

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.

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

FILED PURSUANT TO SUPREME COURT ORDER DATED JULY 2, 2020

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION PRESENTED

This Court's July 2, 2020 Order directs supplemental briefing on the following question: "[W]hether the Court of Appeals erred in holding that the no-fault insurance act, MCL 500.3101 *et seq.*, precluded the City of Detroit from seeking contractual indemnification from GFL Environmental USA, Inc. for the City's payment of personal protection insurance (PIP) benefits." App 81a.

The City of Detroit answers "yes"

Appellee answers "no"

INTRODUCTION

The freely negotiated indemnification clause at issue here serves an important public purpose; namely, protecting City of Detroit taxpayers from monetary losses caused by the negligence of a major City contractor (GFL). Under this Court's decisions, the indemnification clause could violate the no-fault act and, hence, public policy, **only** if there was a conflict between the clause and the no-fault act. That would occur, for example, if the clause interfered with the City's payment of Bronner's statutorily prescribed no-fault benefits.

The court of appeals opinion confirms that did not occur - nor could it possibly occur because the contract "cannot be interpreted as an attempt to shift GFL into the position of the primary no-fault insurer in this case * * *. App 14a. The City at all times was the primary and sole no-fault insurer and, as such, was liable for (and timely paid) Bronner's no-fault benefits. Because the City's monetary loss was caused by the negligence of GFL's garbage truck driver, the City pursued a separate contractual indemnity claim against GFL. The City's assertion of that separate contract claim does not conflict in any way with the no-fault act, nor is there anything in the act that purports to prohibit such a claim. The court of appeals clearly erred in striking down the indemnity provision.

FACTS

The operative facts in this case are uncontested and are, for the most part,

accurately set forth by the lower court's decision. App 12a. GFL holds a roughly \$50 million dollar contract with the City to collect garbage. App 6a. A GFL garbage truck negligently ran into a City bus and injured plaintiff Bronner. App 12a. The City, being self-insured for no-fault liabilities, paid to Bronner roughly \$100,000 in first party no-fault benefits. Id. The question here is whether the City was entitled to recoup those amounts from GFL under the broad indemnification clause in the parties' contract. App 7a.

One fact needs clarification. The court of appeals states that "When the City refused to pay the no-fault benefits, Bronner initiated a lawsuit." App 12a. That might suggest the City did not pay no-fault benefits until suit was filed.

In fact, following the accident the City's third party administrator voluntarily paid tens of thousands of dollars in first party benefits to Bronner. App 18a-22a, payment history. The administrator only ceased payment when, as so often happens in these cases, there was a dispute as to the reasonableness or necessity of continued treatment. After Bronner filed suit in Wayne County Circuit Court, the City, while negotiating a settlement of Bronner's no-fault claim against the City, separately raised the indemnification issue by filing a third-party complaint against GFL.

The trial court granted summary disposition in favor of the City on its indemnification claim. App 71a-73a. The court of appeals reversed. App. 12a. This Court Ordered supplemental briefing and oral argument on the City's application for

leave to appeal. App 81a.

STANDARD OF REVIEW

This case involves questions of law and statutory interpretation which this Court reviews de novo. *Velez v Tuma*, 492 Mich 1, 11 (2012).

ARGUMENT

I. The lower court erred in striking down the indemnity clause because there is no conflict between enforcement of the clause and the no-fault act.

A. *Cruz v State Farm* controls and permits indemnification.

In *Cruz v State Farm Mut. Auto Ins.*, 466 Mich 588 (2002), Cruz contested the enforceability of a no-fault policy provision. The Opinion's introductory paragraph sets forth the governing rule:

“We granted leave to appeal to consider whether the inclusion of an examination under oath (EUO) provision in an automobile no-fault insurance policy is permitted under the Michigan no-fault insurance act. MCL 500.3101 *et seq.* We hold that EUO provisions may be included in no-fault policies, but are only enforceable to the extent that they do not conflict with the statutory requirements of the no-fault act. Because the insurer in this matter, State Farm Mutual Automobile Insurance Company, impermissibly sought to enforce the EUO as a condition precedent to its duty to pay no-fault benefits, this brought the EUO provision into conflict with the requirements of the no-fault statute. The EUO provision must yield to the statute. Accordingly, the Court of Appeals judgment in favor of plaintiff is affirmed, albeit for different reasons.” 466 Mich 588, 589.

This Court acknowledged that the no-fault act “is a comprehensive legislative enactment designed to regulate the insurance of motor vehicles in this state and the

payment of benefits resulting from accidents involving those motor vehicles.” Id at p. 594, 595. Nevertheless, parties are free to agree to other policy provisions provided they do not conflict with the act: “* * * [W]here contract language is neither ambiguous, nor contrary to the no-fault statute, the will of the parties, as reflected in their agreement, is to be carried out, and thus the contract is enforced as written.” Id at 594. The court of appeals erred when it found that EOUs were precluded in the no-fault context because EOUs “were not mentioned in the act.” Id at p. 598.

This Court also cited the familiar rule that “we are obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute.” Id at p. 599. The Court therefore upheld the inclusion of EOU requirements in no-fault policies, but did not allow their use to negate the act’s prompt payment requirements: “Thus, a no-fault policy that would allow the insurer to avoid its obligation to make prompt payment upon the mere failure to comply with an EUO would run afoul of the statute and accordingly be invalid.” Id.

Here, there is no conflict between the City’s enforcement of the indemnification clause and the no-fault act. There was no basis for the lower court to hold the clause unenforceable.

B. This Court’s caveat in *Universal Underwriters v Kneeland* is not relevant to this case.

Cruz v. State Farm (id at 599) cited with approval *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491 (2001). There, an auto shop loaned Kneeland a vehicle while repairing Kneeland’s vehicle. The loaner agreement made Kneeland responsible for damages to the vehicle while in her possession. Kneeland was in an accident. The auto shop’s insurer, Universal Underwriters, paid damages and sued to recover the payment from Kneeland under the terms of the loaner agreement.

This Court held that Universal was entitled to enforce its contractual right to recover the payment from Kneeland. The Court reasoned that, because collision is not a coverage mandated by the no-fault act, the parties were free to impose that liability on Kneeland:

“Additionally, § 3135 of our no-fault act, M.C.L. § 500.3135, expressly abolishes tort liability arising from the ownership, maintenance, or use of a motor vehicle (with some exceptions). The statutory language does *not* reflect an intent to abolish *contractual* liability for collision damages, an *optional* form of insurance *not required by the no-fault act*. See *Kinnunen, supra* at 639, 341 N.W.2d 167 (“Had the Legislature intended to abrogate contractual liability as well, the words *any* ‘liability arising out of the ownership, maintenance, or use of a motor vehicle’ could easily have been substituted”); *Ben Franklin Ins, supra* at 513, 335 N.W.2d 70 (“**Nothing in the no-fault system relieves a motor vehicle operator of liability which he may have incurred in contract**”).” 464 Mich 491, 500, italics in original, bold emphasis added.

This Court in *Kneeland* explained it was not deciding whether a contract could lawfully shift liability for a mandatory no-fault coverage: “A shift of liability” for

“damages for which no-fault insurance coverage is mandatory * * * might contravene the no-fault act.” Id at 496, citing *State Farm v. Enterprise Leasing*, 452 Mich. 25, 36 (1996). The court of appeals here misconstrued the Court’s caveat in *Kneeland*. After discussing *Kneeland* the court of appeals in this case stated:

“As noted, left unanswered by the *Universal Underwriters* decision is whether parties may contractually seek reimbursement for damages subject to mandatory coverage under the no-fault act. See *id.* We conclude that the text of the no-fault statute provides the only way for shifting the costs of mandatory PIP coverage after payment is made, and because the private indemnification agreement used in this case is not anticipated by the act, it is unenforceable.” App 15a.

The lower court misstated and misapplied the issue left open in *Kneeland*. The court confused (i) a shift of primary liability for a mandatory no-fault coverage – which could violate the no-fault act but did not occur here, with (ii) this case, where the City was at all times primarily liable for Bronner’s benefits and there was no impermissible shift of liability or conflict with the act.

This Court cited *State Farm v. Enterprise Leasing, supra*, in support of the concern expressed in *Kneeland* that a shift of a mandatory no-fault coverage might contravene the no-fault act. In *State Farm*, defendant rental car companies attempted to shift to their lessees primary residual liability coverage – a mandatory no-fault coverage. That contractual provision directly violated the no-fault act which requires “the owner or registrant” of a motor vehicle to provide residual liability coverage. 452 Mich 25, 31-32. “The owner cannot shift that responsibility to another party.”

Id at p. 34. Further, allowing such a shift could result in a complete lack of coverage which “violates the no-fault act.” Id at p. 36.

Nothing in *Kneeland* remotely suggests that its caveat was meant to apply to the situation here. There was no shift of the primary no-fault insurer’s (City’s) obligations and no conflict with the no-fault act. The lower court here expressly acknowledged that “no impermissible shift in priority occurred through the [GFL] contract.” App 14a. The court also stated: “Turning to the present case, for purposes of the no-fault act there is no dispute that the City is a self-insurer, required to pay PIP benefits to Bronner for the injuries he sustained in the accident. The City paid Bronner's no-fault benefits. The dispute concerns GFL's liability.” App 14a.

The City did not “shift” its obligation to pay mandatory no-fault benefits. The City, as primary and sole insurer, paid the required benefits to Bronner. Separate from its no-fault obligations, the City pursued its contractual indemnity claim against GFL. Because there was no “shift in liability” the indemnification clause does not conflict in any way with the no-fault act. Accordingly, under *Cruz* and *Kneeland* the City is entitled to recover under the indemnification clause.

An attempted “shift of liability” might have occurred if the City had refused to pay benefits to Bronner while it litigated the negligence issue with GFL. That did not occur here and the language of the GFL-City contract does not support that position. The lower courts ruled and the City agrees that it was the primary and sole

no-fault insurer and responsible for timely payment of Bronner's no-fault benefits.

C. Because there was no shift of liability and no conflict with the no-fault act, the court of appeals clearly erred in refusing to enforce the indemnity clause.

The lower court does not cite any, and there is no, conflict between the enforcement of the indemnity clause and the no-fault act. The court also concedes "there is no provision [in the no-fault act] expressly prohibiting an insurer from contracting away the cost of its obligation to provide mandatory PIP benefits * * *." App 15a. Under *Cruz*, that should be the end of the discussion.

Nevertheless, the court invalidated the indemnity clause based on the following reasoning: "The no-fault act provides a comprehensive scheme for payment, as well as recovery, of certain "no-fault" benefits, including personal protection insurance benefits. This comprehensive scheme provides limited avenues for insurers, like the City, to recover the costs incurred from paying PIP benefits." App 15a. The court concluded that because the City's indemnification claim was not among those "limited avenues," it was unenforceable:

"* * * "By negative implication of these provisions [the act's "limited avenues" for indemnification], other reimbursement mechanisms are prohibited.* * *." App 16a.

The court's reasoning is directly rejected by *Cruz* and *Kneeland*. Those cases also acknowledge the no-fault act is a "comprehensive statute," but hold there must be an actual conflict between a contract provision and the no-fault act for the contract

to be invalidated. Other relevant Supreme Court cases are discussed in the final section of this brief. Although not involving the no-fault act, those cases confirm that the fundamental common law right of freedom of contract, and the City's Constitutional rights under the home rule cities provisions, can only be impaired in very limited circumstances. No such circumstances are present here. The indemnity contract does not conflict with the no-fault act and cannot be invalidated based on "negative implication."

Finally, the lower court erroneously relied on *City of S Haven v Van Buren Bd of Com'rs*, 478 Mich 518, 528-29 (2007), App 16a:

"Because "[i]t is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers." *City of S. Haven v. Van Buren Co. Bd. of Com'rs*, 478 Mich. 518, 528–29; 734 N.W.2d 533 (2007) (citation omitted). Where a statute gives rights and prescribes remedies, such remedies must be strictly pursued. *Id.* Because the no-fault act does not provide any other vehicle for passing on or recouping costs associated with providing PIP benefits, beyond those associated with the MCCA, the MACP, or exerting a lien on tort recovery, the City is foreclosed from shifting this cost to GFL. If the legislature had desired other cost-shifting procedures, or wants to in the future, it is the legislature's province to create the appropriate statutory mechanism to do so. It is beyond the role of this Court to create such a mechanism by judicial fiat." App 16a.

In *South Haven*, Van Buren County collected road millage proceeds raised under MCL 224.20b. The County used all of the proceeds to repair county roads, in violation of the statute requiring the proceeds to be shared with cities and villages in the county.

South Haven sued for the County's violation of the statute. This Court agreed there had been a violation. The Court, however, denied the requested relief of restitution because the statute did not provide for such relief. Under the statute only the Attorney General was authorized to seek relief. The Court explained: "Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only." *Id* at p. 529.

South Haven is plainly inapposite because the City is not suing to enforce, or for a violation of, the no-fault act. So whatever remedies the no-fault act may or may not provide are irrelevant. The only remedy the City seeks is under its entirely separate contract with GFL. That contractual remedy could be voided only if it were in conflict with the no-fault act, and it is not.

II. Cases in analogous contexts uphold contractual indemnification.

In *Zahn v Kroger Company*, 483 Mich 34 (2009), Zahn was injured while working on a construction project at a Kroger store. Zahn's employer, Cimarron, was a subcontractor on the project to the general contractor Martin. Zahn sued Martin. Martin settled with Zahn and then sued Cimarron, Zahn's employer, for indemnification under the parties subcontract agreement. This Court allowed Martin to recover under the indemnification contract. In doing so, the Court rejected two statutory defenses similar to the defense asserted by GFL here.

In the court below GFL correctly argued that the no-fault act eliminated tort liability for injuries below the specified statutory threshold (death, serious impairment of body function, etc). GFL then erroneously argued it could not be held liable for its negligence in causing Bronner's injuries, because those injuries are exclusively compensable under the no-fault act.

GFL's argument fails under *Cruz* and for the reasons stated above. But it is significant that Cimarron, in *Zahn*, made a substantively identical argument; namely, that Martin's indemnity claim against Cimarron was barred by the exclusive remedy provisions of the workers' compensation disability act. This Court emphatically rejected that argument:

“Finally, we address whether the exclusive remedy provision of the WCDA precludes enforcement of an indemnification contract when the injured party is the employee of the entity being required to pay the indemnification amount. Cimarron suggests that an employer cannot be required to assume liability for a particular type of damages for negligence from which it is otherwise shielded as a matter of law. Although Cimarron cannot be held directly liable for negligence by its own employee by virtue of the WCDA, nothing in contract law precludes an employer from voluntarily assuming liability for negligence through a contractual arrangement. Similarly, nothing in the WCDA precludes parties from entering into such an agreement. Accordingly, we conclude that the contract language controls, and we affirm the judgment of the Court of Appeals.”

Zahn is directly applicable here. Merely because Bronner could not sue GFL for its negligence does not bar the City from obtaining contractual indemnity under the City-GFL contract.

Cimarron also argued the indemnification claim was barred by MCL 600.2956 which abolished joint and several liability. Cimarron claimed “that it cannot be held liable for Martin’s negligence because MCL 600.2956 requires that parties pay only for their pro rata share of liability.” *Id* at p. 38. This Court rejected Cimarron’s argument:

“Here, Cimarron voluntarily entered into an agreement with another business entity. These are business entities with equal bargaining power. The parties came to a mutually acceptable agreement to govern liability for construction site injuries. * * * To adopt the position that MCL 600.2956 renders express contractual indemnification clauses unenforceable would require that we negate the parties’ contract. We find no language in the statute, nor any compelling public policy, that would require us to do so.” *Id* at pp. 38-39.

The court of appeals similarly upheld an indemnity contract in the context of the dramshop act. *Ahmad v Community House Ass’n*, 1998 WL 1992799 (Mich App), copy appended at app 83a. The City cites *Ahmad*, an unpublished decision, because it’s reasoning in upholding an indemnity contract is fully consistent with that employed by this Court in the cases cited above. MCR 7.215(C)(2).

In *Ahmad*, L&L Wine rented the Community House facility to put on a wine tasting event. Cook, an employee of L&L, became intoxicated at the event and later that evening caused a serious auto accident in which Ahmad was injured. Defendant Community House filed a cross-claim for contractual indemnification against L&L.

Because L&L was a wine distributor and not a retailer, it could not be sued under the dramshop act. *Id* at * 3. And L&L argued that the indemnity clause

violated public policy because enforcement of the clause would “abrogate Community House's non-delegable duties under the Dramshop Act.” Id at *1.

In rejecting L&L’s argument, the court first noted:

“* * * although the Dramshop Act clearly permits Community House to seek indemnification from Gary Cook, the alleged intoxicated person, it does not specifically prohibit Community House from seeking indemnification from L & L Wine, Cook's employer and distributor of the intoxicating beverage. * * * Accordingly, the Dramshop Act does not preclude Community House's claim for indemnification under the contract.” Id at *3.

The court then concluded:

“Further, there is no public policy exception here. It is not contrary to this state's public policy for a party to contract against liability for damages caused by its own ordinary negligence. * * * There is no claim or showing that the contract was unfairly or unknowingly made, or in any other way invalid. * * * Because the indemnity clause is clear and unambiguous, the trial court properly found that its interpretation was a question of law for the court to decide. * * * The indemnity clause is not invalid as against public policy nor is it precluded by the Dramshop Act.” Id at *3, citations omitted.

The cases cited above allow contractual indemnity even where the party seeking indemnification may itself be guilty of negligence. In this case, GFL was solely responsible for the monetary loss in question.

III. The City’s right to enforce the indemnity contract is supported by compelling public policy considerations.

A. Freedom of contract.

Freedom of contract is, of course, a fundamental right under common law. This Court has repeatedly emphasized that common law rights can be impaired only

in limited circumstances: “Statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law.” *Koenig v City of S Haven*, 460 Mich 667, 678 fn 3 (1999), emphasis added. When the meaning of a statute is unclear, it is to be “given the effect which makes the least rather than the most change in the common law.” *Id.* See also *Velez v Tuma*, 492 Mich 1, 11 (2012), (Court held the Legislature did not abrogate common-law setoff rule and stated “[T]he Legislature ‘should speak in no uncertain terms’ when it exercises its authority to modify the common law.”)

Likewise, in *DeFrain v State Farm*, 491 Mich 359 (2012), the Court rejected a challenge to an insurance contract provision that shortened the time frame in which notice of a hit-and-run accident had to be provided. This Court explained that “the right to contract freely” sharply limited the Judiciaries ability to interfere with unambiguous contract provisions. *Id* at p. 372. The Court also held: “The circumstances under which a contract provision can be said to violate law or public policy are likewise narrow.” *Id* at 372, 373 (2012).

The uncontested facts here present compelling reasons to uphold the right of the City and GFL to contract for the indemnity clause at issue – even beyond the dispositive fact that the contract does not conflict with the no-fault act. There can be no question that the clause was freely negotiated between parties of equal bargaining power. The indemnity provision is supported by enormous consideration - the

garbage collection contract pays GFL \$50 million over the contract term. App 6a. Finally, public policy supports imposing liability on the negligent party (GFL) which is in the best position to adopt policies to avoid such accidents in the future.

B. Michigan Constitution's home rule cities provisions.

In *Associated Builders v City of Lansing*, 499 Mich 177 (2016), this Court addressed the Constitution's home rule cities' provisions. Const. 1963, art. 7, §§ 22 and 34. The Court upheld Lansing's ability to require contractors performing municipal contracts to pay laborers prevailing wages and benefits. "We have held that 'home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied.'" *Id*, fn 29, (also observing that home rule allows cities to consider their "unique needs"). In response to plaintiff's argument that such wages implicated matters of state concern, this Court responded: "If a municipality has broad powers over local concerns, it certainly has the power to set terms for the contracts it enters into with third parties for its own municipal projects * * *." *Id* at p. 187-188.

The City of Detroit operates by far and away the largest public transit system in the state. App 2a (roughly 25 million riders per year pre-COVID). Pursuant to the no-fault act, the City acts as no-fault insurer for many of those passengers if they sustain injuries within the scope of the act. The City also is subject to third party claims in certain cases of negligent operation of a City vehicle. Due to the enormous

number of first and third party claims to which the City is subject, and the catastrophic nature of some of those, the City, despite exhaustive due diligence, has not been able to purchase insurance that provides meaningful coverage. The City self-insures its vehicle liabilities with the approval of the State regulators.

The City has many responsibilities (public safety, blight remediation etc) but limited financial resources. The City must be fiscally responsible by, *inter alia*, protecting its taxpayers from losses resulting from a negligent vendor. The City has done that here by the indemnity contract. That important municipal power cannot be abrogated except by an express statutory provision - which is entirely absent here.

CONCLUSION AND RELIEF

The City respectfully requests that the Court grant its application for leave to appeal, reverse the court of appeals decision on the indemnification issue and affirm the trial court's decision on that issue.

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August 12, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that on August 12, 2020, he arranged for e-filing of the foregoing application and exhibits thereby providing service on all counsel of record.

/s/Charles N. Raimi