STATE OF MICHIGAN
IN THE COURT OF APPEALS

ELLEN M. ANDARY, a legally incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., PHILIP KRUEGER, a legally incapacitated adult, by and through his Guardian, RONALD KRUEGER & MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan corporation,

Plaintiffs-Appellants,

v

USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan corporation,

Defendants-Appellees.
______________________________________/

Court of Appeals No. 356487

Ingham Circuit Court No. 19-738-CZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

MOTION TO FILE AMICUS CURIAE BRIEF OF THE DIRECTOR OF THE MICHIGAN DEPARMENT OF INSURANCE AND FINANCIAL SERVICES

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General
Counsel of Record

Assistant Attorney General
Attorneys for Amicus Director of DIFS
Corporate Oversight Division

Dated: August 16, 2021

RECEIVED by MCOA 8/16/2021 5:08:45 PM

Anita G. Fox, Director of the Michigan Department of Insurance and Financial Services (the DIFS Director), by and through her attorneys, Dana Nessel, Attorney General, and [redacted], Assistant Attorney General, moves pursuant to MCR 7.212(H) for leave to file an amicus curiae brief in this case pending before the Court. In support of this motion, the DIFS Director states as follows:

1. The DIFS Director has an express interest in this case because she exercises comprehensive regulatory authority over the insurance industry in this State, including Michigan's no-fault automobile insurance system provided for in Chapter 31 of the Insurance Code.

2. Pursuant to MCL 500.200, the DIFS Director is the administrator of the "distinct state department which shall be especially charged with the execution of the laws in relation to insurance and surety business" and with performing "such other duties as may be required by law."

3. To effectuate the purposes of the Insurance Code and to execute and enforce the provisions of Michigan's insurance laws, MCL 500.210 further authorizes the DIFS Director to "promulgate rules and regulations in addition to those now specifically provided for by statute" as she deems necessary.

4. Based on her authority as Michigan's insurance regulator, the DIFS Director requests to be heard on the important issues raised by this case.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

WHEREFORE, for the reasons stated above, the DIFS Director respectfully requests this Court to grant her motion for leave to file an amicus curiae brief in this case, and to accept her amicus curiae brief filed together with this motion.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General
Counsel of Record

Assistant Attorney General
Attorneys for Amicus Director of DIFS
Corporate Oversight Division

Dated: August 16, 2021

RECEIVED by MCOA 8/16/2021 5:08:45 PM

STATE OF MICHIGAN
IN THE COURT OF APPEALS

ELLEN M. ANDARY, a legally incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., PHILIP KRUEGER, a legally incapacitated adult, by and through his Guardian, RONALD KRUEGER & MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan corporation,

Plaintiffs-Appellants,

v

USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan corporation,

Defendants-Appellees.

______________________________________/

Court of Appeals No. 356487

Ingham Circuit Court No. 19-738-CZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

AMICUS CURIAE BRIEF OF THE DIRECTOR OF THE MICHIGAN DEPARMENT OF INSURANCE AND FINANCIAL SERVICES

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General
Counsel of Record

Assistant Attorney General
Attorneys for Amicus Director of DIFS
Corporate Oversight Division

Dated: August 16, 2021

RECEIVED by MCOA 8/16/2021 5:08:45 PM

TABLE OF CONTENTS

Page

Index of Authorities ii

Statement of Jurisdiction iv

Counter-Statement of Questions Presented v

Constitutional Provisions and Statutes Involved vii

Introduction 1

Counter-Statement of Facts and Proceedings 2

Standard of Review 2

Argument 2

I. The lower court properly determined that the No-Fault amendments at issue do not violate the Contract Clause 2

II. The No-Fault amendments at issue do not operate retroactively. Alternatively, even if this Court determines that the amendments operate retroactively, there is a clear expression of Legislative intent supporting such retroactive application 7

III. The lower court properly determined that the No-Fault amendments at issue do not infringe on any fundamental or constitutional right. 10

IV. The lower court properly determined that Plaintiffs lack standing to vindicate the supposed constitutional rights of non-party individuals injured in automobile accidents and non-party medical providers that treat these injured individuals. 13

V. The lower court did not abuse its discretion by denying Plaintiffs' request to amend their complaint or motion for reconsideration. 14

Conclusion and Relief Requested 16

RECEIVED by MCOA 8/16/2021 5:08:45 PM

INDEX OF AUTHORITIES

Page

Cases

Allied Structural Steel Co v Spannaus,
438 US 234, 244 (1978) 3

Bronson Health Care Group, Inc v State Auto Property & Cas Ins Co,
330 Mich App 338 (2019) 4

Buhl v City of Oak Park,
___ Mich ___, 2021 Mich LEXIS 1042 at *8 (June 9, 2021) 8

Cleary v Turning Point,
203 Mich App 208 (1993) 2

Darman v Twp of Clinton,
269 Mich App 638 (2006) 14

Fieger v Commissioner of Ins,
174 Mich App 467 (1988) 13

Long v Liquor Control Commission,
322 Mich App 60 (2017) 2

Maiden v Rozwood,
461 Mich 109 (1999) 2

Mays v Snyder,
323 Mich App, 1 (2018) 11

O'Bannon v Town Court Nursing Ctr,
447 US 773 (1980) 10

O'Donnell v State Farm Mut Auto Ins Co,
404 Mich 524 (1979) 12

People v Jensen,
231 Mich App 439 (1998) 10

Proudfoot v State Farm Mut Ins Co,
469 Mich 476 (2003) 8

PT Today, Inc v Comm'r of the Office of Fin & Ins Servs,
270 Mich App 110 (2006) 15

RECEIVED by MCOA 8/16/2021 5:08:45 PM

Rogers v Little Rock, Arkansas,
152 F3d 790 (CA 8, 1988) 11

Romein v General Motors Corp,
436 Mich 515 (1990) 3

Rookledge v Garwood,
340 Mich 444 (1954) 4, 5

Shavers v Kelley,
402 Mich 554 (1978) 5, 12

Van Buren Charter Twp v Garter Belt Inc,
258 Mich App 594 (2003) 4

Woods v SLB Property Management, LLC,
277 Mich App 622 (2008) 2

Statutes

MCL 500.2111f(8) 9

MCL 500.3107(1)(a) 3, 6

MCL 500.3110(4) 8

MCL 500.3157 .... 7, 9

MCL 500.3157(10) 6, 7

MCL 500.3157(11) 12

MCL 500.3157(2) and (7) 6, 7

MCL 500.3157(2) to (12) 9

Rules

MCR 2.116(C)(8) 1, 2

MCR 2.119(F) 14

MCR 2.605(A)(1) 14

RECEIVED by MCOA 8/16/2021 5:08:45 PM

STATEMENT OF JURISDICTION

Amicus Curiae, the Director of the Michigan Department of Insurance and Financial Services (the DIFS Director), concurs with Plaintiffs-Appellants' (Plaintiffs') Statement of Jurisdiction.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the lower court properly determine that the No-Fault amendments at issue do not violate the Contract Clause?

   Defendants-Appellees' answer: Yes.

   Trial court's answer: Yes.

   DIFS Director's answer: Yes.

   Plaintiffs-Appellants' answer: No.

2. Do the No-Fault amendments at issue operate retroactively?

   Defendants-Appellees' answer: No.

   Trial court's answer: Did not answer.

   DIFS Director's answer: No.

   Plaintiffs-Appellants' answer: Yes.

3. Did the lower court properly determine that the No-Fault amendments at issue do not infringe on any fundamental or constitutional right?

   Defendants-Appellees' answer: Yes.

   Trial court's answer: Yes.

   DIFS Director's answer: Yes.

   Plaintiffs-Appellants' answer: No.

4. Did the lower court properly determine that Plaintiffs lack standing to vindicate the constitutional rights of non-party individuals injured in automobile accidents and non-party medical providers that treat these injured individuals?

   Defendants-Appellees' answer: Yes.

   Trial court's answer: Yes.

   DIFS Director's answer: Yes.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

Plaintiffs-Appellants' answer: No.

5. Did the lower court abuse its discretion by denying Plaintiffs' request to amend their complaint or motion for reconsideration?

   Defendants-Appellees' answer: No.

   Trial court's answer: No.

   DIFS Director's answer: No.

   Plaintiffs-Appellants' answer: Yes.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, art 1, § 2

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Const 1963, art 1, § 10

> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.

Const 1963, art 1, § 17

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MCL 500.2111f(8)

> (8) An insurer shall pass on, in filings to which this section applies, savings realized from the application of section 3157(2) to (12) to treatment, products, services, accommodations, or training rendered to individuals who suffered accidental bodily injury from motor vehicle accidents that occurred before July 2, 2021. An insurer shall provide the director with all documents and information requested by the director that the director determines are necessary to allow the director to evaluate the insurer's compliance with this subsection. After July 1, 2022, the director shall review all rate filings to which this section applies for compliance with this subsection.

MCL 500.3157

> (1) Subject to subsections (2) to (14), a physician, hospital, clinic, or other person that lawfully renders treatment to an injured person for an accidental bodily injury covered by personal protection insurance, or a person that provides rehabilitative occupational training following the injury, may charge a reasonable amount for the treatment or training. The charge must not exceed the amount the person customarily charges for like treatment or training in cases that do not involve insurance.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

(2) Subject to subsections (3) to (14), a physician, hospital, clinic, or other person that renders treatment or rehabilitative occupational training to an injured person for an accidental bodily injury covered by personal protection insurance is not eligible for payment or reimbursement under this chapter for more than the following:

> (a) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 200% of the amount payable to the person for the treatment or training under Medicare.
>
> (b) For treatment or training rendered after July 1, 2022 and before July 2, 2023, 195% of the amount payable to the person for the treatment or training under Medicare.
>
> (c) For treatment or training rendered after July 1, 2023, 190% of the amount payable to the person for the treatment or training under Medicare.

* * *

(7) If Medicare does not provide an amount payable for a treatment or rehabilitative occupational training under subsection (2), (3), (5), or (6), the physician, hospital, clinic, or other person that renders the treatment or training is not eligible for payment or reimbursement under this chapter of more than the following, as applicable:

> (a) For a person to which subsection (2) applies, the applicable following percentage of the amount payable for the treatment or training under the person's charge description master in effect on January 1, 2019 or, if the person did not have a charge description master on that date, the applicable following percentage of the average amount the person charged for the treatment on January 1, 2019:
>
> > (i) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 55%.
> > (ii) For treatment or training rendered after July 1, 2022 and before July 2, 2023, 54%.
> > (iii) For treatment or training rendered after July 1, 2023, 52.5%.
>
> (b) For a person to which subsection (3) applies, the applicable following percentage of the amount payable for the treatment or training under the person's charge description master in effect on January 1, 2019 or, if the person did not have a charge description

RECEIVED by MCOA 8/16/2021 5:08:45 PM

master on that date, the applicable following percentage of the average amount the person charged for the treatment or training on January 1, 2019:

(i) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 70%.
(ii) For treatment or training rendered after July 1, 2022 and before July 2, 2023, 68%.
(iii) For treatment or training rendered after July 1, 2023, 66.5%.

(c) For a person to which subsection (5) applies, 78% of the amount payable for the treatment or training under the person's charge description master in effect on January 1, 2019 or, if the person did not have a charge description master on that date, 78% of the average amount the person charged for the treatment on January 1, 2019.

(d) For a person to which subsection (6) applies, the applicable following percentage of the amount payable for the treatment under the person's charge description master in effect on January 1, 2019 or, if the person did not have a charge description master on that date, the applicable following percentage of the average amount the person charged for the treatment on January 1, 2019:

(i) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 75%.
(ii) For treatment or training rendered after July 1, 2022 and before July 2, 2023, 73%.
(iii) For treatment or training rendered after July 1, 2023, 71%.

* * *

(10) For attendant care rendered in the injured person's home, an insurer is only required to pay benefits for attendant care up to the hourly limitation in section 315 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.315. This subsection only applies if the attendant care is provided directly, or indirectly through another person, by any of the following:

(a) An individual who is related to the injured person.

(b) An individual who is domiciled in the household of the injured person.

(c) An individual with whom the injured person had a business or social relationship before the injury.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

INTRODUCTION

Bipartisan amendments to Michigan's No-Fault Act were enacted in 2019 to reduce and contain the high cost of automobile insurance in Michigan. While Plaintiffs may have chosen a different path to lower automobile insurance premiums, the State of Michigan (State) acted well within its authority in enacting the amendments at issue. Accordingly, the lower court's decision to dismiss Plaintiffs' complaint under MCR 2.116(C)(8) should be affirmed.

First, Plaintiffs' contractual claims fail because their right to medical and attendant care are governed by the No-Fault Act, as opposed to their auto insurance policies, and because the State had a rational basis for enacting the challenged amendments that imposed a fee schedule on certain medical care and optional hourly limitations on family-provided attendant care. Second, the amendments to the No-Fault Act apply prospectively, not retroactively, to PIP benefit services rendered after July 1, 2021, that are subject to the amendments' fee schedule and optional hourly limitations on family-provided attendant care. Third, the amendments at issue do not result in the infringement of any fundamental right and, therefore, withstand constitutional scrutiny. Fourth, and finally, Plaintiffs lack standing with respect to any constitutional rights of non-party individuals injured in automobile accidents and non-party medical providers that treat these injured individuals.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The DIFS Director adopts the Counter-Statement of Facts and Proceedings contained in Defendants-Appellees' Brief on Appeal.

STANDARD OF REVIEW

The lower court dismissed Plaintiffs' complaint under MCR 2.116(C)(8), which this Court reviews *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118 (1999).

Following dismissal of their complaint, Plaintiffs moved to amend their complaint and for reconsideration; the lower court denied both motions on February 18, 2021. This Court reviews for an abuse of discretion a lower court's denial of a motion to amend a complaint, *Long v Liquor Control Commission*, 322 Mich App 60, 67 (2017), and also reviews for an abuse of discretion the denial of a motion for reconsideration. *Woods v SLB Property Management, LLC*, 277 Mich App 622, 629 (2008). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Cleary v Turning Point*, 203 Mich App 208, 210 (1993).

ARGUMENT

I. The lower court properly determined that the No-Fault amendments at issue do not violate the Contract Clause.

As identified by the lower court, the Michigan Supreme Court in *Romein v General Motors Corp* adopted a three-pronged test to determine whether a legislative enactment violates the Contract Clause:

RECEIVED by MCOA 8/16/2021 5:08:45 PM

> The first prong is to determine "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."
>
> * * *
>
> To the extent, if any, that contractual interests are impaired, the second prong of the Contract Clause test requires that there be a legitimate public purpose for the regulation. This requirement guarantees that rather than merely providing a benefit to special interests, the state is validly exercising its police power.
>
> * * *
>
> The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted.

Romein v General Motors Corp, 436 Mich 515, 534-36 (1990) (citing *Allied Structural Steel Co v Spannaus*, 438 US 234, 244 (1978)). The lower court properly applied this test to conclude that the challenged No-Fault amendments do not violate the Contract Clause, and this Court should therefore affirm the lower court's dismissal of Plaintiffs' Contract Clause claims.

As an initial matter, the No-Fault amendments did not change what PIP benefits the Plaintiffs are entitled to, and they remain entitled to "reasonably necessary products, services, and accommodations for [their] care, recovery, or rehabilitation." MCL 500.3107(1)(a). The amendments only changed how much PIP medical providers are paid and provided insurers with options on who can provide required attendant care in excess of 56 hours per week. Because Plaintiffs remain entitled to the same "reasonably necessary" PIP benefits to which they were entitled before the amendments, there has been no "substantial impairment" of their PIP benefits, which in any event are not contractual benefits.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

Under the first prong of the test as to whether there has been a "substantial impairment of a contractual relationship," it is pivotal to recognize that PIP benefits are a creature of statute:

> PIP benefits are mandated by the no-fault act, and a claimant's entitlement to PIP benefits is therefore based in statute, not in contract. Because [PIP] benefits are mandated by the no-fault statute, the statute is the "rule-book" for deciding the issues in questions regarding awarding those benefits. Therefore, our task is to interpret the statute and not the policy. Where insurance policy coverage is directed by the no-fault act and the language in the policy is intended to be consistent with that act, the language should be interpreted in a consistent fashion, which can only be accomplished by interpreting the statute, rather than individual policies.

Bronson Health Care Group, Inc v State Auto Property & Cas Ins Co, 330 Mich App 338, 342-43 (2019) (citations and quotation marks omitted). Accordingly, PIP benefits that are mandatory under the No-Fault Act are conferred by statute, not by the Plaintiffs' insurance contracts, and thus there can be no "substantial impairment of a contractual relationship" when the Legislature amends the Act to change those benefits.

Moreover, it is well-settled Michigan law that there can be no vested right in the continuation of existing statutory benefits, because the Legislature is always entitled to revoke or change those benefits. *See Rookledge v Garwood*, 340 Mich 444, 457 (1954) ("And it is the general rule that that which the legislature gives, it may take away. . . . There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal."); *Van Buren Charter Twp v Garter Belt Inc*, 258 Mich App 594, 633 (2003) ("[N]o one has a vested right to the continuation of an existing law by precluding the amendment or repeal of the

RECEIVED by MCOA 8/16/2021 5:08:45 PM

law[.]") (citing *Rookledge*). Thus, Plaintiffs have no legitimate, vested right or expectation that their statutory PIP benefits would never change. Consequently, the No-Fault amendments do not impair any contractual rights. Because there has been no "substantial impairment of a contractual relationship" under the first prong of the Contract Clause test, the lower court's dismissal of Plaintiffs' Contract Clause claims should be affirmed.

Plaintiffs' Contract Clause claims likewise fail under the second prong of the test, which only requires that the challenged legislation serves a "legitimate public purpose." Here, the State's interest in these No-Fault amendments is apparent, as they are mechanisms designed to address the affordability and accessibility of mandatory automobile insurance and to deter fraudulent practices that unduly increase the price of automobile insurance in Michigan. Significantly, as the lower court noted (11/13/20 Order Regarding Defendants' Motion to Dismiss, pp 8-9), the Michigan Supreme Court has previously held that the original No-Fault Act was a valid exercise of the State's police power that served a legitimate public purpose because it was designed to make automobile insurance more available and affordable. *Shavers v Kelley,* 402 Mich 554, 596 (1978). The Legislature reasonably acted for the public good in amending the No-Fault Act to deal with long-standing and widespread concerns about the high price of automobile insurance, which made automobile insurance less accessible to all Michigan drivers. The No-Fault amendments at issue, therefore, serve a legitimate public purpose, justifying the lower court's dismissal of Plaintiffs' Contract Clause claims.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

The last prong of the Contract Clause test considers the means chosen by the Legislature to adjust the contracting parties' rights and responsibilities. As set forth above, because Plaintiffs' entitlement to PIP benefits is statutory rather than contractual, the No-Fault amendments at issue do not impact anyone's contractual rights. Neither do the amendments change Plaintiffs' entitlement to all "reasonably necessary products, services, and accommodations for [their] care, recovery, or rehabilitation." MCL 500.3107(1)(a). Moreover, even assuming some alteration of Plaintiffs' contractual rights, the means chosen by the Legislature to provide Michigan drivers with more affordable and accessible automobile insurance are reasonably related to achieving these goals. Specifically, MCL 500.3157(2) and (7) now provide a fee schedule that defines "reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). The Legislature rationally believed that this fee schedule would reduce one key component of the cost of automobile insurance—medical bills—making this insurance more affordable and accessible to Michigan drivers. Similarly, MCL 500.3157(10) provides optional hourly limitations on family-provided attendant care, directly addressing the legitimate public purpose of eliminating potential fraud and abuse in this area that increased the cost of automobile insurance and lessened its accessibility. Accordingly, these challenged No-Fault amendments reasonably relate to the legitimate public purpose they were designed to combat. For this additional reason,

RECEIVED by MCOA 8/16/2021 5:08:45 PM

this Court should affirm the lower court's dismissal of Plaintiffs' Contract Clause claims.

II. The No-Fault amendments at issue do not operate retroactively. Alternatively, even if this Court determines that the amendments operate retroactively, there is a clear expression of Legislative intent supporting such retroactive application.

Plaintiffs contend that the No-Fault amendments at issue operate "retroactively," because the fee schedule and optional limits on family-provided attendant care apply to PIP claims of people who were injured in automobile accidents and/or whose insurance policies were issued before the amendments took effect on July 2, 2021. But this is not really retroactive application of the amendments. On the contrary, the amendments apply only to PIP benefits that accrue on or after the amendments' effective date of July 2, 2021. Therefore, the amendments' application is prospective, not retroactive.

First, under the plain terms of MCL 500.3157, the challenged amendments (MCL 500.3157(2), (7), and (10)) apply to "treatment or training rendered after July 1, 2021" to an "injured person for an accidental bodily injury covered by personal protection insurance." Thus, the amendments' fee schedule and optional limits on family-provided attendant care apply only going forward as PIP benefit services are rendered on or after July 2, 2021. Conversely, the amendments have absolutely no impact on PIP covered benefit services rendered on or before July 1, 2021, and these claims are payable by insurers under the No-Fault Act as it existed prior to the amendments.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

Second, the fact that these amendments operate prospectively is supported by MCL 500.3110(4), which provides that "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred." *See also Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484 (2003). Accordingly, the date that a person is injured in an automobile accident and/or the date that the person's insurance policy issued has absolutely no bearing on when or to what extent that person is entitled to PIP benefits, because these benefits later *accrue* on the date that the injured person actually receives the reasonably necessary PIP benefit product or service. The amendments impose a fee schedule for certain medical provider costs and optional hourly limitations on family-provided attendant care "after July 1, 2021," and thereby only affect benefits that accrue after the amendments' effective date. The Supreme Court has made clear that a statute does not operate retroactively if it only applies to causes of action that "accrued after the effective date of the amendment." *Buhl v City of Oak Park*, ___ Mich ___, 2021 Mich LEXIS 1042 at *8 (June 9, 2021).

This makes perfect sense, because the level of PIP benefits that an injured person is entitled to receive is not fixed for all time as of the date of the original injury. Instead, there can be a virtually unlimited number of changes to the PIP benefits to which an injured person is entitled after the original injury. For example, the injured person's condition could worsen such that they need more PIP benefit products and services, or could improve such that the person requires fewer

RECEIVED by MCOA 8/16/2021 5:08:45 PM

PIP benefit products and services, or there could be changes in medical technology, or the person could even recover completely. For these reasons, the challenged amendments operate only prospectively, not retroactively, such that this Court need not engage in a retroactivity analysis to uphold these amendments.

Although the Court need not conduct any retroactivity analysis, the amendments would still pass muster if indeed they were deemed retroactive. As argued in Defendants-Appellees' brief on appeal, the primary factor in performing a retroactivity analysis—which is dispositive here—is "whether there is specific language in the statute that indicates whether it should be applied retroactively." *Buhl* at *8. Here, there is express language in the No-Fault Act evidencing that the Legislature intended MCL 500.3157 to apply to motor vehicle accidents occurring before July 2, 2021. MCL 500.2111f(8) states:

> **An insurer shall pass on, in filings to which this section applies, savings realized from the application of section 3157(2) to (12) to treatment, products, services, accommodations, or training rendered to individuals who suffered accidental bodily injury from motor vehicle accidents that occurred before July 2, 2021.** An insurer shall provide the director with all documents and information requested by the director that the director determines are necessary to allow the director to evaluate the insurer's compliance with this subsection. After July 1, 2022, the director shall review this section applies for compliance with this subsection.

MCL 500.2111f(8) (emphasis added). This statute clearly evidences the Legislature's intent to apply the amendments in MCL 500.3157(2) to (12), which include the three subsections challenged here, to "motor vehicle accidents that occurred before July 2, 2021." Given this clear expression of legislative intent to

RECEIVED by MCOA 8/16/2021 5:08:45 PM

apply the amendments to motor vehicle accidents occurring before July 2, 2021, the Court should give the amendments the effect the Legislature intended.

III. The lower court properly determined that the No-Fault amendments at issue do not infringe on any fundamental or constitutional right.

Plaintiffs contend that their "fundamental rights" to privacy and bodily integrity are violated to the extent the No-Fault amendments limit compensation for family-provided attendant care. But as the lower court properly noted with respect to the privacy interest claim, citing *People v Jensen*, 231 Mich App 439, 456 (1998), that right is not fundamental in all circumstances. Here, the lower court correctly noted that "no authority is cited for the proposition that the same services that family members currently provide[ ] to an individual would become a violation of the individual's fundamental constitutional rights if required to be performed by someone else." (11/13/20 Order Regarding Defendants' Motion to Dismiss, p 13). Indeed, while Plaintiffs certainly have a right to attendant care that is deemed reasonably necessary under the No-Fault Act, including attendant care in excess of 56 hours per week, there is no right to such care outside of the No-Fault Act, and certainly no fundamental right to receive compensation for attendant care from a family member. In reaching this conclusion, the lower court relied on *O'Bannon v Town Court Nursing Ctr*, 447 US 773, 785 (1980). In *O'Bannon*, the Court determined that while residents of a nursing home were entitled to choose a qualified nursing home provider without governmental interference, they had no right to reside in a nursing home where its license had been revoked. (11/13/20

RECEIVED by MCOA 8/16/2021 5:08:45 PM

Order Regarding Defendants' Motion to Dismiss, pp 13-14). So too here, Plaintiffs continue to be entitled to reasonable and necessary PIP benefits under the No-Fault Act, but the Legislature has now defined the parameters of what benefits are "reasonable and necessary." Simply put, while Plaintiffs may have a fundamental privacy right in other contexts, they do not have a fundamental right to dictate who provides their attendant care.

This same rationale is applicable to Plaintiffs' claim of bodily integrity. A violation of one's bodily integrity is not implicated simply by having an optional limit placed on the number of hours that a family member may provide compensated attendant care. Rather, a viable claim for a violation of bodily integrity involves something repugnant or physically invasive, such as "an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective." *Mays v Snyder*, 323 Mich App, 1, 60 (2018) (quoting *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1988)); (11/13/20 Order Regarding Defendants' Motion to Dismiss, p 14). Here, there is no violation of bodily integrity where a non-family member, who is trained and qualified, provides reasonably necessary attendant care. Further, while the No-Fault Act provides that compensation for family-provided attendant care may be limited to 56 hours per week, an injured person eligible under the Act retains power to select any other qualified non-family member to provide attendant care in excess of 56 hours per week. Moreover, an insurer is free to contract with a family member to provide attendant care deemed reasonable and necessary in excess of 56 hours

RECEIVED by MCOA 8/16/2021 5:08:45 PM

per week. MCL 500.3157(11); *see also* DIFS Bulletin 2021-31-INS, available at Bulletin 2021-31-INS - Family-Provided Attendant Care (michigan.gov) ("As of the date of this bulletin, insurers representing more than 90% of the market share in Michigan have communicated their willingness to contract with their insureds for more than 56 hours of 'family-provided' attendant care."). As the lower court properly concluded, "Plaintiffs' inability to continue to receive needed services from the provider of their choice is not on the same level of egregious conduct" to support a violation of one's bodily integrity in this case. (11/13/20 Order Regarding Defendants' Motion to Dismiss, p 15).

With respect to Plaintiffs' equal protection claims, they argue that the amendments to the No-Fault Act created two classes of automobile accident victims—those whose injuries and service needs are covered by Medicare, and those whose injuries and service needs are not. But the lower court, relying on *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 537-38 (1979), properly concluded that "the legislature may treat recipients of private benefits differently from recipients of government benefits." (11/13/20 Order Regarding Defendants' Motion to Dismiss, p 18).

The lower court also properly concluded that Plaintiffs failed to assert a cognizable substantive due process claim, relying in part on *Shavers*, 402 Mich at 596, for the proposition that the compulsory purchase of no-fault insurance is a valid exercise of the State's police power, and that this valid exercise extends to

RECEIVED by MCOA 8/16/2021 5:08:45 PM

adopting a fee schedule related to Medicare rates as set forth in the No-Fault amendments at issue.

Given that the No-Fault amendments do not violate any fundamental rights or constitutional rights, and that the amendments are rationally related to the State's legitimate interest in reducing and containing the costs of automobile insurance, addressing fraud, and providing for the general welfare of its citizens, (See Argument I), the lower court properly dismissed Plaintiffs' equal protection and substantive due process claims.

IV. The lower court properly determined that Plaintiffs lack standing to vindicate the supposed constitutional rights of non-party individuals injured in automobile accidents and non-party medical providers that treat these injured individuals.

In Counts XI through XVIII of their complaint, Plaintiffs purport to seek declaratory relief on behalf of all individuals injured in automobile accidents and all medical providers (including Eisenhower Center specifically) that treat these individuals on and after the July 2, 2021 effective date of the No-Fault amendments at issue. As discussed in Defendants-Appellees' brief, this is an overreach that is not supported by Michigan law.

The law is well-settled that "[a] plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Fieger v Commissioner of Ins*, 174 Mich App 467, 471 (1988). A party that overreaches by attempting to vindicate the constitutional rights of others not before the Court fails to satisfy the "case of actual controversy" requirement and lacks

RECEIVED by MCOA 8/16/2021 5:08:45 PM

standing to pursue such claims. *See* MCR 2.605(A)(1) (the Court "may declare the rights and other legal relations *of an interested party seeking a declaratory judgment* . . .") (emphasis added). Accordingly, the lower court lacked the authority to consider, and properly dismissed, Counts XI through XVIII of Plaintiffs' complaint requesting declaratory relief on behalf of non-parties to this lawsuit.

V. The lower court did not abuse its discretion by denying Plaintiffs' request to amend their complaint or motion for reconsideration.

Plaintiffs filed a motion to amend their complaint to add a purported contract claim after the lower court dismissed the complaint. Plaintiffs also filed a motion for reconsideration under MCR 2.119(F). The primary basis for Plaintiffs' motion for reconsideration was that they had a cognizable contract claim and, in that respect, the motion to amend and motion for reconsideration were closely related.

The lower court acted well within its discretion to deny the motions to amend and for reconsideration. As set forth above, any contract claim, to the extent it would be based on challenging the validity of the amendments to the No-Fault Act, fails to state a claim upon which relief can be granted. The lower court fully addressed Plaintiffs' arguments that an insurance contract would negate the statutory requirements in the No-Fault Act in its November 13, 2020 order dismissing the complaint, and thus properly concluded in its February 18, 2021 order denying Plaintiffs' motion to amend that the proposed amendment would be futile. *Darman v Twp of Clinton,* 269 Mich App 638, 654 (2006) ("leave to amend should be denied where amendment would be futile"); *PT Today, Inc v Comm'r of*

RECEIVED by MCOA 8/16/2021 5:08:45 PM

the Office of Fin & Ins Servs, 270 Mich App 110, 143 (2006) (amendment is futile if it is legally insufficient on its face, it merely restates allegations already made, or adds a claim over which the court lacks jurisdiction). And given that Plaintiffs presented the same arguments in their motion for reconsideration (i.e., that they had a viable contract claim), the lower court also properly denied Plaintiffs' motion for reconsideration.

RECEIVED by MCOA 8/16/2021 5:08:45 PM

CONCLUSION AND RELIEF REQUESTED

The No-Fault Act amendments at issue here are rationally related to the State's legitimate interest in reducing the cost of automobile insurance and fraud in the No-Fault system. The challenged amendments do not violate any of Plaintiffs' contractual, fundamental, or constitutional rights and are not retroactive. Accordingly, the lower court properly dismissed Plaintiffs' complaint for failure to state a claim upon which relief can be granted. In addition, the lower court properly denied Plaintiffs' motion to amend complaint and motion for reconsideration. Therefore, Amicus DIFS Director respectfully requests that this Court affirm the lower court's decision.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General
Counsel of Record

)
Assistant Attorney General
Attorneys for Amicus Director of DIFS
Corporate Oversight Division

Dated: August 16, 2021

RECEIVED by MCOA 8/16/2021 5:08:45 PM