

STATE OF MICHIGAN  
IN THE SUPREME COURT

SUPREME COURT NO. 160242

KEITH BRONNER, an individual  
Plaintiff,

COA Docket No. 340930  
WCCC No.: 15-013452-NF

-v-

CITY OF DETROIT, a Municipal Corporation,  
Defendant and Third-Party Plaintiff/Appellant,

-v-

GFL ENVIRONMENTAL USA INC., f/k/a RIZZO ENVIRONMENTAL SERVICES, INC.,  
Third-Party Defendant/Appellee.

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**CITY OF DETROIT'S REPLY BRIEF IN SUPPORT OF ITS  
APPLICATION FOR LEAVE TO APPEAL**

**CERTIFICATE OF SERVICE**

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November 5, 2019

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## INTRODUCTION

This is a case involving very few facts - all of which are uncontested - and clearly defined legal issues. Nevertheless, appellee GFL has filed a 34 page response to the City's 12 page application.

GFL's prolix filing devotes many pages to discussing a straw man argument not being advanced by the City and not before this Court; i.e., whether the City by contract could make GFL the primary no-fault insurer. GFL response, pp. 12 – 17. The City at all times accepted and fulfilled its obligations as Bronner's primary no fault insurer. The City makes no claim that GFL was or should have been the primary insurer; the City's sole claim is for contractual indemnification.

GFL's filing hurls gratuitous insults at the City and its counsel. E.g., page 22, "The only reason why the City sued GFL is because the City is not formally in the insurance business and is presumably not sufficiently familiar with the No Fault Act." When GFL's response (at page 23) finally addresses the City's arguments, GFL simply repeats its unsound positions.

## ARGUMENT

### **1. GFL has offered no meaningful response to the City's arguments.**

The central points of the City's argument, and GFL's responses, are as follows:

#### **A. City's position.** The no-fault act does not purport to prohibit the indemnity

provision at issue here. Under controlling Michigan Supreme Court authority, the City's right to protect itself with an indemnity could only be nullified by an express statutory provision, which is entirely absent. City application, pp. 6 – 8.

**GFL's response.** GFL does not and cannot contest those fundamental principles of law. Nevertheless, GFL continues to argue, without any authority, that the no fault act by implication precludes the City from enforcing its separate indemnity rights (response, p. 25):

“The City suggests that because the No Fault act does not have a specific subsection prohibiting a “contractual indemnification from tortfeasor” option, then this issue becomes a “freedom of contract” issue. However, there is no “common law” entitlement to first party benefits. At common law, a plaintiff would have to sue an at-fault party to recover any damages that would, today, encompass the first-party benefits. The No-Fault statutory scheme changed this, allowing certain economic damages – first-party benefits – to be paid by an insurer as a matter of law without regard to fault. **Because the insurer's obligation arises by statute, “the statute is the ‘rule book for deciding the issues involved in questions regarding awarding those benefits.”** Emphasis added.

Similarly, GFL repeatedly quotes the no fault act's provision which states that the City, as a self-insurer under the act, “has all the obligations and rights of any insurer **under this chapter.**” MCL 500.3101(4), GFL response, p. 13, emphasis added.

What those arguments ignore, and what the lower court ignored, and what GFL ignores throughout its brief, is this dispositive and uncontested fact: **Once the City properly paid Bronner's first party benefits, as it did in this case, the City (i) had discharged its obligations as an insurer under the no fault act and (ii) no**

**longer sought to exercise any rights under the act and was, therefore, free to enforce its separate indemnity rights.**

Once first party benefits have properly been paid, the no fault act is no longer implicated. The City is not subject to any further obligations, nor is the City seeking to exercise any rights, “under this chapter,” i.e., under the no fault act. Rather, the City’s payment of benefits simply represents a liquidated monetary loss. The City has the right to recover that monetary loss under its indemnity contract with GFL. That right is protected by the doctrine of freedom of contract and the City’s home rule powers discussed in the City’s application.

The City’s right to freedom of contract and its constitutional home rule powers cannot be abridged by implication. But the lower court relied only on “negative implication” to void the indemnity provision. Opinion, p. 7. There is no precedent for such a result in Michigan law, and, to the contrary, Michigan expressly forbids the voiding of a lawful municipal contract on such grounds. Likewise, GFL relies only on negative implication, namely, “*expressio unius est exclusion alterius.*” GFL response, p. 18. That doctrine is the embodiment of “negative implication” and adds nothing to the lower court’s erroneous discussion.

Finally, GFL argues the City’s home rule city’s argument is not preserved for appeal because it was not raised before the trial court. GFL response, p. 27, citing *People v Grant*, 445 Mich 535, 546 (1994). But *Grant* contains an express exception

for arguments implicating Constitutional rights. *Grant, supra*, 445 Mich 535, 547. The Michigan Constitution expressly protects the City’s home rule powers, which powers were described by this Court in *City of Detroit v Walker*, 445 Mich 682, 689, 690 (1994):

“The Michigan Constitution provides that “[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.” Const.1963, art. 7, § 34. It also provides that “[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.” Const.1963, art. 7, § 22.

**“Accordingly, it is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance. See Const.1963, art. 7, § 22.”** Emphasis added.

Other principles of law likewise reject GFL’s waiver argument. Appellate courts have the discretion to decide unpreserved issues where the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case. *Providence Hosp. v Nat’l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194–195 (1987). Here, the issue is one of law, there are no disputed facts, and GFL has had a full opportunity to brief the issue. Moreover, the City’s home rule argument is integrally intertwined with the City’s freedom of contract argument – both confirm that the City cannot be

deprived by “implication” of its right to enforce its indemnity contract with GFL.<sup>1</sup>

**B. City position.** The above cited legal principles apply with particular force here, where the indemnification provision does not affect the operation of the no-fault act or payment of benefits thereunder. Application, pp. 8-9.

**GFL response.** The City fully complied with its obligation to timely pay first party benefits and the indemnity provision had no impact whatever on the operation of the no-fault act. GFL offers no response to this critical point.

The only “response” offered is that the no fault act was intended to reduce litigation. GFL response, p. 29. Unfortunately, of course, auto litigation has exponentially increased under no fault. More importantly, GFL never contested its negligence in this case. But for its challenge to the legality of the indemnification provision, there would have been no litigation over the indemnity issue. Contract parties routinely resolve contractual indemnity claims without litigation, and that has nothing to do with the proper functioning of the no fault act.

**2. The City of Detroit’s financial condition and its unique status in the state of Michigan are relevant to this application – both as to whether this Court should hear this case and on the merits.**

The City of Detroit’s financial condition and its unique status in the state,

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<sup>1</sup> The City’s counsel raised this constitutional issue in oral argument before the lower court in response to new arguments in GFL’s reply brief. Ex. 1, excerpt of transcript of argument, pp. 19-20.

which includes operation of the state's largest transportation system, are directly relevant to whether this Court should hear this appeal. See the City's application, pages 1- 4, discussing MCR 7.305(B). Under MCR 7.305(B)(2), for example, this Court considers whether the issue raised "has substantial public interest" and is raised by a municipality. This case precisely fits that Rule.

The City's financial condition and unique status in the state also are relevant to the merits of this appeal. The City has the constitutional home rule right to address its "unique needs" absent an express statutory prohibition to the contrary. *City of Detroit v Walker*, 445 Mich 682, 689, 690 (1994). One of those unique needs is the City's inability to secure insurance and, therefore, its need to require indemnity provisions from its vendors.

GFL cynically argues "if the City wants to protect the taxpayers, it can do what nearly every other individual and entity in Michigan does – secure appropriate insurance." Response, p. 31. But the City of Detroit is not remotely similar to any other "individual or entity in Michigan." The undersigned joined the Duggan administration in January 2014 as deputy corporation counsel. He has, since then, been the City's point person in conducting due diligence as to available insurance and in dealing with the State of Michigan on the City's self-insured status.

The City's annual bus ridership of 25 million, the City's loss history, and the potentially unlimited liabilities imposed by the no fault act for both first and third

party claims, make it impossible for the City to “protect the taxpayers” by purchasing insurance. Potential insurers are not interested in assuming unlimited liabilities. Accordingly, they condition any such insurance on enormous self-insured retentions (“SIRs,” i.e., deductibles), and demand massive premiums for very little incremental coverage over the SIR. Purchase of insurance would itself be a waste of scarce City resources.

As GFL notes, there are municipal risk management pools that are able to secure coverage under the Michigan Catastrophic Claims Act. No such pools will allow the City to join, for obvious reasons, and the City is prohibited from obtaining coverage under the MCCA. In short, GFL’s cavalier suggestion that the City secure insurance is simply not a solution.

The City is in a unique position in the state of Michigan. It is by far the state’s largest City, it operates by far the state’s largest transportation system serving predominately low income residents, and the City recently emerged from the largest municipal bankruptcy in history. Those “unique needs” fully support the City’s home rule and contract right to protect itself via an indemnity contract with its vendors.

GFL points out that the City’s right to enforce the indemnity provision at issue here will not provide protection in other circumstances not involving bus accidents caused by City vendors. That is true. But the City is entitled, and is obligated, to

protect its taxpayers whenever it is feasible and lawful to do so.

### **CONCLUSION AND RELIEF**

GFL's professed concern for the sanctity of the no fault act reflects, of course, its self-interested attempt to avoid its freely negotiated contract obligations. GFL has presented no sound legal or public policy argument in support of its position. The City respectfully requests that the Court grant its application for leave to appeal and reverse the lower's court's decision.

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November 5, 2019

### **CERTIFICATE OF SERVICE**

The undersigned certifies that on November 5, 2019, he arranged for e-filing of the foregoing application and exhibits thereby providing service on all counsel of record.

/s/Charles N. Raimi

**In the Matter Of:**

BRONNER, ET AL. vs CITY OF DETROIT, ET AL.

TRANSCRIPTION

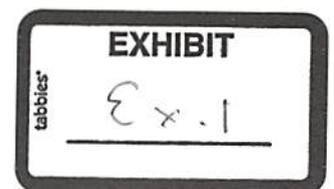
September 17, 2019

*Prepared for you by*



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1 have a -- a company supply the driver and the buses.  
2 Well, then I guess then you're just -- you're just --  
3 THE COURT: Yeah.  
4 THE COURT: -- eliminating the whole --  
5 THE COURT: Yeah.  
6 THE COURT: Yeah.  
7 THE COURT: My situation --  
8 THE COURT: Right.  
9 THE COURT: -- it's your bus and your  
10 vendor driving the bus, you would pay for -- under the  
11 No-Fault Act for the injury, but then you would sue  
12 your vendor through this indemnity agreement for their  
13 negligence. Now, that would -- that would, I think,  
14 change this from being a novel and unique case to  
15 something we would probably see a whole lot more.  
16 MR. RAIMI: Well, you know, I -- you know,  
17 being at the City five years, I know there's no  
18 possible way that could ever happen because the  
19 vendor, you know, obviously, individuals would not be  
20 able to -- the driver wouldn't have the wherewithal  
21 and nobody would have the wherewithal because the City  
22 can't get insurance. But if that was the case, we  
23 would be effectively reinsuring our risk, I guess, at  
24 that point, and again, there would be nothing in the  
25 No-Fault Act that would prohibit that.

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1 THE COURT: So if we rule in your favor,  
2 that would be something that would not be prohibited  
3 under the No-Fault Act?  
4 MR. RAIMI: Yeah, I guess I'd have to, you  
5 know, see it exactly, but again, I really implore the  
6 Court to recognize that this "expressio unius" Latin  
7 phrase is looking at the wrong end of the telescope,  
8 it truly is, because you start from the presumption  
9 that the City retains its common law right to  
10 contract, and unless there's something in the No-Fault  
11 Act that specifically prohibits that, and there is  
12 nothing, then -- then we're entitled to have that  
13 contract.  
14 THE COURT: So if I understand you  
15 correctly, there's nothing in the No-Fault Act that  
16 prohibits reinsurance of PIP benefits?  
17 MR. RAIMI: Reinsurance, or in this case,  
18 an indemnity contract.  
19 THE COURT: Okay.  
20 MR. RAIMI: And I want to -- I want to turn  
21 to another issue because in the reply brief of GFL,  
22 they raise the question of public policy, and your  
23 Honor mentioned increasing litigation. This would not  
24 increase no-fault litigation at all. This -- you  
25 know, contractual indemnity is a separate claim. In

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1 this case, it was brought in the very pending claim  
2 that Mr. Bronner had brought, and, you know,  
3 contractual indemnity claims are brought all the time.  
4 But there is a real public policy issue here. There  
5 is a real, real public policy issue here, and that  
6 public policy is protecting the City's taxpayers from  
7 paying for losses caused by the negligence of a  
8 vendor. That policy is expressly enshrined in  
9 Michigan Statutes and Constitution which protect home  
10 rule cities and give home rule cities the rights, very  
11 broad rights. And in fact, I just want to read this  
12 one sentence from the Michigan Supreme Court's 2016  
13 decision in the Associated Builders case, and again, I  
14 regret this wasn't in our brief because this issue was  
15 raised in the reply brief.  
16 Associated Builders, it's 499 Michigan 177,  
17 footnote 29: "We have held that home ruled Cities  
18 enjoy not only those powers specifically granted, but  
19 they may also exercise all powers not expressly  
20 denied."  
21 So that's saying the very same thing that  
22 we said earlier about the No-Fault Act having to have  
23 something very specific to take away the City's common  
24 law right to obtain indemnity from a -- from a vendor.  
25 So there's two principles that say the very same

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1 thing, and there is nothing in the No-Fault Act that  
2 remotely prohibits what the City has done here. Thank  
3 you.  
4 THE COURT: Okay, thank you. Any rebuttal?  
5 MR. NEWMAN: Yes, your Honor. Your Honor,  
6 just to hit on a couple points that were raised by  
7 brother counsel, the last issue of the public policy  
8 and protecting the taxpayers, I mean, that's something  
9 that the City of Detroit didn't have to be  
10 self-insured, they took steps to become self-insured.  
11 They could have purchased insurance, that's something  
12 that presumably was done as some sort of cost benefit  
13 analysis but actually having the system of being  
14 self-insured is for the benefit of the taxpayers, so I  
15 don't think that's really an overriding issue that the  
16 Court should -- should find in their favor on that  
17 matter, but just talking public policy in general,  
18 if -- if you are to uphold the ruling and rule in  
19 favor of the City of Detroit, it's certainly going to  
20 give an incentive for entities to become self-insured,  
21 even -- but not necessarily municipalities -- but  
22 anybody who owns, I believe, over 25 vehicles can make  
23 an application for that. You could have four GM --  
24 THE COURT: Well, the statute allows them  
25 to do that.