RECEIVED by MSC 10/3/2019 4:10:25 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

MEEMIC INSURANCE COMPANY

Plaintiff/Counter-Defendant/Appellant,

V

LOUISE M. FORTSON, RICHARD A. FORTSON, Individually, and RICHARD A. FORTSON, as Conservator for JUSTIN FORTSON.

Defendants/Counter-Plaintiffs/Appellees.

Supreme Court No. 158302

Court of Appeals No. 337728

Berrien County Circuit Court
No. 14-260-CK

AMICUS CURIAE BRIEF ON APPEAL OF THE INSURANCE ALLIANCE OF MICHIGAN IN SUPPORT OF PLAINTIFF/COUNTER-DEFENDANT/APPELLANT MEEMIC INSURANCE COMPANY

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for Amicus Curiae
Insurance Alliance of Michigan

BY Kimberlee A. Hillock (P65647)
333 Albert Avenue, Suite 500
East Lansing, MI 48823
517-351-6200

RECEIVED by MSC 10/3/2019 4:10:25 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 3

STANDARD OF REVIEW 3

Law and Analysis 4

I. **The Court of Appeals' Conclusion that MCL 500.3114(1) Mandates Coverage for a Domiciled Relative, and Upon Which the Court Structured Its Analysis, is a Faulty Premise Not Supported by the Language of the Statute Itself.** 4

II. **Judicial activism harms the jurisprudence of this state and should not be tolerated.** 10

CONCLUSION AND RELIEF REQUESTED 12

RECEIVED by MSC 10/3/2019 4:10:25 PM

INDEX OF AUTHORITIES

Cases

Bazzi v Sentinel Ins Co, 502 Mich 390, 400; 919 NW2d 20, 25 (2018).....5

Citizens Protecting Michigan's Constitution v Secretary of State, 503 Mich 42, 68 n 55; 921 NW2d 247 (2018).....11

City of Grand Rapids v Consumers' Power Co, 216 Mich 409, 415; 185 NW 852 (1921).....2

Clevenger v Allstate Ins Co, 443 Mich 646, 656, 505 NW2d 553 (1993).....11

Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co, 500 Mich 191; 895 NW2d 490, 493 (2017).....9

Evans v Norris, 6 Mich. 369, 372 (1859).....7

Fountain v Filson, 336 US 681; 69 S Ct 754; 93 L Ed 971 (1949).....11

Henderson v State Farm Fire & Cas Co, 460 Mich 348, 353-354, 596 NW2d 190 (1999).....11

Hobby v Farmers Ins Exch, 212 Mich App 100, 104; 537 NW2d 229 (1995).....10

Huron Tool & Engineering Co v Precision Consulting Services, Inc, 209 Mich App 365, 373; 532 NW2d 541 (1995).....7

Kendzierski v Macomb Co, 503 Mich 296, 312; 931 NW2d 604 (2019).....11

Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 414-415, 295 N.W.2d 50 (1980).....7

Madar v League Gen Ins Co, 152 Mich.App. 734, 741–742, 394 NW2d 90 (1986).....11

Paige v Sterling Hts, 476 Mich 495, 524; 720 NW2d 219 (2006).....12

People v Davis, 472 Mich 156, 190; 695 NW2d 45 (2005).....11

People v Worthington, 503 Mich 863; 917 NW2d 397, 398 (2018).....11

Public Service Enterprise Group, Inc v Philadelphia Electric Co, 722 F Supp 184, 201 (D NJ, 1989).....7

Robinson v City of Detroit, 462 Mich 439, 467-468; 613 NW2d 307 (2000).....11

Rory v Continental Ins Co, 473 Mich 457, 461; 703 NW2d 23 (2005).....4, 6

Royal Prop Group, LLC v Prime Ins Syndicate, Inc, 267 Mich App 708, 715; 706 NW2d 426, 432 (2005).....11

State Treasurer v Sprague, 284 Mich App 235, 242; 772 NW2d 452 (2009).....11

Titan v Hyten, 491 Mich 547, 554; 817 NW2d 562 (2012).....5, 6

Velez v Tuma, 492 Mich 1, 16–17; 821 NW2d 432 (2012).....8

Wilkie v Auto-Owners Ins Co, 469 Mich 41, 62; 664 NW2d 776, 787 (2003).....7

Wright v Genesee Co, ___ Mich ___, ___; ___ NW2d ___ (2019), *slip op* at 5 (Docket No. 156579).....7

Statutes

MCL 500.2103(1)(c)..... 6, 11
MCL 500.2118..... 11
MCL 500.3112..... 9
MCL 500.3114(1)..... 4, 10, 11
MCL 500.3173a(4)..... 6
MCL 500.4503..... 5, 11
MCL 500.4503(a)..... 8
MCL 500.4503(b)..... 8
MCL 500.4503(d)..... 8
MCL 500.4503(i)..... 9, 10

Other Authorities

5 Corbin, Contracts, § 1007..... 7

RECEIVED by MSC 10/3/2019 4:10:25 PM

RECEIVED by MSC 10/3/2019 4:10:25 PM

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Insurance Alliance of Michigan ["the Alliance"] is a government affairs and public information association representing most of the property and casualty insurance companies operating in the State of Michigan. Our carriers write more than 75% of the automobile no-fault policies sold in Michigan. Major insurance companies representing thousands of Michigan employees and millions of customers statewide joined forces to create Insurance Alliance of Michigan, which is comprised of two former major statewide organizations, the Insurance Institute of Michigan and the Michigan Insurance Coalition. The Alliance speaks with a single, unified voice on insurance industry issues, and is a respected spokesperson for Michigan's property and casualty insurance industry.

The Alliance has a strong interest in the proper development and maintenance of Michigan automobile no-fault law. This includes as a top priority the proper interpretation and application of legislation affecting such insurance. It also includes the proper interpretation of rules governing insurance policies as a matter of contract law and related common law doctrines that occasionally come into play in disputes between and among insurers, insureds, and health care providers regarding coverage and payment for medical bills arising out of auto accidents. Decisions regarding insurers' rights and obligations relating to the Michigan No-Fault Act can unsettle the industry, upset underwriting and reserves based on past precedent, and render insurance unavailable or more costly to consumers. The Alliance, therefore, regularly files amicus briefs to offer the industry's perspective on important legal issues.

[1] The undersigned certifies that counsel for neither party authored this brief in whole or in part. The undersigned further certifies that no party and no other person or entity other than amicus made a monetary contribution intended to fund the preparation or submission of this brief.

RECEIVED by MSC 10/3/2019 4:10:25 PM

This Court has long recognized that the function of an amicus is to shed additional light on a case, particularly where there is an important public interest. See *City of Grand Rapids v Consumers' Power Co*, 216 Mich 409, 415; 185 NW 852 (1921) ("This court is always desirous of having all the light it may have on the questions before it. In cases involving important public interest leave is generally granted to file a brief as *amicus curiae*… .")

RECEIVED by MSC 10/3/2019 4:10:25 PM

STATEMENT OF FACTS

IAM adopts the statement of facts contained in Meemic Insurance Company's brief on appeal.

STANDARD OF REVIEW

IAM agrees with Meemic Insurance Company, that the standard of review applicable to the interpretation of a statute and applicable to summary disposition rulings is *de novo*.

RECEIVED by MSC 10/3/2019 4:10:25 PM

Law and Analysis

I. The Court of Appeals' Conclusion that MCL 500.3114(1) Mandates Coverage for a Domiciled Relative, and Upon Which the Court Structured Its Analysis, is a Faulty Premise Not Supported by the Language of the Statute Itself.

Contrary to the Court of Appeals' conclusory assertion, a domiciled relative is not "statutorily *entitled*" to coverage under the no-fault act as claimed by the Court of Appeals; nor does MCL 500.3114(1) *mandate* coverage for a resident relative. Relevantly, MCL 500.3114(1) merely states that a no-fault *policy applies* to a domiciled relative:

> [A] personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident.

Thus, nothing in MCL 500.3114(1) would give a domiciled relative or spouse greater rights than the person named in the policy. The spouse or domiciled relative at most has the same rights as the named policyholder. Certainly, MCL 500.3101(1)[2] requires an owner or registrant to maintain PIP coverage. However, this Court has recognized on several occasions that an insurer may rely on common-law defenses to coverage. A no-fault policy is subject to the same contract construction principles applicable to any other type of contract, and unless a policy provision violates the law, the provision must be applied as written. *Rory v Continental Ins Co,* 473 Mich 457, 461; 703 NW2d 23 (2005). "[R]ecognized traditional contract defenses may be used to avoid the enforcement of contract provisions." *Rory, supra*, at 470. "Examples of

---

[2] Prior to 2019 PA 21, MCL 500.3101(1) relevantly stated:

> [T]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance.

After the amendment, the same statute states:

> Except as provided in sections 3107d and 3109a, the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance and property protection insurance as required under this chapter, and residual liability insurance.

RECEIVED by MSC 10/3/2019 4:10:25 PM

traditional defenses include duress, waiver, estoppel, fraud, or unconscionability." *Rory*, at 470 n 23. These defenses may be used unless prohibited by statute. *Titan v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012). Unless clearly prohibited by statute, an insurer may continue to avail itself of any common-law defenses. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 400; 919 NW2d 20, 25 (2018).

There is no statute that prohibits an insurer from voiding a policy based on fraud. In fact, the Legislature has specifically provided that an insurer may refuse to provide coverage when defrauded. The Legislature first defined what constitutes fraud in MCL 500.4503:

> A fraudulent insurance act includes, but is not limited to, acts or omissions committed by any person who knowingly, and with an intent to injure, defraud, or deceive:
>
> * * *
>
> (c) ***Presents*** or causes to be presented to . . . any insurer, ***any . . . statement*** . . . as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, ***knowing that the statement contains false information concerning any fact or thing material to the claim***.
>
> (d) Assists, abets, solicits, or conspires with another to prepare . . . any . . . statement . . . that is intended to be presented to . . . any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false information concerning any fact or thing material to the claim.
>
> * * *
>
> (i) Knowingly and willfully assists, conspires with, or urges any person to fraudulently violate this act, or ***any person who due to that assistance, conspiracy, or urging knowingly and willfully benefits from the proceeds derived from the fraud***.

The Legislature then stated that a person who commits a fraudulent act is not eligible for insurance:

> "Eligible person", for automobile insurance . . . does not include any of the following:
>
> * * *
>
> A person . . . who has been successfully denied, within the immediately preceding 5-year period, payment by an insurer of a claim in excess of $1,000.00

RECEIVED by MSC 10/3/2019 4:10:25 PM

> under an automobile insurance policy, if there is evidence of fraud or intent to defraud involving an insurance claim or application. [MCL 500.2103(1)(c).]

The clear implication of this statutory provision is that for a person to be successfully denied payment on the basis of fraud or intent to defraud, an insurer must be permitted to deny payment on the basis of fraud or intent to defraud. This is confirmed by MCL 500.2118, which states that MCL 500.2103(1) is one of the bases that an insurer may rely on to refuse to insure, refuse to continue to insure, or limit coverage:

> (1) . . . an insurer shall not refuse to insure, refuse to continue to insure, or limit coverage available to an eligible person for automobile insurance, *except in accordance with underwriting rules established pursuant to this section* . . .
>
> (2) The underwriting rules that an insurer may establish for automobile insurance shall be based only on the following:
>
> (a) Criteria identical to the standards set forth in section 2103(1).

While the Legislature was more concise with respect to the Michigan Automobile Insurance Placement Facility's (MAIPF) right to refuse PIP benefits with respect to a fraudulent claim,

> A person who presents . . . a claim to the Michigan automobile insurance placement facility . . . knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 . . . . A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment of personal protection insurance benefits under the assigned claims plan. [MCL 500.3173a(4).]

such precision was necessary because the MAIPF is a creature of statute and not a party to a contract. As previously noted, and to come full circle, a party to a contract may rely on traditional defenses to enforcement of a contract, such as fraud. *Rory, supra,* 473 Mich at 461, 470, 470 n 23; *Titan, supra,* 491 Mich at 554.

The Court of Appeals' attempt to distinguish between fraud pertaining to a claim and fraud in the inducement was clearly erroneous for two reasons.

RECEIVED by MSC 10/3/2019 4:10:25 PM

First, while most cases permitting avoidance of a contract on the basis of fraud pertain to fraud in the inducement, this is because fraud (traditionally considered a tort) committed during the performance of the contract is subsumed in the concept of breach of contract:

> "Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim.... [It] is undergirded by factual allegations identical to those supporting their breach of contract counts.... This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract...." [*Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995), quoting *Public Service Enterprise Group, Inc v Philadelphia Electric Co*, 722 F Supp 184, 201 (D NJ, 1989).]

The remedies for a breach of contract are "'those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made.'" *Wright v Genesee Co*, ___ Mich ___, ___; ___ NW2d ___ (2019), *slip op* at 5 (Docket No. 156579), quoting *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 414-415, 295 N.W.2d 50 (1980), citing 5 Corbin, Contracts, § 1007. Remedies specifically stated in a contract are ones that were clearly within the contemplation of the parties at the time the contract was made. "The rights and duties of parties to a contract are derived from the terms of the agreement." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776, 787 (2003), citing *Evans v Norris,* 6 Mich. 369, 372 (1859). Thus, a contractual provision permitting an insurer to void coverage in the event of fraud by an insured establishes an enforceable remedy.

The second reason it was error to distinguish between fraud regarding a claim and fraud in the inducement is because the Legislature has by legislative enactment decreed that there is no distinguishable difference. A legislative enactment is to be construed in harmony with common law unless in express derogation, and then only in a manner that makes the least change in common law:

RECEIVED by MSC 10/3/2019 4:10:25 PM

> [T]he Legislature is presumed to be aware of the common law when enacting legislation. Our function in construing statutory language is to effectuate the Legislature's intent. Plain and clear language is the best indicator of that intent, and such statutory language must be enforced as written. Further, a statute in derogation of the common law will not be construed to abrogate the common law by implication, but if there is any doubt, the statute is to be given the effect that makes the least change in the common law. [*Velez v Tuma*, 492 Mich 1, 16–17; 821 NW2d 432 (2012) (internal citations omitted).]

To the extent that the common law might have differentiated between fraud in the inducement and fraud in making a claim, the Legislature has, in no uncertain terms, made clear that both constitute a fraudulent act in the no-fault context. Compare for instance MCL 500.4503(a):

> Presents . . . to . . . an insurer . . . any . . . statement knowing that the statement contains any false information concerning any fact material to an *application* . . .

with MCL 500.4503(c):

> Presents . . . to . . . any insurer, any . . . statement . . . in support of, a claim . . . knowing that the statement contains false information concerning any fact or thing material to the *claim*.

And compare MCL 500.4503(b):

> Prepares or assists, abets, solicits, or conspires . . . to . . . make [a] statement that is intended to be presented to or by any insurer in connection with, or in support of, any *application* . . . knowing that the statement contains any false information concerning any fact or thing material to the *application*

with MCL 500.4503(d):

> Assists, abets, solicits, or conspires . . . to . . . make [a] statement . . . that is intended to be presented to or by any insurer in connection with, or in support of, any *claim* . . . knowing that the statement contains any false information concerning any fact or thing material to the *claim*.

Moreover, the Legislature has made clear that someone who knowingly and willfully benefits from such actions has also committed a fraudulent act:

RECEIVED by MSC 10/3/2019 4:10:25 PM

> A fraudulent insurance act includes, but is not limited to, acts or omissions committed by any person who knowingly, and with an intent to injure, defraud, or deceive:
>
> * * *
>
> (i) Knowingly and willfully assists, conspires with, or urges any person to fraudulently violate this act, or any person who due to that assistance, conspiracy, or urging *knowingly and willfully benefits from the proceeds derived from the fraud*. [MCL 500.4503(i).]

Given that Louise and Richard Fortson submitted claims for 24/7 attendant care for 311 days when attendant care clearly was not provided nor could have been provided, the Court of Appeals correctly held that Louise and Richard fraudulently bilked or attempted to bilk, MEEMIC out of $82,104.

However, the Court incorrectly concluded that Justin did not benefit from the proceeds derived from the fraud. This Court made clear in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490, 493 (2017), that any no-fault payments are made on behalf of the injured person: "MCL 500.3112 permits a no-fault insurer to discharge its liability to an injured person by paying a healthcare provider directly, on the injured person's behalf." *Covenant,* at 196. "[A]ccording to the first sentence of MCL 500.3112, PIP benefits, which are paid by the insurer, 'may, can, or must be paid' either (1) to the injured person *or* (2) for the benefit of the injured person." *Covenant*, at 209. While MCL 500.3112 was recently amended by 2019 PA 21 to permit some providers to assert a direct claim of payment for services provided, § 3112 still provides, "Personal protection insurance benefits are payable to or for the benefit of an injured person . . ." Thus, an injured person benefits from the proceeds paid to his or her providers. When these benefits are paid to family members with whom the person lives, and these benefits are derived from their fraudulent claims for services that the person knows were not actually performed, this Court should hold as a matter of law that the person has

RECEIVED by MSC 10/3/2019 4:10:25 PM

committed a fraudulent insurance act under MCL 500.4503(i), by knowingly and willfully benefitting from the proceeds derived from the fraud.

II. Judicial activism harms the jurisprudence of this state and should not be tolerated.

The Court of Appeals panel's circuitous reasoning in the instant case is nearly impossible to follow.

First, the Court disregarded the policy and held that if the son had not been an insured under the policy, he would have been entitled to benefits under MCL 500.3114(1) *because the statute mandates coverage for a resident relative that is domiciled with the policy holder*. (This ignores the fact that the son *was* defined as an insured under the policy. Furthermore, the logic is faulty because, as discussed in Issue I, the Court of Appeals' reasoning would give the son greater rights that those of the named insured). *Slip op* at 5. The Court stated that the son had a statutory right to receive benefits because the parents had a validly procured no-fault policy in place at the time of the motor vehicle accident." *Slip op* at 5.

Second, the Court then inconceivably held that the parents, the named insureds, the policyholders on the policy under which the son claimed benefits, the policy that triggered domiciled relative status coverage under MCL 500.3114(1), *were not insureds at the time they committed fraud*.

How is it even possible for the named insureds on the date of loss to no longer be insureds, yet the son, who obtains his entitlement to benefits only by virtue of the named insureds' policy and status, to still be considered an insured? It is well established that the rights of the parties to a contract or policy become fixed at the time of an accident. "When an insured is involved in an accident, the rights created under the insurance policy become fixed on the date of the accident, and the parties may not retroactively cancel the coverage." *Hobby v Farmers Ins Exch*, 212 Mich App 100, 104; 537 NW2d 229 (1995), citing *Madar v League Gen Ins Co,* 152

RECEIVED by MSC 10/3/2019 4:10:25 PM

Mich.App. 734, 741–742, 394 NW2d 90 (1986), and *Clevenger v Allstate Ins Co,* 443 Mich 646, 656, 505 NW2d 553 (1993). The Court of Appeals' opinion in the instant case is precisely the type of "unrestrained, mistaken use of the power of interpretation [that] wrongly creates a 'judicial veto'" which has been condemned by this Court. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 68 n 55; 921 NW2d 247 (2018).

The harms caused by such activism include: uncertainty whether the plain language of a statute will be enforced, *Robinson v City of Detroit*, 462 Mich 439, 467-468; 613 NW2d 307 (2000), uncertainty whether the plain language of the parties' agreement will be enforced, *Kendzierski v Macomb Co,* 503 Mich 296, 312; 931 NW2d 604 (2019), frequent litigation and re-litigation of once-believed settled doctrines, *People v Davis*, 472 Mich 156, 190; 695 NW2d 45 (2005) *(*Kelly, J.*, Dissenting)*, "surprise" issues raised *sua sponte* by the Court for the first time on appeal, *People v Worthington*, 503 Mich 863; 917 NW2d 397, 398 (2018) (Viviano, J., *Concurring*), and consideration of completely unpreserved issues, *Fountain v Filson,* 336 US 681; 69 S Ct 754; 93 L Ed 971 (1949). Such activism leaves the bench and bar in a state of flux and unrest, being unable to decide cases and unable to advise clients.

In the instant case, the Court of Appeals reasoning contradicted statutes MCL 500.3114(1), MCL 500.4503, MCL 500.2103(1)(c), and MCL 500.2118. It contradicted the terms of the contract itself, as well as authority of this Court holding that contracts are enforced as written. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354, 596 NW2d 190 (1999); *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426, 432 (2005). And the Court disregarded authority from this Court, *Rory, Titan, Bazzi,* under the guise of distinguishing it contrary to concepts of *stare decisis. State Treasurer v Sprague,* 284 Mich App 235, 242; 772 NW2d 452 (2009), quoting *Paige v Sterling Hts,* 476 Mich 495,

RECEIVED by MSC 10/3/2019 4:10:25 PM

524; 720 NW2d 219 (2006) ("[O]nly [the Supreme] Court has the authority to overrule one of its prior decisions. Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it"). Such decision making, untethered by bedrock legal principles, undermines confidence in the judicial system.

CONCLUSION AND RELIEF REQUESTED

Despite finding clear fraud, the Court of Appeals circuitously held that the beneficiary of that fraud was nevertheless entitled to benefits, despite statutes stating otherwise, policy provisions stating otherwise, and holdings from this Court stating otherwise. Such result-oriented reasoning should not be condoned. Reversal of the Court of Appeals opinion is required.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for Amicus Curiae
Insurance Alliance of Michigan

Dated: October 3, 2019 BY */s/ Kimberlee A. Hillock*

Kimberlee A. Hillock (P65647)
333 Albert Avenue, Suite 500
East Lansing, MI 48823
517-351-6200

I:\Team_f\Hillock\129067 Alliance - Meemic v Fortson\Amicus Brief on Appeal\129067amicus.brief 2.doc