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 Circuit Court
Case No. 17-108637-NF

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Amicus Curiae Brief of the Michigan Health & Hospital Association in Opposition to the Application for Leave to Appeal

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Introduction and Statement of Interest

State Farm asks this Court to alter Michigan's common law and apply a "simple rule": "If a [no-fault] policy provision does not conflict with the No-Fault Act, it does not violate public policy." At. Supp. Br. at 14. The drastic effect of such a rule is illustrated by State Farm later in its brief:

> [B]y 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 . . . 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. [*Id.* at 22.]

The startling shift in Michigan jurisprudence that State Farm requests would usurp this Court's constitutional role and discard centuries of common law. The principle that a contract is to be enforced as written has always been tempered by the rule that, when it violates public policy or a traditional defense, the contract will not be enforced. State Farm now asks this Court to strike that rule and yield its constitutional authority to unelected officials in the Department of Insurance and Financial Services, approving the anti-assignment provision in State Farm's policy along the way. This Court should reject that request.

State Farm's arguments are based on a misreading of *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). In *Rory*, this Court explicitly differentiated between public policy "clearly rooted in the law"—which provides a mandatory basis for restricting contracts—and a "judicial assessment of reasonableness"—which is not within the judiciary's authority. *Id.* at 470-471. *Rory* did not abdicate the role of courts in assessing whether contracts conflict with

public policy; it explicitly affirmed that role, holding that "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written *unless the provision would violate law or public policy*." *Id.* (emphasis added).

One such public policy is articulated by this Court in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), which State Farm also misreads. There, this Court rejected an anti-assignment provision in an insurance policy on the basis of public policy. *Roger Williams* holds:

> 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 a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy. [*Id.* at 254.]

While *Roger Williams* references a statute, that statute was simply the real-party-in-interest statute in existence at the time. The "absolute right" *Roger Williams* articulated did not come from that statute, but from Michigan's common law and the English common law before that.

Indeed, the assignability of legal claims—also called "choses in action"—is a doctrine that was created through a glacial common-law process dating back to ancient English and Roman law. Over the centuries, the common law developed the relevant public policy in England, then post-Revolution America, then, finally, Michigan, where *Roger Williams* articulated and applied the result of centuries of legal wisdom. *Roger Williams* was far from the first or last Michigan case to apply the common-law rule prohibiting parties from restricting the

assignability of accrued claims. It is just the most direct embodiment of that principle.

This Court has been loath to abrogate Michigan's common law without compelling justification. And the history of the rule in this case demonstrates why. That common-law rule developed via trial and error for nearly a millennium. An untold number of parties, lawyers, and judges lived out the reasons why the rule exists. State Farm's request that this Court wipe it away assumes that modern parties and judges know better than all of those who came before them. State Farm offers no reason why this Court should discard this historical wisdom. It should not.

In recent years, this Court has repeatedly reached the same conclusion. It has even done so in the context of no-fault insurance policies and common-law contract interpretation principles. For instance, in *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018), and *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), this Court rejected attempts to modify common-law contract doctrines. Yet State Farm now comes to this Court and asks it to modify the common law. The only meaningful difference here is that modifying the common law would advantage no-fault insurers, while modifying the common law in *Bazzi* and *Titan* would have disadvantaged them. This Court should maintain its principled position, reject State Farm's request, reassert Michigan's common law, and affirm the Court of Appeals below. *Shah v State Farm Mut Auto Ins Co*, 324 Mich App 182; 920 NW2d 148 (2018).

As a statewide organization established in 1919 representing all community hospitals in Michigan, the Michigan Health & Hospital Association (the "MHA") is interested in this case because of the sweeping implications it could have on the ability of healthcare providers to receive payment for their services. State Farm's request that this Court deviate from its constitutional role and ancient common-law wisdom would have the practical effect of reducing access to high-quality, cost-effective, and accessible health care across the state.

Statement of Question Presented

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 Court of Appeals answered, no.

Plaintiffs answer, no.

Defendant answers, yes.

Amicus MHA answers, no.

Argument

I. State Farm's position ignores the foundational concepts of contract interpretation and enforceability, which demand consideration of common-law defenses and public policy.

"[U]nambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy." *Rory*, 473 Mich at 491. "[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, *if the contract is not 'contrary to public policy*.'" *Id.* (emphasis added), citing *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000).

State Farm's repeated citation to the axiom that contracts must be enforced as written omits the important caveat above. Regardless of how clear a contract's language may be, parties may not contract in a manner that is contrary to public policy. Indeed, "courts have a duty to refuse to enforce a contract that is contrary to public policy." *Sands Appliance*, 463 Mich at 246.

The right to contract is not, and has never been, unbounded as State Farm suggests. Neither has the language of the contract been the sole consideration of courts. To the contrary, built into the interpretive standards is, and has always been, the indispensable proviso that the text controls "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies[.]" *Rory*, 473 Mich at 461. That is why *Rory* and every other decision interpreting the language of a no-fault insurance policy considered and applied common-law contract defenses and public policy. See, e.g.,

Raska v Farm Bureau Mut Ins Co of Michigan, 412 Mich 355, 361-362; 314 NW2d 440 (1982) ("Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy."); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 372-373; 817 NW2d 504 (2012); *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

The reason is simple: "public policy is the 'foundation' of our constitutions, statutes, and common law." *Terrien v Zwit*, 467 Mich 56, 77; 648 NW2d 602 (2002) (citation omitted). "It is precisely because of this truth that a contract that *does* violate public policy is unenforceable." *Id.*; accord *Robinson v Godfrey*, 2 Mich 408, 410 (1852) ("[I]t is the undoubted duty of the Court to carry out that intention, unless it violates some rule of law or public policy . . .").

II. *Roger Williams* articulates a rule of public policy established under ancient common law and adopted in Michigan at the time of statehood.

One public policy established at common law is that "[i]t is the absolute right of every person" "to assign . . . claims [accrued after a loss covered by an insurance policy], and such a right cannot be thus prevented." *Roger Williams*, 43 Mich at 254. Accordingly, regardless of the contract language, a provision of a contract prohibiting the assignment of an accrued claim "without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action." *Id.* "[I]t is against public policy." *Id*

State Farm attempts to avoid *Roger Williams* by arguing that its assignment holding is based on a long-forgotten statute. But that is incorrect. Although *Roger Williams* referenced a statute, common law favoring the free

assignability of accrued legal claims—called "choses in action"—existed long before that.

A. The historic treatment of "choses in action" demonstrates the common-law rule enforced by *Roger Williams*.

The common law is the foundation of the English and American legal systems. It is characterized by Blackstone as "that ancient collection of unwritten maxims and customs" that were handed down in English courts by tradition. 1 Blackstone, Commentaries on the Laws of England 17 (William S. Hein & Co. 1992) (1767). It developed conservatively over time, becoming more perfect through experience and application.

As developed under common law, a chose in action is a "right to personal things of which the owner has not the possession, but merely a right of action for their possession." *City of Holland v Fillmore Twp*, 363 Mich 38, 43; 108 NW2d 840 (1961), citing *Black's Law Dictionary* (4th ed); *Powers v Fisher*, 279 Mich 442, 448; 272 NW 737, 739 (1937). In simpler terms, a chose in action is just a legally enforceable claim, including a claim under a contract. *Id.*; *Cook v Bell*, 18 Mich 387, 393 (1869).

Centuries ago, under both Roman and English law, legal claims were unassignable. "In the language of Roman law, personal actions were founded upon an *obligatio*," that is to say, "a personal action brought either on a contract or a tort [wa]s essentially a personal thing." Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 Harvard L Rev 997, 1002-1003 (1920).

Because such rights were personal in nature, ancient jurists held that they could not be transferred; their assignment "was unthinkable." *Id.*, at 1003.

The law of choses in action developed slowly over time. By the fourteenth century, if suing for a sum certain, a merchant could appoint "the assignee his attorney, to sue for the debt, and could stipulate that he should keep the amount realized." *Id.* at 1019. By the fifteenth century, English courts had adopted this as part of the common law. *Id.* By the eighteenth century, "it was quite settled" that English courts "would recognize the validity of the assignment both of debts and of other things recognized by the common law as *choses* in action." *Id.* at 1020. (The complicated but interesting history of choses in action is outlined admirably by Holdsworth, *supra*.)

B. By the time of Michigan's statehood, American common law held that legal claims were freely assignable.

By the time of the American Revolution, the common law was considered "the birthright of free men, a precious inheritance." Friedman, *A History of American Law* (1973) at 95; see also *Perrin v Lepper*, 34 Mich 292, 295-296 (1876). England's refusal to afford its protections to the colonies even led the Continental Congress to declare in defiance "[t]hat the respective colonies are entitled to the common law of England . . . ." Declaration of Rights, First Continental Congress, Journals of the Continental Congress (October 14, 1774). Unsurprisingly, this grievance led a majority of the states to declare the common law in force within the first decade after the revolution.

Michigan followed suit. In each of its four constitutions, starting with the first in 1835, Michigan citizens declared that the common law then in force, and not repugnant to the constitution, should remain in force until altered or repealed. Const 1835, Schedule, § 2; Const 1850, Schedule, § 1; Const 1908, Schedule, § 1; Const 1963, art 3, § 7.

In one of its earliest decisions, this Court powerfully addressed this point:

> [I]t is said, that if the action would lie at the common law, that law is not in force in this state as a means of civil remedy. This is a somewhat startling proposition to be seriously urged at this time, when this court, as well as the circuit courts, have been adjudicating common law actions upon common law rules and principles, since their organization under the state government; and also, the territorial courts had done so previously, from the organization of the territorial government under the acts of congress and the ordinance of 1787. It can require but a few moments' consideration. [*Stout v Keyes*, 2 Doug 184, 188 (1845).]

In their receipt of the common law,[1] American states followed their English counterparts and adopted the principle that, generally, choses in action were freely assignable.[2] Michigan was no different. In case after case, this Court recognized and applied that common-law rule.

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[1] In this respect, it is noteworthy that America did not receive the common law as a completed system; rather, it was "Americanized" and continued to evolve as it was adopted in the nascent state governments. Friedman, *supra*, at 95-96.

[2] Cook, *The Alienability of Choses in Action*, 29 Harvard L Rev 816, 826-837 (1916), discussing cases, including *Bildad Fowler v John Harmon* (1772), reported in *Redfield v Hillhouse*, 1 Root 63, 64 (Conn, 1774) (holding that "by the assignment of the note, the property of the grain upon the tender, vested in the assignee"); *Andrews v Becker*, 1 Johns Cas 411 (NY, 1800) (holding that a release executed by the assignor "after the assignment of the bond and notice to the defendant, [wa]s a nullity and ought not to be regarded" due to the assignment in favor of the assignee); *Hackett v Martin*, 8 Greenl 77, 78 (Me, 1831) (holding that the "assignee [wa]s to be recognized as the owner"

In *Wilson v Davis*, 1 Mich 156, 159-160 (1848), this Court overruled an objection that an appeal had been taken by the assignee of a judgment, Farrand, rather than the nominal plaintiff, Wilson, reasoning:

> The fourth section of the act provides that "if any party shall appeal from a judgment rendered by a justice of the peace, as herein before provided, such party, his agent or attorney, shall, within five days, enter into a recognizance," etc. We think that Farrand must be considered to be the agent and attorney for the nominal plaintiff. He is the assignee of the judgment; the plaintiff has authorized him, by the sale to him, to prosecute the suit, and to do all matters necessary to make it available to him, at the least, if the plaintiff does not interfere. The assignment of the judgment operates as a power of attorney, irrevocable to the assignee, to prosecute and collect the judgment in the name of the assignor, the plaintiff in the judgment. [*Id.*]

A decade later, in *Adair v Adair*, 5 Mich 204 (1858), this Court rejected a litigant's effort to challenge the validity of an assignment to the assignee plaintiff:

> Whether the assignment was for or without a consideration, is no matter of concern to this defendant, except for the single purpose of enabling him to make available his claim of set-off and payment; which we will presently consider. Its form furnishes no sufficient ground for the presumption that it was never delivered. No witnesses are necessary to render an assignment valid, nor is an acknowledgment and registry necessary; nor would a registry be constructive notice. Indeed, as a general rule, the transfer of the debt, or obligation, with the evidence of it, will operate to assign all collateral

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and the assignor after the assignment "ha[d] no more power over it, than a stranger"); *Colbourn v Rossiter*, 2 Conn 503, 508 (1818) ("It is a well settled principle of common law in Connecticut, that the property in a chose in action, may be assigned; and the courts of law have long since recognized the property in the assignee as fully as courts of chancery."); *Jones v Witter*, 13 Mass 304 (1816) (payment to the assignor does not discharge the obligation to the assignee); *Duncklee v Greenfield Steam Mill Co*, 23 NH 245 (1851) (release by the assignor is not valid to release the obligation to the assignee); *Sloan v Sommers*, 14 NJ L 509 (1834) (the assignee is the only one who can control court proceedings respecting the claim); *M'Cullum v Coxe*, 1 Dall 150 (Pa, 1785) (same); *Cutts v Perkins*, 12 Mass 206 (1815) (payments made to assignee extinguish the claim).

> securities, without any instrument of writing whatever. The assignment being then sufficient in this case to transfer the obligation and the security, and it being found in the possession of the complainant, no presumption can be raised against his title. [*Id.* at 210-211.]

And a decade after that, in *Final v Backus*, 18 Mich 218 (1869), Justice Cooley, noting the principle that actions in tort that are "personal" in nature were generally unassignable, nevertheless, held that the tort at issue—conversion of property—was properly assignable. He reasoned:

> [T]his [nonassignability] rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him; while torts for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, may, it seems, be assigned so as to pass an interest to the assignee which he can enforce by suit at law. [*Id.* at 231, citing various common law authorities from other states.]

Accord *Dutton v Ives*, 5 Mich 515, 519 (1858) (enforcing a mortgage assignment); *Warner v Whittaker*, 6 Mich 133, 136 (1858) ("No rule is better settled than that the assignee of a chose in action takes it subject to all equities existing between the debtor and creditor."); *Spinning v Sullivan*, 48 Mich 5, 8; 11 NW 758 (1882) (same); *Draper v Fletcher*, 26 Mich 154, 155 (1872) (the assignment of things in action may be made and enforced orally or in writing); *Bannister v Rouse*, 44 Mich 428, 429; 6 NW 870 (1880) (holding that the failure of endorsement on commercial notes did not operate as a defense because "the papers were assignable and suable as choses in action").

Before *Roger Williams*, this Court had even recognized at common law that the consent of the obligor is not necessary to effect a valid assignment. In *Perrin*, the owners of certain property leased it to Lepper for five years in consideration of rents. One of the owners thereafter conveyed the property and assigned the rents owing to Perrin with notice to Lepper. When payment was not made Perrin sued. Lepper objected that he had not consented to the assignment of the rents. On appeal, this Court rejected that defense:

> It has come to be the generally accepted doctrine in this state, that a person who is owner of real estate, personal property or choses an action, or who has an interest therein, may grant, convey or assign his right or interest, *without the assent or acquiescence of any third person*, and that the grantee or assignee will take, hold and enjoy the property so acquired in the same manner and with the like rights that his grantor or assignor had. *The law has always been very liberal in this state in permitting assignments of choses in action, and now*[3] *permits the assignee to sue and recover thereon in his own name*. [*Perrin*, 34 Mich at 294 (emphasis added).[4]]

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[3] The Court's reference to "now" corresponds to *Roger Williams*'s reference to the statute, which abrogated the common-law requirement that an assignee sue in the name of the assignor. See also *Spinning*, 48 Mich at 8 (explaining that in the case of "the assignment of a chose in action . . . the assignee takes it subject to antecedent equities, and the *late provision* to permit assignees to sue in their own names has not affected the principle") (emphasis added); *Gale v Mayhew*, 161 Mich 96, 99; 125 NW 781 (1910) (explaining that "at common law an assignee of a chose in action could not sue in his own name," but that the statute "gives this right in certain cases"); *Draper*, 26 Mich at 155 ("The statute allowing actions by other than original parties to agreements declares that, 'The assignee of any bond, note, or other chose in action, not negotiable under existing laws, which has been, or may hereafter be assigned, may sue and recover the same in his own name,' etc. This statute does not require any particular method of assignment, and was evidently intended to remove the old indirect method of suing in the name of the nominal, for the use of the real, owner."). Compare Holdsworth at 1019 (noting that at common law "the assignee sued for the debt in the assignor's name and as his attorney").

[4] This Court went on to reject another common law doctrine (atornment) that would have allowed the obligor to object to the transfer to the assignee, concluding that the doctrine "may serve a useful purpose in estopping a tenant from denying the title of a landlord to whom he has attorned, but beyond this it can be of but little if any use." *Perrin*, 34 Mich at 295-296. The same can be said of State Farm's argument here under the anti-assignment provision in its policy formbook.

The foregoing common law is what this Court was speaking of when it decided *Roger Williams* and held that "[i]t is the absolute right of every person" to assign "an accrued cause of action" in Michigan. And it is that common law on which this Court relied to reject the attempt by the insurance company in that case to invalidate the assignment as having been made "without the company's consent." *Roger Williams*, 43 Mich at 254.

C. *Roger Williams* identified and applied a common-law rule that has never been abrogated.

Although *Roger Williams* referenced a statute, as detailed above the "absolute right" it cited arose, not from that statute, but at common law. Indeed, the statute, the history of which Plaintiffs recount in their supplemental brief, see Ae. Supp. Br. At 39-40, is still in effect and substantively the same as it was in the 19th Century. See MCL 600.2041. That statute, which merely required claims be prosecuted "in [a party's] own name" (now, "in the name of the real party in interest"), simply incorporated the common law by allowing an assignee to sue directly, rather than in the name of the assignor. See *supra* at 13 n 3. The statute did not create the policy in favor of free assignability, as explained above. See *id.*; see also *The Alienability of Choses in Action*, 29 Harvard L Rev at 821 ("[S]tatutes permitting the assignee to sue in his own name merely changed the label of the action and not the substantive law."); *Draper*, 26 Mich at 155.

State Farm's position entirely ignores the multiple legal authorities, both general and Michigan-specific that support the rule confirmed in *Roger Williams*. In addition to the cases cited above, a variety of Michigan cases support

the rule. See, e.g., *Northwestern Cooperage & Lumber Co v Byers*, 133 Mich 534, 538; 95 NW 529 (1903); *Detroit T & I R Co v Western Union Telegraph Co,* 200 Mich 2 (1918); *Watertown Fire Ins Co v Grover & Baker Sewing Machine Co*, 41 Mich 131, 136-137; 1 NW2d 961 (1879); accord *Voigt v Murphy Hearing Co,* 164 Mich 539, 542; 129 NW 701 (1911).

Several federal decisions analyzing Michigan law also support or apply the rule, including several post-*Covenant*[5] decisions. See, e.g., *Mich Ambulatory Surgical Ctr v State Farm Mut Auto Ins Co*, No. 16-cv-14507; 2018 WL 1570332, *7 (ED Mich, March 3, 2018); *Estate of Grimmett v Encompass Indem Co*, No. 14-14646; 2017 WL 5592897, *4-5 (ED Mich, November 21, 2017); *Covenant Med Ctr v Auto-Owners Ins Co*, No. 17-cv-11176; 2017 WL 4572327, *4-5 (ED Mich, October 13, 2017); *Century Indem Co v Aero-Motive Co*, 318 F Supp 2d 530, 539 (WD Mich, 2003); *In re Jackson*, 311 BR 195, 200-201 (Bankr WD Mich, 2004) ("[O]nce 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."); *Action Auto Stores v United Capital Ins Co*, 845 F Supp 417, 422-23 (WD Mich, 1993).

And the rule favoring the free assignability of post-loss claims is anything but a concept unique to Michigan. For example, the MBIPC provides citation to decisions from Alabama, Arizona, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Jersey, New York, North

[5] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017).

Carolina, Ohio, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin. MBIPC Br. at 8.

Additionally, as Judge Shapiro noted in his concurrence below, several well-respected treatises also confirm the rule. *Shah*, 920 NW2d at 166-167 (SHAPIRO, J., concurring in part), citing, e.g., 3 Couch on Insurance § 35:8 (explaining that "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 the loss"); 17 Williston on Contracts § 49:126 (explaining that anti-assignment clauses in insurance policies are generally only enforceable before a loss occurs, not after, being that a post-loss assignment does not increase the risk to the insurer and because the policy is, at that point, no longer executory but rather "a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property"). The Restatement of Contracts (Second) at § 322 similarly provides:

> A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . 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. [Restatement Contracts, 2d, § 322 at 32.]

And specific to this state, Michigan Civil Jurisprudence explains:

> [O]nce 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 nonassignment clause*. [1 Mich Civ Jur, Assignments § 4, Validity and Effect of Contract Provisions Prohibiting Assignment (emphasis added).]

The rule in *Roger Williams* was, thus, deeply ingrained in common law before that decision. It has remained so ever since.

D. The common-law rule articulated in *Roger Williams* is also consistent with the common-law rule against restraints on alienation.

The rule articulated in *Roger Williams* is also consistent with other comparable public policy concepts that have similarly deep roots in Michigan common law. For instance, "Michigan recognizes a strong public policy against restraints on alienation." *Albro v Allen*, 434 Mich 271, 281; 454 NW2d 85 (1990); see, generally, *Mandlebaum v McDonell*, 29 Mich 78, 91-107 (1874) ("The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void."); *Sloman v Cutler*, 258 Mich 372, 374; 242 NW 735 (1932) ("If one's interest in property is absolute, as a fee simple, restriction on his right of alienation is void as repugnant to the grant."); *Braun v Klug*, 335 Mich 691; 57 NW2d 299 (1953).

Citing Lord Coke, *Mandlebaum* further demonstrates the historical depth of common-law prohibitions on the right of Michigan citizens to do as they wish with their property:

> "And the like law is of a devise in fee upon condition the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and

> repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void; because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic, and bargaining and contracting between man and man."--*Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem, etc.* (Freely translated): It is a wrong to freemen to restrain the free alienation of their property. [*Mandlebaum*, 29 Mich at 95-96, citing Coke's commentary.]

That ancient concept applies with equal force to the assignment of property rights to vested claims acquired under no-fault insurance contracts.

III. This Court should reject State Farm's invitation to alter Michigan's common law.

A. The "simple rule" State Farm asks this Court to adopt is predicated on a misreading of *Rory* and would rewrite Michigan's common law and the wisdom built into it.

State Farm repeatedly invokes a "simple rule" it asks this Court to adopt: "If a policy provision [in an insurance contract] does not conflict with the No-Fault Act, it does not violate public policy." See, e.g., At. Supp. Br. at 11, 14. State Farm's "theory seems to be that it may include any provision in its policies so long as the provision is not explicitly barred in the no-fault act." *Shah*, 920 NW2d at 168 (SHAPIRO, J., concurring in part). Such a rule would be a radical departure from Michigan jurisprudence

If adopted, State Farm's position would elevate no-fault insurance contracts to a preferential position in law, where they are not subject to the same

rules as every other contract, giving the lie to State Farm's rote statement that insurance policies are contracts just like any other. It is, of course, true that insurance policies are contracts just like any other, see, e.g., *Rory*, 473 Mich at 461, but State Farm's "simple rule," which asks this Court to discard all other principles of law when interpreting no-fault policies, would make those policies unlike any other contract under the law. Thankfully, *Rory* is explicit: "*unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies*, a court must construe and apply unambiguous contract provisions as written." *Id.* Public policy—under common, statutory, or constitutional law—represents the former consideration. *Id.* at 469, citing *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

Contrary to State Farm's conflation of the concepts, *Rory* explicitly differentiates public policy, on the one hand, with "[a] mere judicial assessment of 'reasonableness,'" on the other. It holds:

> [A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of "reasonableness" is an invalid basis upon which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of the contract provision. [473 Mich at 470 (footnote omitted).]

So, while "assessment[s] of [contractual] 'reasonableness'" are reserved for the Insurance Commissioner, whether an agreement "violate[s] law or public policy" is a question left for the judiciary to decide. See also *Sands Appliance*, 463 Mich at 24. "In ascertaining the parameters of our public policy, we must look to

'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.'" *Rory*, 473 Mich at 471, citing *Terrien*, 467 Mich at 66-67.

Rory did not replace all Michigan common-law with the no-fault act. State Farm misreads *Rory* when it argues that "[f]or no-fault policies, 'narrow' [review by the judiciary] becomes nearly non-existent, because the Legislature sets Michigan public policy for no-fault insurance directly in the No-Fault Act." At. Supp. Br. at 10-11. *Rory*'s statement that the "explicit 'public policy' of Michigan *is that the reasonableness of insurance contracts* is a matter for the executive, not judicial, branch of government," speaks exclusively to the issue of "reasonableness" in no-fault insurance contracts and the creation of new judicial glosses on that concept. *Rory*, 473 Mich at 476. That is the basis on which this Court overruled *Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588; 242 NW2d 396 (1976); *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118; 301 NW2d 275 (1981); and their progeny. *Rory*, 473 Mich at 470 ("To the degree that *Tom Thomas*, *Camelot*, and their progeny abrogate unambiguous contractual terms *on the basis of reasonableness determinations*, they are overruled.") (emphasis added). Thus, State Farm's argument that this Court owes near-absolute deference to the Insurance Commissioner on all issues related to no-fault policies is, at best, a red herring, and at worse, a creative reimagining of *Rory*.

That is plain from *Terrien*, which explains:

> To determine whether the covenant at issue runs afoul of the public policy of the state, it is first necessary to

> discuss how a court ascertains the public policy of the state. In defining "public policy," *it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges*, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is,* and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison,* 5 US 137, 177; 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law "is," not what it "ought" to be. [*Terrien*, 467 Mich at 66 (footnote omitted and emphasis added).]

"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. There is no other proper means of ascertaining what constitutes our public policy." *Id.* at 67.

As it pertains to anti-assignment provisions and their application to post-loss assignments, *Roger Williams* represents that clearly-rooted law. The contrary "modern trend" State Farm concocts exists nowhere within this Court's jurisprudence.

B. This Court has recently and repeatedly refused to alter the common law via the no-fault act.

Under Michigan's Constitution, "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Const 1963, art 3, § 7. "Michigan courts have uniformly held that legislative amendment of the common law is not lightly presumed." *World Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). Moreover, "[t]he Legislature is presumed

to know of the existence of the common law when it acts." *Id.* at 234, citing *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

1. The no-fault act has not abrogated or "superseded" common-law contract doctrines.

State Farm suggests that the common law articulated by *Roger William* has been "superseded by modern law." At. Supp. Br. At 27. But Michigan does not recognize a distinction between modern law and ancient law; there is only law. And Michigan's law includes *Roger William* and the common-law rule it applies. That law has never been changed, and this Court should not change it now.

State Farm contends that the *Roger Williams* rule has been superseded for two reasons. Both are unavailing. First, State Farm argues that under *Rory*, the no-fault act has replaced the application of standing common-law rules with the whim of the Insurance Commissioner's discretion (or inaction) in approving the form of insurance policies. As set forth earlier, State Farm is incorrect.

State Farm also argues that adherence to textual interpretation demands that any public policy exceptions to enforcement are no longer valid. The opposite is true. As noted in section I, *supra*, Michigan's contractual interpretive canons include the caveat that agreements are enforced as written unless they are "in violation of law or public policy." See, e.g., *Wilkie*, 469 Mich at 51.

The only way over these hurdles for State Farm is to argue that the no-fault act implicitly displaced all common-law doctrines regarding the interpretation

and enforceability of contracts, where those contracts involve no-fault insurance. It did not. As seen in *Rory*, this Court has continued to apply general contract interpretation principles to the interpretation of no-fault insurance contracts. *Rory*, 473 Mich at 461. See also *Bazzi*, 502 Mich at 399 ("[A]utomobile insurance contracts are governed by a combination of statutory provisions and the common law of contracts."); *Titan*, 491 Mich at 554.

2. This Court should continue its practice of rejecting alterations to common-law contract principles in the name of the no-fault act.

Far from the rule that State Farm divines, *Rory* upheld the established rule that contracts must yield to public policy. In this case, that public policy arises from equally established common-law rules. As this Court explained in *Bugbee v Fowle,* 277 Mich 485, 492; 269 NW 570 (1936), the common law "is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes[.]'" *Id.*, quoting *Kansas v Colorado,* 206 US 46, 97; 27 S Ct 655; 51 L Ed 956 (1907). "This Court is the principal steward of Michigan's common law." *Henry v Dow Chem Co,* 473 Mich 63, 83; 701 NW2d 684 (2005). In that role, this Court has repeatedly rejected attempts by the lower courts and invitations of parties—like State Farm here—to alter or disregard the common law.

In *Price v High Pointe Oil Co, Inc,* 493 Mich 238; 828 NW2d 660 (2013), this Court addressed the recovery of noneconomic damages for the negligent destruction of property at common law. *Price* explained that courts have the constitutional authority to change the common under Const 1963, art 3, §7. Thus,

"the common-law rule remains the law until modified by this Court or by the Legislature." *Longstreth v Gensel,* 423 Mich 675, 686; 377 NW2d 804 (1985).

Price also explained that alteration of the common law should be approached cautiously with the fullest consideration of public policy and should not occur through sudden departure from longstanding legal rules. *Price,* 493 Mich at 259, citing *Henry,* 473 Mich at 83 ("[O]ur common-law jurisprudence has been guided by a number of prudential principles. See Young, *A Judicial Traditionalist Confronts the Common Law,* 8 Texas Rev L & Pol 299, 305-310 (2004). Among them has been our attempt to 'avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences,' *id.* at 307. . . ."); see also *Woodman ex rel Woodman v Kera LLC,* 486 Mich 228, 231; 785 NW2d 1 (2010) (opinion by YOUNG, J.) ("[M]odifications [of the common law] should be made with the utmost caution because it is difficult for the judiciary to assess the competing interests that may be at stake and the societal trade-offs relevant to one modification of the common law versus another in relation to the existing rule."); *id.* at 268 (MARKMAN, J., concurring in part and dissenting in part) (explaining that the common law develops incrementally); *North Ottawa Community Hosp v Kieft,* 457 Mich 394, 403 n 9; 578 NW2d 267 (1998) (providing that common law should only be changed "in the proper case"); *People v Kevorkian,* 447 Mich 436, 482 n 60; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J.), quoting Justice Cardozo's *The Nature of the Judicial Process*. "As this emphasis on incrementalism suggests, when it comes to alteration of the common

law, the traditional rule must prevail absent compelling reasons for change. This approach ensures continuity and stability in the law." *Price*, 493 Mich at 259-260.

Equally true, this Court has repeatedly warned that changes to the common law may "have undesirable effects that neither we nor the parties can satisfactorily predict." *Henry*, 473 Mich at 83. Accordingly, this Court has repeatedly rejected recent arguments that the common law's contract protections should yield to the no-fault act.

For instance, in *Titan* this Court addressed "whether an insurance carrier may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, when the fraud was easily ascertainable and the claimant is a third party." *Titan*, 491 Mich at 550. *Titan* held that common-law fraud rules applied to no-fault insurance contracts and, therefore, reversed a 40-year-old "easily ascertainable" exception to contract rescission for common-law fraud that had been put in place by the Court of Appeals. In so doing, *Titan* explained:

> The no-fault act seeks to protect third parties in a variety of ways, including through tort actions, *but it states nothing about altering the common law that enables insurers to obtain traditional forms of relief when they have been the victims of fraud*. We are not oblivious to the fact that adoption of the "easily ascertainable" rule might in some cases protect a potential source of monetary recovery for persons bringing tort claims, *but this does not by itself justify a rule that alters first principles of contract formation, redefines the common-law concept of fraud*, reduces disincentives for insurance fraud, and transfers legal responsibility from parties that have acted fraudulently to parties that have not. [*Id.* at 568-569.]

More recently, this Court reaffirmed its aversion to carving exceptions into the common law via the no-fault act. In *Bazzi*, this Court addressed "whether the judicially created innocent-third-party rule, which precludes an insurer from rescinding an insurance policy procured through fraud when there is a claim involving an innocent third party, survived this Court's decision in *Titan* . . . ." *Bazzi*, 502 Mich at 396. *Bazzi* held it did not. Explaining, again, that historic common-law defenses to contract apply to no-fault policies, see *id.* at 399-400, *Bazzi* emphasized that the no-fault act does not abrogate the common law unless the Legislature's intent "is clearly reflected in the language employed in the statute." *Id.* at 400.

The same is true here. With respect to the application of common-law exceptions to contracts, the only difference between the issue in this case—whether the common-law rule against post-loss assignments survived the no-fault act—and the issues in *Bazzi* and *Titan*—whether the common-law fraud defenses survived the no-fault act—is whether the result benefits the insurer. Of course, if the sauce is good for the goose, it is good for the gander. And just like State Farm asks this Court to treat insurance policies to a special standard of interpretation, its request for a special exemption from long-established common-law rules likewise asks that insurance contracts be treated as special creatures, rather than simple contracts.

For the same reasons that this Court rejected common-law exceptions in *Titan* and *Bazzi*, it should reject State Farm's plea for an exception here. As a matter of Michigan's common-law stretching back for more than a century, anti-

assignment provisions are unenforceable against post-loss assignments. The wisdom of that rule is supported by its longevity. Insurance companies and their insureds have managed to operate productively under it for all that time. This Court should not invite the uncertainty of changing the common-law now.

Conclusion

The MHA requests that this Court maintain its principled position on the application of common-law contract doctrines, reject State Farm's request to defer the judicial role to the Insurance Commissioner, reassert Michigan's common law contract rules, and affirm the Court of Appeals below. In so doing, this Court will be affirming the wisdom of centuries and safeguarding the effective provision of healthcare to all Michiganders involved in automobile accidents.

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