RECEIVED by MSC 1/16/2019 9:46:40 AM

STATE OF MICHIGAN
IN THE SUPREME COURT

JAWAD A. SHAH, M.D., P.C.
INTEGRATED HOSPITAL SPECIALISTS,
PS, 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

Paul D. Hudson (P69844)
Samantha S. Galecki (P74496)
Joel C. Bryant (P79506)
Miller Canfield Paddock and Stone, P.L.C.
277 S. Rose Street, Suite 5000
Kalamazoo, MI 49007
(269) 383-5805
hudson@millercanfield.com
Attorneys for Defendant/Appellant State
Farm Mutual Automobile Insurance Company

GREEN & GREEN, PLLC
Jonathan A. Green (P51461)
30300 Northwestern Hwy., #250
Farmington Hills, MI 48334
(248) 932-0500
jgreen@greenandgreenpllc.com
Attorneys for Plaintiffs

MILLER & TISCHLER, P.C.
Wayne J. Miller (P31112)
Attorneys for Amicus Curiae Michigan Brain
Injury Provider Council
28470 W. 13 Mile Rd., Ste. 300
Farmington Hills, MI 48334
(248) 945-1040 / (248) 536-5042 fax
Email: wmiller@msapc.net

MICHIGAN BRAIN INJURY PROVIDER COUNCIL'S
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

PROOF OF SERVICE

RECEIVED by MSC 1/16/2019 9:46:40 AM

Michigan Brain Injury Provider Council (MBPIC) moves this Court for leave to file an amicus curiae brief in opposition to the application for leave to appeal in the above-captioned matter pursuant to MCR 7.312(H).

MBIPC is a non-profit, membership-based trade association that has served the brain injury community since 1987. MBIPC's purpose is to enhance the ability of its members to provide high-quality and ethical rehabilitation, health care, and related services to individuals with brain injuries. Additionally, MBIPC strives to improve access to and funding for essential services for these individuals.

MBIPC is interested in this case because many MBIPC members are health care providers, such as hospitals, rehabilitation facilities, case managers, etc., who provide services to motor vehicle accident victims. These members are therefore subject to the payment provisions of the Michigan No-Fault Act and case law interpreting it.

MBIPC's provider-members will be adversely impacted should this Court grant leave in this case and ultimately reverse the Court of Appeals' published decision in *Shah v State Farm Mut Auto Ins Co.*, 324 Mich App 182 (2018). Such a decision would greatly impede these members' ability to obtain payment for the valuable, life-saving services provided to motor vehicle accident victims. This would inevitably impact the quality of care and services that these provider-members extend to the brain injury community.

MBIPC was not involved in the case below and can present this Court with a different perspective. Additionally, Michigan's judicial policy favors amicus filings. *Grand Rapids v Consumer Power Co*, 216 Mich 409; 185 NW 852 (1921).

For these reasons, MBIPC respectfully requests that this Court enter an order granting this Motion and accept for filing MBIPC's proposed Amicus Curiae Brief, attached as **Exhibit A**.

Respectfully submitted,

MILLER & TISCHLER, P.C.

/s/ WAYNE J. MILLER
BY: WAYNE J. MILLER (31112)
Attorneys for Amicus Curiae
Michigan Brain Injury Provider Council
28470 W. 13 Mile Rd., Ste. 300
Farmington Hills, MI 48334
(248) 945-1040 / (248) 536-5042 fax
Email: wmiller@msapc.net

Dated: January 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of **JANUARY, 2019**, I electronically filed the foregoing document and Certificate of Service, with the Clerk of the Court using the *TrueFiling* system which will electronically send notification to all counsel of record listed on said pleadings;

/s/ *Robin R. Stewart*
Robin R. Stewart

RECEIVED by MSC 1/16/2019 9:46:40 AM

EXHIBIT A

RECEIVED by MSC 1/16/2019 9:46:40 AM

RECEIVED by MSC 1/16/2019 9:46:40 AM

STATE OF MICHIGAN
IN THE SUPREME COURT

JAWAD A. SHAH, M.D., P.C.
INTEGRATED HOSPITAL SPECIALISTS, PS, 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

Paul D. Hudson (P69844)
Samantha S. Galecki (P74496)
Joel C. Bryant (P79506)
Miller Canfield Paddock and Stone, P.L.C.
277 S. Rose Street, Suite 5000
Kalamazoo, MI 49007
(269) 383-5805
hudson@millercanfield.com
Attorneys for Defendant/Appellant State Farm Mutual Automobile Insurance Company

GREEN & GREEN, PLLC
Jonathan A. Green (P51461)
30300 Northwestern Hwy., #250
Farmington Hills, MI 48334
(248) 932-0500
jgreen@greenandgreenpllc.com
Attorneys for Plaintiffs

MILLER & TISCHLER, P.C.
Wayne J. Miller (P31112)
Attorneys for Amicus Curiae Michigan Brain Injury Provider Council
28470 W. 13 Mile Rd., Ste. 300
Farmington Hills, MI 48334
(248) 945-1040 / (248) 536-5042 fax
Email: wmiller@msapc.net

MICHIGAN BRAIN INJURY PROVIDER COUNCIL'S AMICUS CURIAE BRIEF

RECEIVED by MSC 1/16/2019 9:46:40 AM

TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

AMICUS CURIAE MICHIGAN BRAIN INJURY PROVIDER COUNCIL'S STATEMENT OF EXISTENCE AND PURPOSE 1

AMICUS CURIAE MICHIGAN BRAIN INJURY PROVIDER COUNCIL'S STATEMENT OF PERSPECTIVE 2

LEGAL ANALYSIS 6

I. THE RULE FROM *ROGER WILLIAMS* REMAINS GOOD LAW IN MICHIGAN AND NATIONALLY 6

II. THE RATIONALE UNDERLYING ANTI-ASSIGNMENT CLAUSES IS INAPPLICABLE TO POST-LOSS ASSIGNMENTS 9

III. MICHIGAN'S PUBLIC POLICY REGARDING ASSIGNMENTS IS EMBODIED IN ITS STATUTES 12

CONCLUSION AND RELIEF REQUESTED 16

RECEIVED by MSC 1/16/2019 9:46:40 AM

INDEX OF AUTHORITIES

Cases

Action Auto Stores, Inc. v United Capitol Ins Co, 845 F Supp 417 (WD Mich, 1993) 6

Aetna Casualty & Surety Co v Valley National Bank, 15 Ariz.App. 13, 485 P.2d 837 (1971).........9

Aetna Ins Co v Aston, 123 Va. 327, 96 S.E. 772 (1918) 8

Alabama Farm Bureau Ins Co v McCurry, 336 So.2d 1109 (Ala. 1976) 8

Ardon Constr Corp v Firemen's Ins Co, 16 Misc.2d 483, 185 N.Y.S.2d 723 (1959) 8

Benson v. Assurity Life Insurance Company, No. 1: 03-CV-817 (W.D. Mich. June 16, 2004) 7

Bolz v State Farm Mut Auto Ins Co, 274 Kan. 420, 52 P.3d 898 (2002) 8

Century Indemnity Co v Aero-Motive Co, 318 FSupp2d 530 (WD Mich, 2003) 6, 7

Conrad Brothers v John Deere Ins Co, 640 NW2d 231 (Iowa 2001) 8

Covenant Medical Center, Inc. v State Farm Mut Auto Ins Co, 313 Mich App 50; 880 NW2d 294 (2015) 3

Covenant Medical Center, Inc. v State Farm Mut Auto Ins Co, 500 Mich 191; 895 NW2d 490 (2017) 3, 4, 13, 16

Edgewood Manor Apartment Homes v RSUI Indem Co, 782 F.Supp.2d 716 (E.D. Wis. 2011).......8

Egger v Gulf Ins Co, 588 Pa. 287, 903 A.2d 1219 (2006) 8

Elat, Inc v Aetna Cas and Sur Co, 280 N.J.Super. 62, 654 A.2d 503 (1995) 9

First-Citizens Bank & Tr Co v Universal Underwriters Ins Co, 113 N.C.App. 792, 440 S.E.2d 304 (1994) 8

Fluor Corp. v. Superior Court, 61 Cal.4th 1175, 1208 (2015) 7

Garetson-Greason L Co v Home L & A Co, 131 Ark. 525, 199 S.W. 547 (1917) 9

Georgia Fire Assoc v Borchardt, 123 Ga. 181, 51 S.E. 429 (1905) 8

Gimbels Midwest v Northwestern Nat Ins Co, 72 Wis.2d 84, 240 N.W.2d 140 (1976) 8

Ginsburg v Bull Dog Auto Fire Ins Ass'n, 328 Ill. 57, 160 N.E. 145 (1928) 8

Gopher Oil v American Hardware, 588 N.W.2d 756 (Minn.App.1999) 9

RECEIVED by MSC 1/16/2019 9:46:40 AM

Illinois Tool Works, Inc v Commerce & Industry Ins Co, 2011 IL App (1st) 093084, 357 Ill.Dec. 141, 962 N.E.2d 1042 (2011)........9

In re Ambassador Ins Co, Inc, 184 Vt. 408, 965 A.2d 486 (2008)........8

Kaczmarck v La Perriere, 337 Mich 500, 506; 60 NW2d 327 (1953)........12

Lakeland Neurocare Centers v State Farm Mutual Auto Ins Co, 250 Mich App 35; 645 NW2d 59 (2002)........3, 16

Magers v National Like & Accident Ins Co, 329 S.W.2d 752 (Mo.1959)........9

Manley v Automobile Ins Co of Hartford, 169 S.W.3d 207 (Tenn.App.2005)........9

Marion v Vaughn, 12 Mich App 453, 463 (1968)........7

McNeil v Charlevoix County, 275 Mich App 686, 701 (2007), aff'd 484 Mich 69 (2009)........14

Michigan Head & Spine, PC v State Farm, 299 Mich App 442; 830 NW2d 781 (2013)........3

Millard Gutter Company v. Farm Bureau Property & Casualty Insurance Company, 295 Neb 419, 602; 889 NW2d 596 (2016)........7, 8

Pikington N Am v Travelers Cas & Sur, 112 Ohio St.3d 482, 861 N.E.2d 121 (2006)........9

Pietrantonio v Travelers Ins Co, 282 Mich 111; 275 NW 786 (1937)........7

Professional Rehab Assocs v State Farm Mut Auto Ins Co, 228 Mich App 167; 577 NW2d 909 (1998)........13

PUD 1 v International Ins Co, 124 Wash.2d 789, 881 P.2d 1020 (1994)........8

Regents of the University of Michigan v State Farm, 250 Mich App 719; 650 NW2d 129 (2002)........3, 16

RL Vallee v American International Specialty Lines, 431 F.Supp.2d 428 (D.Vt.2006)........8

Roger Williams Ins Co v Carrington, 43 Mich 252; 5 NW2d 303 (1880)........*passim*

Santiago v Safeway Ins Co, 196 Ga.App. 480, 396 S.E.2d 506 (1990)........8

Security First v Office of Ins Regulation, 177 So.3d 627 (Fla.App.2015)........9

Shah v State Farm Mut Auto Ins Co., 324 Mich App 182 (2018)........2, 9, 12, 14, 16

Smith v Buege, 182 W.Va. 204, 387 S.E.2d 109 (1989)........8

Southwestern Bell Tel Co v Ocean Acc & Guar Corp, 22 F.Supp. 686 (W.D. Mo. 1938) 9

Straz v Kansas Bankers Sur Co, 986 F.Supp. 563 (E.D.Wis. 1997)..8

Titan Insurance Company v State Farm Mutual Automobile Insurance Company, 296 Mich App 75, 84 (2012), citing *State Treasurer v Schuster*, 456 Mich 408, 417 (1998) 14

US v Lititz Mut Ins Co, 694 F Supp 159 (M.D.N.C. 1988)..8

Viking Pump, Inc v Century Indem Co, 2 A.3d 76 (Del. Ch. 2009) 9

Viola v Fireman's Fund Ins Co, 965 F.Supp. 654 (E.D. Pa. 1997) 8

Wehr Constructors v Assurance Co of Am, 384 S.W.3d 680 (Ky.2012) 9

Wonsey v Life Ins Co of North America, 32 F Supp 2d 939 (ED Mich, 1998)...............................10

Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co, 308 Mich App 389; 864 NW2d 598 (2014), lv den, 497 Mich 1029 (2015) 3

Statutes

MCL 440.9101 et seq. 13

MCL 440.9102(1)(a)..14

MCL 440.9102(1)(ss) 14

MCL 440.9109(4)(h)..13

MCL 440.9408(1) 14

MCL 500.3143 ....4, 12, 13

Other Authorities

Couch on Insurance 3d §35:8 ....8, 11

Restatement (Rest (2d) Contracts, § 322) 10

Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston", § 49:119 (4th ed. 2015) 10, 11

RECEIVED by MSC 1/16/2019 9:46:40 AM

AMICUS CURIAE MICHIGAN BRAIN INJURY PROVIDER COUNCIL'S STATEMENT OF EXISTENCE AND PURPOSE

Amicus Curiae, Michigan Brain Injury Provider Council (MBIPC), is a non-profit, membership-based trade association that has served the brain injury community since 1987. MBIPC's members include both organizations and individuals rendering care and services to those with brain injuries and their families. MBIPC's members include but are not limited to: hospitals, physicians, acute and post-acute residential rehabilitation facilities, case management agencies, nurses, outpatient clinics, home care agencies, and private practitioners.

MBIPC's purpose is to enhance the ability of its members to provide high-quality and ethical rehabilitation, health care, and related services to individuals with brain injuries. Additionally, MBIPC strives to improve access to and funding for essential services for these individuals. To accomplish this goal, MBIPC: (1) provides professional development and educational opportunities to its members and the public; (2) supports resource sharing and information exchange; and (3) advocates in the executive, legislative, and judicial branches of state government on behalf of brain-injured clients. Members are governed by ethical principles, business practice guidelines, ethical conduct policy, and other standards and practices prescribed by MBIPC.

RECEIVED by MSC 1/16/2019 9:46:40 AM

AMICUS CURIAE MICHIGAN BRAIN INJURY PROVIDER COUNCIL'S STATEMENT OF PERSPECTIVE

MBIPC's members come from different segments of the community. Most, if not all, members serve individuals who have suffered brain injuries. And more specifically, many MBIPC members are healthcare providers that treat and care for victims of motor vehicle accidents. As such, MBIPC members are subject to the payment provisions of the Michigan No-Fault Act and case law interpreting same. MBIPC, therefore, has a unique perspective as to the devastating consequences that will occur if this Court overturns the Court of Appeals' decision in *Shah v State Farm Mut Auto Ins Co.*, 324 Mich App 182 (2018) that insurance companies' anti-assignment clauses are unenforceable as against Michigan public policy. To appreciate this perspective, it is important for the Court to consider *why* providers sought a right of direct action in the first place.

Before providers were granted a right of direct action, providers were forced to work through their patients (and the patients' attorneys) to bring their claims. This was problematic because the relationship between patient and provider (in addition to the therapeutic relationship) is primarily one of debtor (patient) and creditor (provider). Thus, the primary interest of the patient was to reduce their financial exposure to the provider. The patient (and thus their attorney) did ***not*** have an interest in obtaining full payment for the provider.

As a result, patients and their attorneys often attempted to force providers to accept reduced payments on their charges. This was done by patient's attorneys negotiating lump sum settlements that would then be paid directly to the patient and the patient's attorney. Thus providers were often forced to accept amounts determined by the patient and/or the patient's attorney; amounts that were mostly (if not always) a fraction of the providers' charges.

RECEIVED by MSC 1/16/2019 9:46:40 AM

RECEIVED by MSC 1/16/2019 9:46:40 AM

In addition, providers' claims were subject to standard insurer defenses. Having no intimate knowledge of the providers' services and business practices, the patients' attorneys were often unable to adequately rebut these defenses.

These unfair results drove providers to seek their own right of direct action, which the Court of Appeals granted with its decisions in *Lakeland Neurocare Centers v State Farm Mutual Auto Ins Co*, 250 Mich App 35; 645 NW2d 59 (2002) and *Regents of the University of Michigan v State Farm*, 250 Mich App 719; 650 NW2d 129 (2002). Following these decisions, the aforementioned issues providers had previously experienced were eradicated. For more than a decade, the law was clear that providers were entitled to bring direct actions against no-fault insurers to recover payment of the providers' unpaid charges. This did not go unchallenged by insurance companies, but the Court of Appeals continued to cite *Lakeland* with approval and uphold the providers' right of direct action. See *Michigan Head & Spine, PC v State Farm*, 299 Mich App 442; 830 NW2d 781 (2013) and *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389; 864 NW2d 598 (2014), lv den, 497 Mich 1029 (2015); *Covenant Medical Center, Inc. v State Farm Mut Auto Ins Co*, 313 Mich App 50; 880 NW2d 294 (2015).

Following the Court of Appeals' decision in *Covenant*, *supra*, this Court issued its opinion in *Covenant Medical Center, Inc. v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017) holding that providers did not have a right of direct action against no-fault insurers for no-fault benefits. And just like that, a whole new layer of delay, expense, and complexity was visited on providers. The one, thin reed to which providers' clung was this Court's declaration that its holding in *Covenant* was "not intended to alter an insured's ability to

assign his or her right to past or presently due benefits to a healthcare provider." *Covenant*, 500 Mich at 217, fn. 40.

Even with the assignment, however, providers have experienced substantial delay, expense, and complexity. For example, there has been delay in getting assignments from patients. In many cases, providers have had to hire private investigators to locate discharged patients, at substantial additional expense. In addition, merely hiring an investigator did not ensure that patients would sign the assignments. Many patients refused to sign the assignments. Attorneys who represent patients would often try to extort a fee from the provider for the simple service of obtaining the assignment. The entire process of seeking assignments has also often caused substantial delay, including to the point that the no-fault "one year back" rule has expired, once again leaving the provider without the ability to bring their claim against the insurer. Some providers already routinely obtained assignments in the course of treatment. However, the assignments were often obtained before treatment terminated. This enabled-insurers to argue the assignments violated the No-Fault Act's prohibition on assignment of future benefits. (MCL 500.3143). While a lot of small providers were able to adapt their practices to obtain post-procedure assignments, this was not feasible for larger providers (such as hospitals).

The delay, expense, and frequent resulting inability to litigate directly against the insurer has been a dramatic and even disastrous change from the pre-*Covenant* world. Yet, even with the new layer of delay, expense, and complexity that has followed the practice of obtaining assignments since *Covenant*, that practice has at least mitigated the harshness of the *Covenant* holding. Should this Court also take away the right of assignment, providers will be left with no alternatives but to rely on the patients' attorneys (who, as stated above, do not have an interest in fully reimbursing their patient's creditors) or to sue the patient directly.

RECEIVED by MSC 1/16/2019 9:46:40 AM

If the providers' ability to sue through assignment is taken away, it would be a return to the pre-2002 world, with all the issues that caused providers to seek a right of direct action in the first place. Such a return would adversely impact MBIPC's provider-members economically because their ability to obtain payment would be severely hampered. This would undoubtedly have a devastating effect on these members' ability to provide high quality care to the brain injury community.

RECEIVED by MSC 1/16/2019 9:46:40 AM

LEGAL ANALYSIS

I. THE RULE FROM *ROGER WILLIAMS* REMAINS GOOD LAW IN MICHIGAN AND NATIONALLY

The Michigan rule with regard to anti-assignment clauses is still the rule as set forth by this Court in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW2d 303 (1880). In *Roger Williams*, Carrington was the assignee of an insurance policy that covered a livery stable. The insurance policy was assigned to Carrington following a fire that destroyed the livery stable to secure a debt owed Carrington. The applicable policy of insurance contained an "anti-assignment" clause purporting to void the policy in the event the insured assigned the policy without the insurer's consent. In addressing the validity of the anti-assignment clause, this Court unequivocally held:

> The assignment having been made after the loss, did not require the consent of the company. **The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action.** It is the absolute right of every person-- secured in this State by statute-- to assign such claims, and such right cannot thus be prevented. It cannot concern the debtor, **and it is against public policy.** *Roger Williams*, 43 Mich at 254. (Emphasis added).

Although rarely cited, the rule from *Roger Williams* continues to be the law in Michigan. For example, *Roger Williams* was cited by the United States District Court for the Western District of Michigan in *Action Auto Stores, Inc. v United Capitol Ins Co*, 845 F Supp 417 (WD Mich, 1993). More recently, the same court again cited *Roger Williams* in *Century Indemnity Co v Aero-Motive Co*, 318 FSupp2d 530 (WD Mich, 2003). In that case, the court acknowledged that assignments of contract, including assignments of insurance policies, may be precluded by contract. But the court also recognized that the validity of such prohibitions on assignments under Michigan law is limited to assignments of contract before a loss occurs:

RECEIVED by MSC 1/16/2019 9:46:40 AM

RECEIVED by MSC 1/16/2019 9:46:40 AM

> Michigan law recognizes the validity of contractual provisions against assignment of contracts, including insurance policies . . . **However, an anti-assignment clause will not be enforced where a loss occurs before the assignment, because in that situation, the assignment of the claim under the policy is viewed no differently than any other assignment of an accrued cause of action.** *Century Indemnity Co v Aero-Motive Co*, 318 FSupp2d at 539. (Citations omitted). (Emphasis added).

In support, the *Century Indemnity* Court went on to cite the above-quoted passage from *Roger Williams*. *Century Indemnity Co* at 539-540. See, also, *Benson v. Assurity Life Insurance Company*, No. 1: 03-CV-817 (W.D. Mich. June 16, 2004) (citing *Roger Williams* and concluding "Michigan law allows for assignment of rights under an insurance policy after a loss has occurred, even where the policy contains an anti-assignment clause as in this case"), *Marion v Vaughn*, 12 Mich App 453, 463 (1968) (citing *Roger Williams* for the proposition that a claim under a contract of property insurance may be assigned after a loss) and *Pietrantonio v Travelers Ins Co*, 282 Mich 111; 275 NW 786 (1937) (holding that an insurer's anti-assignment clause was invalid as against an assignment executed post-loss).[1]

But Michigan is not the only state that follows the rule set forth in *Roger Williams*. Indeed, the rule that anti-assignment clauses are ineffective as against post-loss assignments is the majority view in the United States. And *Roger Williams* has been cited by the courts of other states. See *Fluor Corp. v. Superior Court,* 61 Cal.4th 1175, 1208 (2015) (citing *Roger Williams* and noting that in the late 19th century the notion that a consent-to-assignment clause is void and unenforceable post-loss was quickly and widely embraced within the context of first-party insurance contracts); See also *Millard Gutter Company v. Farm Bureau Property & Casualty Insurance Company*, 295 Neb 419, 602; 889 NW2d 596 (2016).

[1] Though this case does not specifically cite to *Roger Williams*, it is clear that this Court continued to adhere to the rule that restrictions as to post-loss assignments are invalid.

The majority rule disallowing attempted prohibitions of post-loss assignments has been accepted by the vast majority of courts that have encountered it: "Although there is some authority to the contrary, the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss." Couch on Insurance 3d §35:8. As noted by the Nebraska Supreme Court in *Millard*, *supra* at 602, this is the rule regardless of the type of insurance involved. Courts across the country have applied the rule in the context of property insurance,[2] fire insurance,[3] various types of automobile insurance,[4] pollution liability insurance,[5] directors and officers liability insurance,[6] excess and umbrella liability insurance,[7] employers liability insurance,[8] comprehensive general liability

[2]See *Edgewood Manor Apartment Homes v RSUI Indem Co*, 782 F.Supp.2d 716 (E.D. Wis. 2011); *US v Lititz Mut Ins Co*, 694 F Supp 159 (M.D.N.C. 1988); *Conrad Brothers v John Deere Ins Co*, 640 NW2d 231 (Iowa 2001).

[3] See *Alabama Farm Bureau Ins Co v McCurry*, 336 So.2d 1109 (Ala. 1976); *Georgia Fire Assoc v Borchardt*, 123 Ga. 181, 51 S.E. 429 (1905); *Roger Williams*, supra; *Ardon Constr Corp v Firemen's Ins Co*, 16 Misc.2d 483, 185 N.Y.S.2d 723 (1959); *Aetna Ins Co v Aston*, 123 Va. 327, 96 S.E. 772 (1918); *Smith v Buege*, 182 W.Va. 204, 387 S.E.2d 109 (1989); *Gimbels Midwest v Northwestern Nat Ins Co*, 72 Wis.2d 84, 240 N.W.2d 140 (1976).

[4] See *Santiago v Safeway Ins Co*, 196 Ga.App. 480, 396 S.E.2d 506 (1990); *Ginsburg v Bull Dog Auto Fire Ins Ass'n*, 328 Ill. 57, 160 N.E. 145 (1928); *Bolz v State Farm Mut Auto Ins Co*, 274 Kan. 420, 52 P.3d 898 (2002); *First-Citizens Bank & Tr Co v Universal Underwriters Ins Co*, 113 N.C.App. 792, 440 S.E.2d 304 (1994).

[5]See *RL Vallee v American International Specialty Lines*, 431 F.Supp.2d 428 (D.Vt.2006).

[6]See *Straz v Kansas Bankers Sur Co*, 986 F.Supp. 563 (E.D.Wis. 1997).

[7]See *Viola v Fireman's Fund Ins Co*, 965 F.Supp. 654 (E.D. Pa. 1997); *Egger v Gulf Ins Co*, 588 Pa. 287, 903 A.2d 1219 (2006); *In re Ambassador Ins Co, Inc,* 184 Vt. 408, 965 A.2d 486 (2008); *PUD 1 v International Ins Co*, 124 Wash.2d 789, 881 P.2d 1020 (1994).

RECEIVED by MSC 1/16/2019 9:46:40 AM

insurance,[9]other variations of liability or indemnity insurance,[10] builder's risk insurance,[11] industrial life insurance,[12] and homeowners insurance.[13]

There is absolutely no authority that this is no longer the majority view or that Michigan no longer follows it. The fact is that anti-assignment clauses are invalid as to post-loss assignments. This is still the majority view, as set forth in this Court's opinion in *Roger Williams* (and more recent cases) and others in the opinions of courts across the nation. Therefore, this Court should uphold and reaffirm its decision in *Roger Williams*, not overturn it.

II. THE RATIONALE UNDERLYING ANTI-ASSIGNMENT CLAUSES IS INAPPLICABLE TO POST-LOSS ASSIGNMENTS

The Court of Appeals' decision in *Shah* was correct in relying on *Roger Williams* to find that anti-assignment clauses prohibiting post-loss assignments are contrary to Michigan public policy. But there is another reason to render invalid these anti-assignment clauses as to post-loss assignments: That is, that the anti-assignment clauses exist for the purpose of containing an

---

[8]See *Southwestern Bell Tel Co v Ocean Acc & Guar Corp*, 22 F.Supp. 686 (W.D. Mo. 1938); *Garetson-Greason L Co v Home L & A Co*, 131 Ark. 525, 199 S.W. 547 (1917).

[9]See *Gopher Oil v American Hardware*, 588 N.W.2d 756 (Minn.App.1999); *Elat, Inc v Aetna Cas and Sur Co*, 280 N.J.Super. 62, 654 A.2d 503 (1995).

[10]See *Aetna Casualty & Surety Co v Valley National Bank*, 15 Ariz.App. 13, 485 P.2d 837 (1971); *Viking Pump, Inc v Century Indem Co*, 2 A.3d 76 (Del. Ch. 2009) (applying New York law); *Illinois Tool Works, Inc v Commerce & Industry Ins Co*, 2011 IL App (1st) 093084, 357 Ill.Dec. 141, 962 N.E.2d 1042 (2011); *Pikington N Am v Travelers Cas & Sur*, 112 Ohio St.3d 482, 861 N.E.2d 121 (2006).

[11]See *Wehr Constructors v Assurance Co of Am*, 384 S.W.3d 680 (Ky.2012).

[12]See *Magers v National Like & Accident Ins Co*, 329 S.W.2d 752 (Mo.1959).

[13]See *Security First v Office of Ins Regulation*, 177 So.3d 627 (Fla.App.2015); *Manley v Automobile Ins Co of Hartford*, 169 S.W.3d 207 (Tenn.App.2005).

RECEIVED by MSC 1/16/2019 9:46:40 AM

RECEIVED by MSC 1/16/2019 9:46:40 AM

insurer's risk to that which was specifically undertaken. Enforcing an anti-assignment clause against a *post*-loss assignment does not serve its purpose. The rationale for distinguishing between pre and post-loss assignments was explained by Professor Williston's treatise on contract law, "Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston", §49:119 (4th ed. 2015):

> Anti-assignment clauses in insurance policies are strictly enforced against attempted transfers of the policy itself before a loss has occurred, because this type of assignment involved a transfer of the contractual relationship and, in most cases, would materially increase the risk to the insurer. **Policy provisions that require the company's consent for an assignment of rights are generally enforceable only before a loss occurs, however.** As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy- consisting of the right to receive the proceeds of the policy- after a loss has occurred. **The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer.** After loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now **a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.** (Emphasis added).

To the same effect is the Restatement (Rest (2d) Contracts, § 322) provides:

> (1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" **bars only the delegation to an assignee of the performance by the assignor of a duty or condition.**
>
> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,
>
> > (a) does not forbid assignment of a right to damages for breach of the whole contract **or a right arising out of the assignor's due performance of his entire obligation**;
> >
> > (b) gives the obligor a right to damages for breach of the terms forbidding assignment **but does not render the assignment ineffective**;
> >
> > (c) is for the benefit of the obligor, and **does not prevent the assignee from acquiring rights against the assignor or the obligor from**

RECEIVED by MSC 1/16/2019 9:46:40 AM

> **discharging his duty as if there were no such prohibition.**(Emphasis added).

Therefore, it is generally held that post-loss assignments are effective despite any prohibition. And while the Restatement acknowledges that an assignment is considered a breach of the insured's promise to the insurer, the anti-assignment clause is still considered to be ineffective as to the assignment where is serves no legitimate interest to the insurer. In the case of a post-loss assignment, where the loss is fixed, *who* brings the claim for that loss is of no consequence to the insurer. This point was explained in *Wonsey v Life Ins Co of North America*, 32 F Supp 2d 939 (ED Mich, 1998):

> As the latest Restatement makes clear, the modern trend with respect to contractual prohibitions on assignments is to **interpret these clauses narrowly,** as **barring only the delegation of duties,** and not necessarily as precluding the assignment of rights from the assignor to assignee. **The rationale behind these cases is derived from the implicit recognition that the obligor, the party obligated to perform, would not suffer any harm by a mere assignment of payments under the contract.** Harm to the obligor would result, however, in cases involving personal services contracts or other situations where the duties owed to the parties may change depending on the identity of the assignee. *Wonsey*, 32 F Supp 2d at 943. (Emphasis added).

Moreover, Couch on Insurance 3d §35:8, *supra*, goes on to provide that anti-assignment clauses do not apply to post-loss assignments:

> [F]or the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim. **The purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.** (Emphasis added).

That the purpose underlying anti-assignment clauses was never to prohibit assignment of an accrued cause of action has been expressly stated in Michigan case law:

RECEIVED by MSC 1/16/2019 9:46:40 AM

> What is the nature of the benefit intended to be vouchsafed to the insurer by the [anti-assignment] provision in question? Clearly, it is to protect the insurer from liability on risk which it did not elect or choose to assume. **It is <u>not designed to serve as a loophole through which insurer may escape liability for loss in connection with the precise risk assumed under the policy</u> by the simple expedient of a retroactive, *nunc pro tunc* termination of coverage in relation to that risk and assumption of a new and different risk in place thereof.** *Kaczmarck v La Perriere*, 337 Mich 500, 506; 60 NW2d 327 (1953) (Emphasis added).

In cases such as *Shah* involving no-fault benefits, post-loss assignments to providers are for payments that are already owed by virtue of a loss that has already occurred. The insurers do not suffer any harm merely because it is now the provider pursuing the claim: the burdens under the No-Fault Act remain the same (i.e., accidental bodily injury arising out of a motor vehicle accident; proof that the charges are reasonable and services reasonably necessary, etc.); the amounts that may be due do not change; and the risk originally assumed by the insurer does not change. Therefore, there is no sound reason to uphold an insurer's anti-assignment clause in a case like *Shah*, where the assignment has been made post-loss.

III. MICHIGAN'S PUBLIC POLICY REGARDING ASSIGNMENTS IS EMBODIED IN ITS STATUTES

Insurers argue the validity of *Roger Williams* because it cites an unnamed statute for the proposition that restrictions on post-loss assignments are against Michigan public policy. But one need not look far for a statute that still embodies this proposition. The very statute underlying this appeal—the Michigan No-Fault Act—exemplifies this principle. MCL 500.3143 provides that "[a]n agreement for assignment of a right to benefits payable in the future is void." This exact proscription of this statute was addressed by the Michigan Court of Appeals in *Professional Rehab Assocs v State Farm Mut Auto Ins Co*, 228 Mich App 167; 577 NW2d 909 (1998). With regard to §3143, the *Professional Rehab*, Court stated:

> We believe that **this statutory language is 'clear and unambiguous.'** Under the plain language of this statute, **'a right to benefits payable in the future' is distinguishable from a right to past due or presently due benefits.** Keeping in mind our duty to discern and effectuate the intent of the Legislature, **we believe that if the Legislature had intended to prohibit the assignment of all rights, it would not have included the word 'future' in the language of the statute.** The Legislature is presumed to have intended the meaning that a statute plainly expresses. *Id.* at 172. (citations omitted). (Emphasis added).

Moreover, the *Professional Rehab Court's* interpretation of the Legislature's intent in enacting §3143 was cited with approval by this Court in *Covenant*, supra: "Moreover, our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Covenant* at 216, fn. 40. It was clearly the Michigan Legislature's intent in enacting §3143 to permit assignments of past and presently due benefits. Therefore, any restriction prohibiting these assignments must be held to violate Michigan's public policy in permitting them.

In addition to the Michigan No-Fault Act, Michigan's public policy permitting assignments and prohibiting restrictions on same can also be gleaned from Michigan's Uniform Commercial Code (UCC), MCL 440.9101 et seq. In particular, MCL 440.9109(4)(h) confirms that Article 9 is applicable to "a transfer or an interest in or an assignment of a claim under a policy of insurance" as long as it is "an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment." Under the UCC, the following terms are defined:

> "**Account**"...means a right to payment of a monetary obligation, whether or not earned by performance, for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, for services rendered or to be rendered, for a policy of insurance issued or to be issued, for a secondary obligation incurred or to be incurred, ...**The term includes health-care-insurance receivables**. MCL 440.9102(1)(a). (Emphasis added).

RECEIVED by MSC 1/16/2019 9:46:40 AM

"**Health-care-insurance-receivables,**" are defined as "an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health care goods or services provided." MCL 440.9102(1)(ss).

Furthermore, MCL 440.9408(1) provides:

> "[A] term in a promissory note or in an agreement between an account debtor [insurance company] and a debtor [injured party/patient] that relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and **which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is *ineffective*** to the extent that the term does 1 or more of the following:
>
> (a) Would impair the creation, attachment, or perfection of a security interest.
>
> (b) Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

This is precisely the case in *Shah*—where there has been an assignment of a "health-care-insurance-receivable."[2] Therefore, the UCC expressly permits assignments to medical providers and prohibits any provisions attempting to restrict the assignments.

In light of the statutory provisions of Michigan's No-Fault Act and Michigan's UCC, it is clear that Michigan public policy supports assignments to medical providers and disfavors any restrictions on these assignments. In other words, such assignments are obviously and soundly

[2] While it is noted that the claims in *Shah* were brought under the No-Fault Act, "statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Titan Insurance Company v State Farm Mutual Automobile Insurance Company*, 296 Mich App 75, 84 (2012), citing *State Treasurer v Schuster*, 456 Mich 408, 417 (1998); *McNeil v Charlevoix County*, 275 Mich App 686, 701 (2007), aff'd 484 Mich 69 (2009). Statutes relate to the same subject if they relate to the same person or thing or same class of persons or things. *Id.* There is no doubt that the common subjects between these two statutes are assignments to medical providers and the effect of anti-assignment clauses on same.

RECEIVED by MSC 1/16/2019 9:46:40 AM

within Michigan public policy. Therefore, any insurance provision purporting to restrict the assignment is contrary to this public policy and should be struck down.

RECEIVED by MSC 1/16/2019 9:46:40 AM

CONCLUSION AND RELIEF REQUESTED

Many MBIPC members are healthcare providers—providers whose world was turned upside down by this Court's holding in *Covenant*. The one saving grace for these provider members was this Court's express affirmation in *Covenant* of direct provider claims by way of assignment, upheld by the Court of Appeals in *Shah*. Though not a perfect solution for providers (compared to having an independent right of direct action), it gave providers a better alternative compared to: (1) relying on patient attorneys who are duty bound to protect their client's interests and not the interests of their client's creditors; or (2) the repugnant alternative of suing their patients. Clearly these alternatives proved unsuccessful for providers prior to *Lakeland* and *The Regents*, *supra*. But should this Court reverse the Court of Appeals' decision in *Shah*, it would be disastrous for MBIPC's provider members who will be forced to return to utilizing these unsatisfactory avenues for payment. These alternatives will be equally untenable today as they were back then.

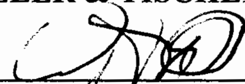
Regardless of this, it is clear that this Court's decision in *Roger Williams* remains good law so that it and *Shah* should be upheld. *Roger Williams* represents the law in Michigan and the majority view nationally that anti-assignment clauses are ineffective against post-loss assignments. This is because the purpose of anti-assignment clauses has never been to prohibit assignments of accrued claims. Moreover, that Michigan public policy permits post-loss assignments and disfavors restrictions on them is clear from Michigan public policy reviewing Michigan statutes such as the No-Fault and UCC. A contract that violates the law must give way to the law.

RECEIVED by MSC 1/16/2019 9:46:40 AM

For these reasons, MBIPC joins Plaintiffs-Appellees in respectfully requesting that this Honorable Court deny Defendant-Appellant, State Farm Mutual Automobile Insurance Company, leave to appeal in this matter.

Respectfully Submitted,

MILLER & TISCHLER, P.C.



WAYNE J. MILLER (P31112)
Attorneys for Amicus Curiae
Michigan Brain Injury Provider Council
28470 W. 13 Mile Rd., Ste. 300
Farmington Hills, MI 48334
(248) 945-1040 / (248) 536-5042 fax
Email: wmiller@msapc.net

RECEIVED by MSC 1/16/2019 9:46:40 AM