits to which they are entitled.

The legal and intellectual poverty of the Opinion graphically illustrates why this Court should reject the Providers' invitation to refuse to enforce unambiguous, and lawful, contractual provisions.

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[5]The Opinion's argument that the No-Fault Act itself bars anti-assignment provisions has been addressed in Issue III. of ACIA's Amicus Brief, and will not be further discussed here.