

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

KEITH BRONNER,

Plaintiff,

MSC Docket No. 160242
Court of Appeals Docket 340930

and

ANGELS WITH WINGS TRANSPORT, LLC,

Intervening-Plaintiff,

Lower Court Case No.: 15-013452-NF

- v -

CITY OF DETROIT, a Municipal Corporation,

Defendant,

and

CITY OF DETROIT, a Municipal Corporation,

Third-Party Plaintiff/Appellant,

- v -

GFL ENVIRONMENTAL USA INC., F/K/A
RIZZO ENVIRONMENTAL SERVICES INC.,

Third-Party Defendant/Appellee.

**SUPPLEMENTAL BRIEF ON BEHALF OF GFL ENVIRONMENTAL USA INC., F/K/A
RIZZO ENVIRONMENTAL SERVICES INC**

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION PRESENTED

WHETHER THE MICHIGAN 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 GLF ENVIRONMENTAL USA, INC., FOR THE CITY'S PAYMENT OF PERSONAL PROTECTION INSURANCE (PPI) BENEFITS?

The City/Appellee will answer: Yes

GFL/Appellant answers: No

The trial court would answer: Yes

The Michigan Court of Appeals answered: No

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

The instant matter is a no-fault action for personal protection insurance benefits (i.e. first-party benefits) from an automobile accident where Plaintiff Keith Bronner alleges he sustained accidental injury while a passenger aboard a bus owned and operated by the Defendant City of Detroit (“City of Detroit”), when it was struck by a vehicle operated by GFL Environmental USA Inc., F/K/A Rizzo Environmental Services Inc. (“GFL” or “Defendant”). This Court must appreciate that the City of Detroit—for purposes of this litigation—was not acting as a municipality, but was instead acting as a self-insured. As a self-insured, the City of Detroit converted its status into an insurer—with the same rights and obligations of an insurance company. No insurance company in Michigan can obtain the indemnification for first-party benefits sought by the City of Detroit in this matter. As a self-insured, the City of Detroit cannot either. GFL respectfully requests that this Honorable Court rule that the Michigan Court of Appeals did not err in holding that the City of Detroit could not obtain indemnification for the first-party benefit liability that it voluntarily chose to incur,. This Court can and should either affirm the trial court’s ruling or deny the application for leave to appeal.

Statement of Facts

GFL will only address a few factual issues that were not covered or underdeveloped in the City of Detroit’s brief.

First, and perhaps most importantly, the City of Detroit is not merely a municipality. It is beyond dispute that the City of Detroit voluntarily chose to self-insure its vehicles (Supplemental Brief, 2, quoting Appendix 12a). As a matter of law, the City of Detroit’s status as a self-insurer is statutorily controlled:

(4) Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved on a highway. **The person filing the security has all the obligations and rights of an insurer under this chapter.** When the context permits, “insurer” as used in this chapter, includes a person that files the security as provided in this section. [MCL 500.3101(4); emphasis added.]

The City of Detroit, by having filed the security under MCL 500.3101(4), was certainly allowed to self-insure. However, by doing so, the City of Detroit incurred all the rights of an insurer, but also incurred all of the obligations of an insurer. *Id.* Although the City of Detroit presents itself as merely a municipality, it is more appropriate to deem it “City of Detroit Insurance Company.” Otherwise, by self-insuring, a party can avail itself of the rights and benefits of an insurance company, without assuming the obligations of and limitations imposed on an insurance company.

Second, from a procedural and preservation issue, the City of Detroit did not brief the “home rule” issue in the trial court or in its Brief on Appeal filed in the Michigan Court of Appeals. Generally, an issue is “abandoned” on appeal if it is insufficiently briefed.” *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). The failure to brief this issue before the Michigan Court of Appeals issued its opinion should preclude its consideration as a basis for error by the Michigan Court of Appeals. Moreover, given that the trial court never considered this issue, it is not even preserved. An appellate court “need not address an issue that is raised for the first time on appeal because it is not properly preserved for appellate review.” *Dep't of Environmental Quality v Morley*, 314 Mich App 306, 318; 885 NW2d 892 (2015). The City of Detroit’s attempt to assert error based on a theory briefed for the first time in its motion for reconsideration in the Michigan Court of Appeals must be rejected.

Finally, the City of Detroit overstates its promptness when paying first-party benefits to Mr. Bronner. Mr. Bronner had to sue the City of Detroit to obtain a significant portion of his

benefits. The lawsuit was filed in October 2015. Appendix 87a. In late Fall 2016, the City of Detroit was still arguing that it was able to shift liability for PIP benefits to GFL—both in terms of shifting priority (which it eventually abandoned) and post-payment indemnification (still at issue). The City of Detroit did not settle its claims with Mr. Bronner until early 2017, resulting in a \$47,500.00 payment in 2017. Thus, almost half of the payments to Mr. Bronner were made after 15 months of litigation. The inescapable conclusion is that the mere ability of the City of Detroit to craft these arguments resulted in more than one year of delay in Mr. Bronner being paid his first-party benefits.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE NO-FAULT INSURANCE ACT, MCL 500.3101 et seq, PRECLUDED THE CITY OF DETROIT FROM SEEKING CONTRACTUAL INDEMNIFICATION FROM GLF ENVIRONMENTAL USA, INC., FOR THE CITY’S PAYMENT OF PERSONAL PROTECTION INSURANCE (PPI) BENEFITS.

As noted above, the City of Detroit seeks to have the perfect world, where it can be a municipality for purposes of entering into contracts and an insurer with respect to its obligation to provide security for its owned vehicles, and then choose which proverbial “hat” to wear when it comes to litigation. The City of Detroit cannot and will not cite any case law that allows an insurance company to obtain indemnification from a third-party for its first-party benefit obligation. The Michigan Legislature was clear in providing specific, but limited, sources of indemnification for insurers with a first-party benefit obligation. As would be the case with any other insurer or self-insurer, the City of Detroit cannot obtain indemnification via its own fortuitous contract provisions. This Court can and should conclude that the City of Detroit was not entitled to contractual indemnification from GFL for this loss, and either affirm the Court of Appeals or deny the City of Detroit’s application for leave to appeal.

a. The City of Detroit, as a Self-Insurer With the Rights and Obligations of an Insurer Under No-Fault Law, Cannot Contract Away or Obtain Extra-Statutory Indemnification From a Third-Party for PIP Obligations

As the Michigan Court of Appeals recognized, the No Fault Act is a “comprehensive” statutory scheme. See also *Citizens Ins Co of Am v Buck*, 216 Mich App 217, 223; 548 NW2d 680, 684 (1996). As part of this comprehensive statutory scheme, liability arising from the ownership, maintenance, or use of a motor vehicle was abolished by the Michigan No-Fault Act. MCL § 500.3135(3).¹ Where there remains any liability, it is only because the Legislature expressly provided for same. Thus, unless the Legislature expressly provided a method of recovery, neither the City of Detroit nor GFL could be liable for claimed damages arising out of an automobile accident.

Fortunately for many injured by automobile accidents, the Legislature did provide methods of recovery of certain damages caused by many vehicle accidents. As part of the comprehensive scheme, the Legislature deviated from the common law and divided potential damages into two categories: (a) those damages that are recoverable as first-party benefits; and (b) those damages recovered as part of a third-party action against the potentially at-fault driver of the accident. This Court has recognized the distinction between first-party benefits and third-party claims under the No Fault Act:

[W]e recognize that claims for first-party no-fault benefits and third-party tort benefits are qualitatively distinct in nature . . . an application for first-party insurance benefits recoverable without regard to fault cannot be equated with a claim for at-fault tort liability. **First-party benefits under the no-fault act are creations of, and thus only available pursuant to, statutory law.** And SMART's insurer is required to pay no-fault personal protection insurance benefits to individuals injured in accidents involving their buses. A person who proves his

¹ The Legislature amended the No Fault Act in 2019. Neither party has argued that the amendments are retroactive. Accordingly, all statutory references in this brief, unless otherwise stated, refer to the pre-amendment version of the No Fault Act that was applicable at the time of the summary disposition ruling below.

entitlement to first-party benefits has proved none of the elements that would entitle him to tort damages. A third-party tort claim is distinct from a claim for first-party benefits because a third-party tort claim involves an adversarial process in which the plaintiff must prove fault in order to recover. [*Atkins, supra* at 718; emphasis added.]

Indeed, as it relates to the first-party benefits at issue in this case, these first-party benefits are due and owed by an insurer and without regard to fault. MCL 500.3105(2)(“Personal protection insurance benefits are due under this chapter without regard to fault.”).

In other words, as a general rule, no individual or entity will ever be liable for PIP benefits. Instead, PIP benefits are only owed by insurers. In fact, prior to amendments of the No Fault Act in 2019, an out-of-state insurer could take advantage of the No Fault Act protections by filing a certificate with the State. See MCL 500.3163 (pre-Amendment). The out-of-state insurer could decline to file the certificate and, therefore, decline to have the protections and obligations of the No Fault Act at its own peril. But it was an option that only applied to insurers. No foreign entity could file the certificate.

Here, the status quo for the City of Detroit was that it would never be liable for PIP benefits. All the City of Detroit had to do was pay premiums for insurance. Instead of doing so, the City of Detroit chose, voluntarily, to assume future liability for paying PIP benefits by self-insuring. While the City suggests that premiums were expensive, this is a reality that is shared by many other individuals and entities. At its core, the City voluntarily chose to self-insure.

This is not to suggest that the City of Detroit improperly or inappropriately self-insured. The No Fault Act statutory scheme expressly allows for self-insurance:

(4) Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved on a highway. **The person filing the security has all the obligations and rights of an insurer under this chapter.** When the context

permits, “insurer” as used in this chapter, includes a person that files the security as provided in this section. [MCL 500.3101(4); emphasis added.]

Thus, the City of Detroit, by having filed the security under MCL 500.3101(4), was certainly allowed to self-insure. However, by doing so, the City of Detroit incurred all the rights of an insurer, but it also incurred all of the obligations of an insurer. *Id.* Indeed, once the City of Detroit self-insured, it was as if the City of Detroit also became City of Detroit Insurance Company.

If this Court is not willing to recognize that the City of Detroit became—for purposes of its first-party benefit obligations—a de facto insurer, then the City of Detroit is able to avoid the plain language of MCL 500.3101(4) obligating the City of Detroit to incur the rights, but also the obligations, of an insurer. The Legislature’s clear intent in MCL 500.3101(4) was for self-insurers to have the same rights and obligations as insurers. And one of those obligations of an insurer under Michigan law is to pay PIP benefits with no ability to obtain contractual indemnification. The City of Detroit did not, because it cannot, cite any authority where an insurer obtained contractual indemnification for its first-party benefit obligations. If the City of Detroit is successful in this venture, then it has the advantages (rights) of being an insurer, without all of the obligations (reduced rights) of being an insurer. This is contrary to the plain language of MCL 500.3101(4).

Moreover, the Legislature was not “silent” on the issue of indemnification; instead, the Legislature “spoke” regarding indemnification under its No Fault Act scheme by creating one, and only one, method of indemnification. Where first-party benefits will exceed a certain statutory amount, the Michigan Catastrophic Claims Association (“MCCA”) will indemnify the insurer out of a pool created by various insurer participants. MCL 500.3114(2). MCL 500.3114 does not authorize an insurer to obtain indemnification from any other source, much less a source that is not financed by another automobile insurer. Importantly, the Legislature provided one, and did

not provide any other, method by which an insurer could be indemnified for paying first-party benefits. The Legislature, despite enacting Legislation that expressly covered indemnification, did not provide any method by which an insurer could be indemnified by contract.

The Legislature also provided for recoupment from certain tortfeasors. MCL 500.3116. Again, however, this statutory provision did not contemplate contractual indemnification as a method of recoupment from an at-fault tortfeasor. The Legislature provided multiple methods for insurers to obtain reimbursement, but did not expressly provided for contractual indemnification as a permissible option. The Legislature's express dictate to allow one form of indemnification and other forms of reimbursement is controlling under the doctrine of *expressio unius est exclusio alterius*. *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74-75; 711 NW2d 340 (2006). MCL 500.3114 and MCL 500.3116 do not support allowing an insurer to be indemnified by any entity other than the MCCA or any other recoupment method for at-fault tortfeasors. This Court must conclude that the Legislature did not intend for contractual indemnification from an at-fault tortfeasor.

And there is a policy reason for this limited indemnification. By requiring an insurer to be indemnified only by the MCCA, this ensures that first-party benefits are paid by either (a) vehicle insurers who are in a position to pass this expense along via premiums or (b) self-insurers who are saving money by not paying premiums based on the cost of premiums in the marketplace. In other words, to the extent that any self-insurer's benefit obligations exceed the cost of premiums, then the self-insured has the incentive to start paying those premiums. To the extent that any self-insurer's benefit obligations do not exceed the cost of premiums, then it makes sense for the self-insured to continue to self-insure and not pay the premiums. But, in all circumstances, there is a clear, unmistakable nexus between the payment of first-party benefits and premiums for same.

This allows the automobile insurance universe to spread the risk and align first-party premiums with first-party benefits paid.

If the City of Detroit is successful in obtaining indemnification from its vendors, such as GFL, the source of that payment will either be (a) party without insurance to cover the contractual obligation assumed; or (b) a CGL policy that provides liability for contractual obligations. And, in most circumstances the entity owing indemnification will be the entity with the lesser bargaining power. An entity with the bargaining power of the City of Detroit will foist others to pay for its own decision to obtain the benefit of self-insuring (no premiums) without the obligation of insuring (no contractual indemnification). Regardless, even if bargaining power was not a concern, allowing insurers and self-insurers to obtain contractual indemnification for first-party benefits will force first-party benefits to move outside the contained universe of benefits paid/premiums. This is contrary to the plain policy of the No Fault Act.

If allowed in this Court, the first incentive would be for the City of Detroit to find new ways to contract with drivers. For example, the City of Detroit could impose a toll system with automatic payment by card (as is common in many states to assist cities with road cost expenditures). For example, the State of Illinois operates I-Pass for traveling on toll roads, most often within Chicago. See <https://www.getipass.com/terms-and-conditions-i-pass>. There is also a website, <https://thetollroads.com/accounts/compare>, that offers different plans for tolls. The terms and conditions require indemnification in certain circumstances.² It would not be much of a leap to add in an even broader indemnification clause to simply provide for “any and all liability” indemnification. A similar result could be obtained via tolls for certain bridges or the use of the City of Detroit parking system. But even if the City of Detroit never expands its contractual reach

² https://thetollroads.com/sites/default/files/pdf/License_agreements.pdf

in this method, there are still many, many vendors beyond GFL that are subject to the same or similar contract terms.

Moreover, if the City of Detroit is successful in obtaining contractual indemnification, it will only embolden insurers to consider whether they, too, may creatively obtain contractual indemnification. After all, if a quasi-insurer such as the City of Detroit can obtain contractual indemnification, there is no reason why an ordinary insurer could not do so also. Again, there is no precedent for allowing insurers to do so—but this Court is being invited to begin the creation of such precedent in this very case.

And this is not merely a hypothetical concern. As just one example, every insurer could write policies that obligate its insureds to indemnify the insurer where it is involved in an accident with another insured for that same insurer and owes PIP benefits. See e.g. *Hackett v Bonta*, 113 NC App 89, 94; 437 SE2d 687 (1993)(both drivers insured by State Farm); *Darlow v Farmers Ins Exch*, 822 P2d 820, 821 (Wy, 1991)(both drivers insured by Farmers Insurance Exchange); *Heigis v Cepeda*, 71 Wash App 626, 628; 862 P2d 129 (1993) (both drivers insured by State Farm). In what are called “double-insured” cases, an insurance company could fortuitously contract with its insureds to require indemnification. If so, a number of Michigan individuals and entities could be exposed to the same liability that GFL now faces.

If this Court is not inclined to believe it appropriate for insurers to obtain contractual indemnification, the question that begs is why this Court would deem it appropriate for a self-insured to obtain contractual indemnification. The sole reason for the indemnification in this matter is the fortuitous combination of a garbage collection contract with the City of Detroit’s operation of a self-insured bus system. This is what happens when courts travel the edge of the proverbial slippery slope of rewriting a statutory scheme contrary to Legislative intent. Had the

Legislature intended for contractual indemnification by insurers or self-insurers, it would have said so within its provisions that do provide for a measure of indemnification or recoupment. The Legislature did not so indicate and there are significant policy reasons to support same.³ This Court can and should reject this attempt by the City of Detroit to avoid the import of the statutory language and the Legislative intent.

b. The City of Detroit's Error Analysis is Not Controlling or Persuasive

The City of Detroit argues that the Michigan Court of Appeals erroneously relied on several cases, and offers alternative cases to support its contention of error. Importantly, the City of Detroit does not cite a single case where an insurer or self-insurer obtained contractual indemnification for the mandatory PIP benefits at issue. The cases that the City of Detroit do cite are not controlling, distinguishable, and lacking persuasiveness. This Court should either deny the City of Detroit's application or affirm the result.

As noted above, the City of Detroit begins by analyzing the cases cited by the Court of Appeals, such as *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 598; 648 NW2d 591 (2002)(Supplemental Brief, 3-4). Nowhere in *Cruz* does it expressly support an insurer or self-insurer being able to obtain contractual indemnification. Instead, the *Cruz* matter involved an issue of whether an insurer could include a policy provision regarding examinations under oath (EUO). *Cruz, supra* at 597. The Michigan Court of Appeals in *Cruz* ruled that these were barred because they were not expressly authorized by the No Fault Act. *Id.* at 598. In reversing, this Court opined as follows:

³ Moreover, the Legislature just substantially amended the No Fault Act. This was another opportunity for the Legislature to consider adding additional methods of indemnification, recoupment, and subrogation. Despite the broad amendments, the Legislature did not create any new right for contractual indemnification.

In our judgment, the Court was in error. EUOs, or other discovery methods that the parties have contracted to use, are only precluded when they clash with the rules the Legislature has established for such mandatory insurance policies. However, when used to facilitate the goals of the act and when they are harmonious with the Legislature's no-fault insurance regime, EUOs in the no-fault context should be viewed no differently than in other types of policies. **In light of this reasoning, we conclude that an EUO that contravenes the requirements of the no-fault act by imposing some greater obligation upon one or another of the parties is, to that extent, invalid. 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.** However, an EUO provision designed only to ensure that the insurer is provided with information relating to proof of the fact and of the amount of the loss sustained--i.e., the statutorily required information on the part of the insured--would not run afoul of the statute. [*Id.*; emphasis added.]

In other words, the *Cruz* majority recognized that the mere failure of the No Fault Act to discuss EUO's did not involve a blanket prohibition against their use. However, the emphasized language also recognized that if the inclusion of policy provisions regarding EUOs had changed the nature of the obligations of the parties, it would be invalid.

Here, the City misreads the *Cruz* decision. Under the No Fault Act, the only entities that pay first-party benefits are insurers and self-insurers. Entities that are not insurers and not self-insured are never deemed to have any obligation relative to first-party benefits. It was the Legislature's choice to decide who must pay first-party benefits and it did so. The *Cruz* Court certainly recognized that, notwithstanding its ruling, any attempt to change the rights of the parties would be contrary to this Legislative intent. Here, the City of Detroit seeks to avoid having a greater benefit from self-insuring than just avoiding premiums—by having its payment reimbursed via indemnification. GFL, a potential tortfeasor that should not have to indemnify an insurer because MCL 500.3116 is inapplicable, is having its rights impaired. Mr. Bronner's recovery was delayed more than one year why the City of Detroit has tried to use contractual bargaining to avoid its statutory obligations expressly imposed by the Legislature. With all this impact on the parties'

rights and obligations, the *Cruz* majority would readily agree that such attempts would be “invalid.”

Moreover, the Legislature was absolutely not silent on the issue of indemnification, as is the case with EUOs. In addition to indemnification by the MCCA, the Legislature provided other methods for recoupment and subrogation. See MCL 500.3114; MCL 500.3116. Although the Legislature could have included contractual indemnification as a possible method for insurers to be reimbursed for PIP benefit expenditures, the Legislature expressly declined to do so. Inasmuch as the Legislature was not “silent,” the Legislature “spoke” and the doctrine of *expressio unius est exclusio alterius* mandates a conclusion that the Legislature did not intend for contractual indemnification for PIP benefit obligations. *Hoerstman, supra*. For all these reasons, the *Cruz* decision supports GFL’s position and certainly does not support a contention of error.

Next, the City shifts to attacking the law cited by the Michigan Court of Appeals, such as *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491; 628 NW2d 491 (2001)(Supplemental Brief, 5-7). The Court of Appeals specifically opined as follows regarding this Court’s *Universal Underwriters* decision:

Presuming that the parties intended to enter into a valid and enforceable agreement, the Court concluded that the parties only intended to shift liability for collision damages, an optional form of coverage under the no-fault act. *Id.* at 496-499. Emphasizing that collision coverage was an optional form of coverage, the Court concluded that allocating responsibility for collision coverage was purely a matter of contract that did not violate the no-fault act. *Id.* 500. Indeed, the holding in *Universal Underwriters* specifically recognized that a contractual allocation of responsibility for collision damages is not void under the no-fault act because “[t]he 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.” *Id.*

The Court acknowledged the limitations of its holding in a footnote, emphasizing that its holding was “limited to contract claims for collision damages” and offering “no view regarding the legality of a contract purporting to shift liability for other categories of damages.” *Id.* Elsewhere, citing *State Farm Mut Auto Ins Co*, 452

Mich at 36, the *Universal Underwriters* Court suggested that a “shift of liability” that “could reach damages for which no-fault insurance coverage is mandatory . . . might contravene the no-fault act.” *Universal Underwriters Ins Co*, 464 Mich at 496-497. But, the Court did not decide whether a contractual shift reaching beyond optional collision coverage was illegal; instead, the Court simply noted that the “argument is available” for future cases. *Id.* at 496 n 3.

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. [Attachment 1, *supra* at 6.]

The Court of Appeals reasonably and correctly observed that the No Fault Act statutory scheme was comprehensive by design. *Id.* at 6-7. Where, as here, the No Fault Act provides specific remedies for an insurer to obtain recoupment, these statutory remedies “represent the only way permitted by the no-fault act for shifting costs after PIP benefits have been paid to the injured party.” *Id.* at 7. Applying the “whole text” statutory construction canon, the Court of Appeals opined as follows: “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.” *Id.* at 7-8.

Contrary to the City of Detroit’s contention, the Court of Appeals’ ruling was entirely correct. The Legislature set out to enact a comprehensive statutory scheme to cover the rights and obligations of numerous participants in the No Fault Act system. The Legislature crafted a statutory scheme where insurers and self-insurers of vehicles incurred liability for certain types of damages falling into the category of first-party benefits. The Legislature included certain, specific methods for such an insurer or self-insurer to obtain reimbursement for the payment of first-party benefits. See e.g, MCL 500.3114, MCL 500.3116. The City of Detroit paid mandatory first-party benefits, but cannot satisfy any of the statutory subsections applicable to being reimbursed for or

recouping those benefits. Although the Legislature *could have* provided for contractual indemnification as one of those methods, it did not do so. If the Legislature chooses to do so in light of circumstances presented in this case, then it is certainly free to do so in the future. But it is plainly apparent that the Legislature has not yet seen fit to include contractual indemnification, especially from an allegedly at-fault party, as a method of recoupment or reimbursement. Thus, the Court of Appeals correctly construed the No Fault Act as a whole to preclude the City of Detroit pursuit of indemnification in this matter.

Moreover, the City's concern regarding "shifting liability" is not borne out by the Michigan Court of Appeals decision. The City suggests that the Court of Appeals confused the issue of shifting liability before a PIP payment was made with shifting liability with after a PIP payment was made (City of Detroit's Supplemental Brief, 6). However, it is the City of Detroit that is confused, as the language quoted by the City of Detroit even recognizes that the issue involved post-payment shifting of costs: "the text of the no-fault statute provides the only way for shifting the costs of mandatory PIP coverage after payment is made . . ." (*Id.*, quoting Court of Appeals decision; emphasis added). The Court of Appeals simply recognized that, just as insurers are only given limited avenues for obtaining recoupment of benefits paid, self-insurers are bound by the same limited avenues. By holding the City of Detroit to the same standard as insurers, the Court of Appeals faithfully applied MCL 500.3101(4), which requires that self-insurers operate with the same rights and obligations as insurers.

In addition, the City of Detroit simply fails to honor the principle recognized in *Universal Underwriters* and other decisions, namely, that there is a distinction between the rights and obligations applicable to the statutorily-created and mandatory first-party benefits mandated and other forms of insurance coverage (such as "collision" damages) that are not mandated by the

Legislature. Perhaps recognizing that it should not rule on an issue that could later be deemed obiter dictum, the *Universal Underwriters* Court left the issue open for a future court to consider. The Court of Appeals in this matter did so, reaching the correct ruling that where the Legislature has spoken to mandate that insurers pay first-party benefits with minimal post-payment options of reimbursement, insurers (and self-insurers) are limited to those expressly enumerated methods of reimbursement.

GFL further observes that the City of Detroit's effort to have GFL pay Mr. Bronner or indemnify GFL resulted in substantial delays to Mr. Bronner, which is undoubtedly part of the reason why the Legislature took specific steps to minimize the potential for any first-party litigation. Here, Mr. Bronner filed his lawsuit against the City of Detroit in October 2015. Appendix 87a. In late Fall 2016, the City of Detroit was still arguing that it was able to shift liability for first-party benefits to GFL—both in terms of shifting priority (which it eventually abandoned) and post-payment indemnification (still at issue). The City of Detroit did not settle its claims with Mr. Bronner until early 2017. Thus, the mere ability of the City of Detroit to craft these arguments resulted in nearly 18 months of additional delay for Mr. Bronner.⁴ This self-serving delay by the City of Detroit is contrary to both the letter and spirit of the No Fault Act, which intended for the prompt payment of the mandatory first-party benefits.

The City of Detroit also reiterates its position that there is no conflict between the No Fault statutory scheme for first-party benefits and contractual indemnification (Supplemental brief, 7-8). Again, MCL 500.3114 and MCL 500.3116 provide the methods upon which an insurer paying

⁴ Again, allowing contractual indemnification from purported tortfeasors would certainly defeat one of the primary purposes of the No Fault Act—reducing litigation. *Kern v Blethen-Coluni*, 240 Mich App 333, 339; 612 NW2d 838 (2000). Although Mr. Bronner was finally paid, this litigation continues.

first-party benefits can obtain reimbursement from another entity, including at-fault parties. Indemnification can only come from the MCCA. And, inasmuch as the Legislature provided a method where an insurer could recoup its benefit payments from certain at-fault parties, this necessarily excludes all other methods upon which an insurer can recoup its benefit payments for certain at-fault parties. If the Legislature had intended unlimited or unrestricted contractual indemnification, there would have been no need to specify the methods upon which an insurer could obtain indemnification or recoupment. Indeed, inasmuch as the *Universal Underwriters* Court certainly did not feel comfortable concluding that mandatory first-party benefits could also be the subject of indemnification, the decision certainly supports the Court of Appeals' decision to confirm indemnification was limited to those insurance coverages that were not expressly mandated by the Legislature.

Next, the City of Detroit contends that the Court of Appeals erroneously relied on *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 528; 734 NW2d 533 (2007), as supporting authority (Supplemental Brief, 9-10). The *South Haven* decision is clear in setting forth that where a statutory scheme provides the remedies, no other remedies are allowed. In *South Haven*, the issue was whether a party could recover via common law restitution—a legal cause of action no less tenable than a common law breach of contract cause of action. This Court ruled that where a statutory scheme provides the remedies, those are the only remedies that may be obtained. *Id.*

Here, the No Fault Act imposed a new statutory obligation for insurers (and self-insurers). Relative to that obligation, the Legislature created specific methods for which such insures (and self-insurers) could be reimbursed, indemnified, or otherwise allowed to recoup the cost of paying those benefits. The Legislature provided the remedies. Had it not provided any remedies, the

Legislature would have left open the potential for an insure to obtain reimbursement, indemnification, or recoupment via all common law methods. Obviously, the Legislature does not need to authorize individuals and entities to rely on the common law⁵. However, by specifying certain methods, the Legislature indicated its intent to expressly narrow the reimbursement options down to just those expressly authorized. At least for the mandatory benefits created by the Legislature, the Legislature was free to limit those remedies and did so. The City of Detroit cannot contract around the limits imposed by the Legislature. The Court of Appeals certainly did not err in relying on the *South Haven* case.

Next, the City of Detroit also asserts that other general indemnification cases support its position (Supplemental Brief, 10-13). For example, the City of Detroit contends that *Zahn v Kroger Co*, 483 Mich 34, 36; 764 NW2d 207 (2009), support its position that it may obtain indemnification from GFL. The City of Detroit's argument is misplaced.

In *Zahn*, the primary argument was that the abolition of joint and several liability via tort reform precluded a contractual indemnification cause of action. Specifically, the party alleged to owe indemnity contended that MCL 600.2956 precluded one potentially at-fault party from obtaining indemnification from another potentially at-fault party. MCL 600.2956 simply provides as follows: "Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee." Nowhere in MCL 600.2956 does it purport to address the rights and obligations of any party with respect to

⁵ Moreover, this is not a statutory scheme where the Legislature indicated any intent to leave open common law remedies.

any specific cause of action. Instead, MCL 600.2956, as well as the related provision MCL 600.6304, merely determine the procedure and fault apportionment principles applicable in common law tort claims. The *Zahn* Court properly concluded that fault apportionment in a common law cause of action does not impact the broader indemnification rights that generally accompany that common law cause of action. The *Zahn* case is factually and legally distinguishable.

The *Zahn* matter also involved consideration of MCL 418.131(1), the exclusive remedy provisions of the Workers Disability Compensation Act (“WDCA”). The exclusive remedy provision, by its own terms, only impacted who (and how) an injured employee could sue his employer (or employers). Moreover, nowhere did the WDCA, much less the exclusive remedy provision, purport to dictate the circumstances upon which a defendant could be reimbursed from its losses. In the absence of a provision allowing indemnification or reimbursement in certain circumstances, there was no basis to argue that the Legislature had any intent relative to indemnification and reimbursement.

In addition, the WDCA continued to control the liability of a party directly. Under the WDCA, every employer is able to, at least in theory, obtain insurance for its WDCA liabilities. This is indemnification, and more specifically contractual indemnification. Further, if the WDCA has provisions regarding permissible indemnification and reimbursement, they were never cited in *Zahn*. Instead, the *Zahn* panel only considered whether the exclusive remedy provisions precluded indemnification, which it rather plainly does not. Frankly, the two theories raised in *Zahn* to oppose contractual indemnification were of little facial merit.

Here, in contrast, the No Fault Statutory scheme eliminated tort liability and then imposed statutory liability onto insurers. The City of Detroit did not owe a common law liability to Mr.

Bronner. The City of Detroit's liability was entirely via the statutory scheme created by the Legislature. Within the statutory scheme that created this new obligation, the Legislature provided limited methods upon which an insurer (or self-insurer) could be reimbursed for this new liability. And, despite providing for methods of indemnification and reimbursement from at-fault parties, it did not include a method for contractual indemnification. If the Legislature had intended for global common law indemnification, it would not have had to specify any methods for indemnification, recoupment, and reimbursement. Because it did, the Legislature demonstrated its clear intent to limit the scope of those measures to what it expressly provided. Under the doctrine of *expressio unius est exclusio alterius*, this Court must conclude that the Legislature did not intend for contractual indemnification. *Hoerstman, supra*. Unlike *Zahn*, precluding contractual indemnification is a faithful application of the plain statutory language.

The City of Detroit also cites the unpublished case of *Ahmad v Community House Association*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 200413, issued 5/12/88)(Supplemental Brief, 12-13). Needless to say, as an unpublished decision construing a different statutory scheme on vastly different facts, this case can and should be disregarded.

Indeed, the *Ahmad* case involved the potential liability following a wine tasting event. As part of the contract to allow an entity to supply wine for tasting (L&L Wine), that entity agreed to indemnify the host location (Community House Association) for damages. An employee of the L&L Wine supplying wine became inebriated at the event and was involved in a vehicle accident. The injured plaintiff sued Community House Association under the Dramshop Act, who sought indemnification from L&L Wine. The only two arguments raised were (a) that the contract did not require indemnification; and (b) that the indemnification was contrary to public policy. L&L

wine never raised the issue of statutory construction and *expressio unius est exclusio alterius* that GFL raises in this case. Accordingly, the City of Detroit's reliance on this case is misplaced.

Instead, as set forth above, the Michigan Court of Appeals properly concluded that where, as here, the Legislature creates a statutory scheme with a new obligation for a party, and provides the circumstances where that party may be reimbursed, the party is limited to those enumerated methods of reimbursement as a matter of law. The Court of Appeals properly ruled.

Next, the City of Detroit contends that the Court of Appeals erred in disregarding its freedom to contract (Supplemental Brief, 13-15). GFL does not quarrel with the general principle of freedom of contract. However, as the Court of Appeals expressly recognized, the freedom of contract does not extend to statutory conflict. Court of Appeals decision, quoting *State Farm Mut Automobile Ins Co v Ruuska*, 412 Mich 321, 336; 314 NW2d 184 (1982). Indeed, in *State Farm*, this Court expressly recognized that the statutory enactments must prevail over contrary contract language. *Id.*

Here, the Legislature has expressly created insurer-liability in the No Fault Act and allowed such insurers only limited measures for indemnification, recoupment, and reimbursement. See MCL 500.3114; MCL 500.3116. If an insurer were to seek indemnification for its first-party benefits, this Court would have to reject same under the doctrine of *expressio unius est exclusio alterius*. If an insurer would seek recoupment or reimbursement from an at-fault party, this Court would reject same. The City of Detroit chose to step into the shoes of such an insurer by self-insuring and is bound by the same statutory restrictions. Inasmuch as the Legislature has spoken on this issue, the City of Detroit cannot contract to avoid the statutory scheme. As the Michigan Court of Appeals properly recognized, the freedom of contract is not without proper limits, as in the unique facts of this case.

Finally, the City of Detroit contends that, as a home rule city with a dire financial situation, this Court should allow it to be indemnified in this case. First, the home rule city argument was never raised in the trial court and was not briefed in the Michigan Court of Appeals until the motion for rehearing/reconsideration. Generally, an issue is “abandoned” on appeal if it is insufficiently brief.” *Dresden, supra*. Here, the issue was not even briefed until after the Court of Appeals issued its ruling. Moreover, given that the trial court never considered this issue, it is not even preserved. An appellate court “need not address an issue that is raised for the first time on appeal because it is not properly preserved for appellate review.” *Morley, supra*. There is certainly no basis for this Court to consider this issue to conclude that the Michigan Court of Appeals somehow erred.

Even so, the issue is not whether the City of Detroit has the freedom to contract. The issue is whether this freedom to contract is allowed to run contrary to Legislative intent in a statutory scheme. To the extent that the City of Detroit has unquestioned freedom of contract, it is subject to the same restrictions on freedom of contract that any other individual or entity is. Thus, the “home rule” issue is a proverbial red herring.

And, as it relates to the City of Detroit’s dire financial situation, this is not a basis to avoid ordinary statutory construction. The law does not change based on the particulars of any particular party. Instead, “justice” is, or should be, “blind” relative to those particulars. Of course, the City of Detroit has sufficient assets to permit self-insuring. And it chose to assume the risk that it is more beneficial to self-insure than pay premiums. Had the City of Detroit chosen to pay premiums, its insurer would have paid Mr. Bronner. Insurance is how those with more modest assets are able to protect those modest assets from litigation costs and damages. The City of Detroit calculated that it would benefit from not paying the premiums and self-insuring. This Court need not bend

the statutory scheme to allow the City of Detroit to avoid the consequences of a voluntary choice that it would not allow any other individual or entity to obtain. In sum, all of the authority and analysis supplied by the City of Detroit is unavailing, and this Court should either affirm the Michigan Court of Appeals' decision to deny the application for leave to appeal.

c. Conclusion

The No Fault Act is a comprehensive statutory scheme that provides for only limited circumstances where an insurer paying mandatory, first-party benefits may obtain reimbursement for those benefits. Those limited circumstances do not include contractual indemnification. As a self-insurer, the City of Detroit can gain no more than any other insurer under the No Fault Act. The Michigan Court of Appeals properly concluded that the City of Detroit was prohibited from obtaining indemnification from GFL for its decision to operate a municipal bus system, but then self-insure those vehicles. The Michigan Court of Appeals properly reversed the trial court's ruling granting the City of Detroit's motion for summary disposition and denying GFL's motion for summary disposition. This Court should either affirm the Court of Appeals or deny the City of Detroit's application for leave to appeal.

CONCLUSION AND REQUEST FOR RELIEF

For all these reasons, GFL respectfully requests that this Honorable Court deny the City of Detroit's application for leave to appeal.

Respectfully submitted,

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Dated: September 2, 2020

PROOF OF SERVICE

I, Remington J. Greenbauer, hereby certify that a copy of this **SUPPLEMENTAL BRIEF ON BEHALF OF GFL ENVIRONMENTAL USA INC., F/K/A RIZZO ENVIRONMENTAL SERVICES INC** and this proof of service were served upon the attorneys of record of all parties to the above cause by e-filing mail on September 2, 2020:

Charles N. Raimi (P29746)
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I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge and belief.

/s/ Remington J. Greenbauer
Remington J. Greenbauer, Legal Assistant