STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL T. ANDARY, M.D., Conservator and Guardian of ELLEN M. ANDARY, LIP, RONALD KRUEGER, Guardian of PHILIP KRUEGER, LIP, and MORIAH, INC., d/b/a EISENHOWER CENTER,
Plaintiffs-Appellees,

v

USAA CASUALTY INSURANCE COMPANY and CITIZENS INSURANCE COMPANY OF AMERICA,
Defendants-Appellants.

Supreme Court No. 164772
Court of Appeals No. 356487
Ingham CC No. 19-000738-CZ

AMICI CURIAE BRIEF ON BEHALF OF ANDREW PHELPS, KIERA OGBURN, THROUGH HER GRANDMOTHER/GUARDIAN JOSEPHINE WOODEN, STEPHEN GEDDA, THROUGH HIS BROTHER/GUARDIAN MATTHEW GEDDA, MIKAYLA CLARK, THROUGH HER MOTHER/GUARDIAN REGINA DEBOSE, MICHAEL O'KEEFFE, THROUGH HIS BROTHER/GUARDIAN JAMES O'KEEFFE, KATHLEEN KUBICA, SHAWN HALL, DAVID MARTIN, STEPHANIE DAYTON, AND SCOTT MILLER IN SUPPORT OF PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE[1]

There are approximately 17,000 catastrophically injured accident victims in this state who rely on auto insurance benefits for their daily survival.[2] No-fault reform, however, has wreaked havoc on these accident victims and their families. This amici brief is filed on behalf of ten such victims – Andrew Phelps, Kiera Ogburn, Stephen Gedda, Mikayla Clark, Michael O'Keeffe, Kathleen Kubica, Shawn Hall, David Martin, Stephanie Dayton, and Scott Miller (collectively, "Amici Curiae") – who are representative of the thousands of catastrophically injured individuals in this state. And while each individual has their own unique story, the legal conclusion for all should be the same: no-fault reform cannot be retroactively applied to them and doing so is unconstitutional, as held by the Court of Appeals.

As explained below, some of these individuals purchased their own policies and some are covered by a family member's policy. Some were injured 40 years ago, others within the last ten years. The injuries suffered, complications, and specific care needs vary from person to person. Numerous different insurers are involved. But *all* of these individuals unquestionably need care as a result of accident injuries, *all* face life-threatening consequences without their care, and, due to insurers' improper application of reform, *all* were confronted with the real prospect of losing their care, with no one else willing or able to help them. It is these accident victims – the most vulnerable members of our society – that must be protected, and the focus should be on ensuring that they receive the care, and can obtain the care, that they need and are entitled to.

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[1] Pursuant to MCR 7.312(H)(4), neither party's counsel authored this brief in whole or in part and neither party's counsel, nor any party, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The latest information shows 16,880 open claims with the MCCA. See https://www.michigancatastrophic.com/Consumer-Information/Claim-Statistics

I. ANDY PHELPS

Andy was tragically injured in an auto accident over twenty years ago, in 1998. He is a quadriplegic. Andy's doctors prescribe him 24/7 high-tech and nursing care, as he needs help with all activities of daily living and suffers from conditions that are life-threatening. One such condition is autonomic dysreflexia, a dangerous syndrome that develops in individuals with spinal-cord injuries, resulting in acute, uncontrolled hypertension. It is considered a medical emergency and, if left untreated, can cause seizures, retinal hemorrhage, pulmonary edema, renal insufficiency, myocardial infarction, cerebral hemorrhage, and death.[3] Per Andy's nurse case manager, Andy's autonomic dysreflexia is the worst she has seen in her over twenty years as a nurse for spinal cord injury patients. Andy has, on occasion, needed emergency medical attention due to complications of his autonomic dysreflexia. Andy's care providers are trained to monitor him constantly for this, and other, conditions and complications of his spinal cord injury.

[3] See, e.g., https://www.webmd.com/hypertension-high-blood-pressure/hypertension-autonomic-dysreflexia

Andy purchased a policy from Auto Club/AAA in 1998 that is supposed to provide him lifetime coverage and payment of all reasonable expenses for his accident injuries. Prior to July of 2021, AAA paid the reasonable rates charged by Andy's care provider. After July of 2021, AAA delayed and paid nothing for over 90 days, placing Andy at risk of losing the care he needs to survive. As confirmed by his nurse case manager, no other agencies were willing to take on Andy's care, knowing that AAA was not paying and improperly relying on the new fee caps in § 3157 to slash reimbursements. Andy was forced to seek emergency injunctive relief to protect his life. Distraught and losing hope, Andy had to be hospitalized. Judge Christina Elmore of the Kent County Circuit Court granted Andy's motion, requiring AAA to pay reasonable rates for his care while his case is litigated.[4]

II. KIERA OGBURN

Kiera Ogburn was raised by her grandmother Josephine Wooden in Benton Harbor. In 2010, Kiera Ogburn was a 17-year-old high-school student, with her whole life ahead of her:

[4] See **Exhibit 1,** Opinion and Order by Judge Elmore. The affidavit of Andy's nurse case manager explaining Andy's critical care needs and complications and a lack of alternative care options is attached as **Exhibit 2.** Amici Curiae note that for all of the injunctions sought and obtained as discussed herein, additional affidavits from treating doctors and nurses, along with medical records, were also presented to the trial courts, further explaining the life-threatening situations.

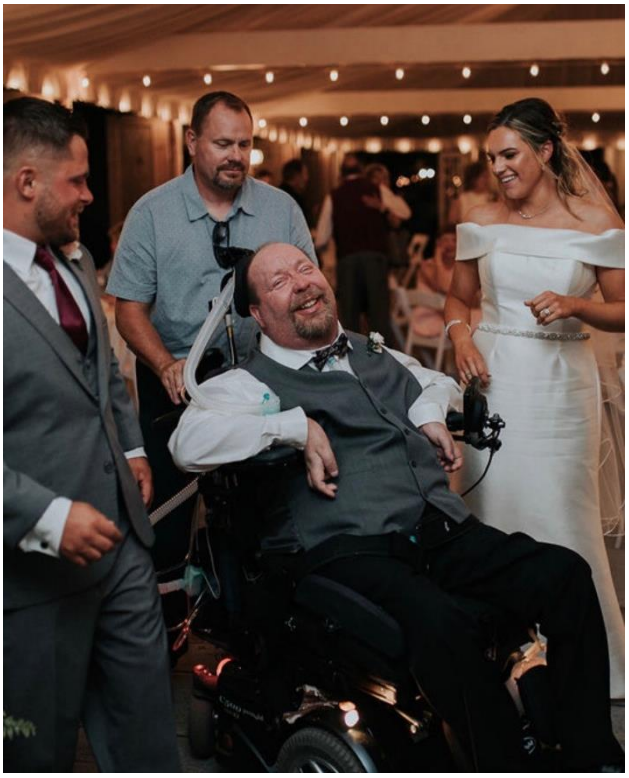
Kiera's life was forever changed on August 17, 2010, when she was struck by a vehicle while walking. Kiera's injuries were catastrophic. She suffered an anoxic brain injury and was rendered a paraplegic. She requires and is prescribed 24/7 care. To this day, Kiera is paralyzed, unable to communicate, experiences seizures and other life-threatening complications, and relies on her care givers for all of her daily needs.

Auto-Owners Insurance Company is the responsible no-fault insurer for Kiera. Prior to July 2, 2021, Auto-Owners fully paid Kiera's provider's reasonable rates. After July 2, however, Auto-Owners paid nothing for numerous months. Then, after months of no payment, Auto-Owners, citing to amended § 3157, cut reimbursements to financially unsustainable levels, to the point where her provider could no longer continue. Kiera's case manager confirmed her inability to find any other agencies willing or able to take on Kiera's prescribed home care. With her life at risk, Kiera, through her grandmother, filed suit and sought emergency injunctive relief. Judge Donna Howard, Berrien County Circuit Court, granted an injunction.[5]

[5] See **Exhibit 3**, Judge Howard Opinion and Order. Attached as **Exhibit 4** is an affidavit from Kiera's nurse case manager explaining her extensive efforts to find alternative care for Kiera, to no avail.

III. STEPHEN GEDDA

Stephen Gedda suffered a spinal cord injury in a 2011 accident. He is a quadriplegic and dependent on a ventilator. State Farm is Stephen's no-fault insurer. For over ten years, State Farm paid Stephen's provider's reasonable rates, allowing him to have the care he needs to survive and live a meaningful life.



After the no-fault reform fee caps went into effect, State Farm paid nothing for Stephen's care for over *six months.* Despite pleas from Stephen's family, State Farm refused to pay. At risk of losing his care, Matthew Gedda, Stephen's brother, had to file suit and seek an emergency injunction requiring State Farm to pay reasonable amounts for Stephen's care. Judge Archie Brown, Washtenaw County Circuit Court, granted the motion.[6]

IV. MIKAYLA CLARK

In 2016, at the age of 19, Mikayla Clark was injured in an accident. She suffered a traumatic brain injury, resulting in major neurocognitive disorder, behavioral disturbance, and seizures. Mikayla's conditions are so serious that she is prescribed two care givers – an aide and a nurse – 24/7.

[6] See **Exhibit 5**, Judge Brown Order (also finding, like the Court of Appeals, that the fee caps are unconstitutional and do not retroactively apply). Attached as **Exhibit 6** is an affidavit from Stephen's nurse case manager explaining Stephen's critical care needs and inability to find alternative care providers.

Mikayla is insured by State Farm. State Farm paid for Mikayla's life-sustaining care until July of 2021 and then cut reimbursements, citing § 3157. Mikayla's agency providers stuck with her as long as they could but, ultimately, could not financially continue. Mikayla filed her complaint and sought emergency injunctive relief. State Farm removed Mikayla's case to federal court. Judge Sally Berens, Western District of Michigan, granted Mikayla emergency injunctive relief, noting that the evidence established that no other providers would take on her care.[7]

V. MICHAEL O'KEEFFE

In 1981, as a freshman in college, Michael O'Keeffe was hit by a drunk driver. He suffered a traumatic brain injury. For over 40 years, Michael has required 24/7 care from aides and nurses.

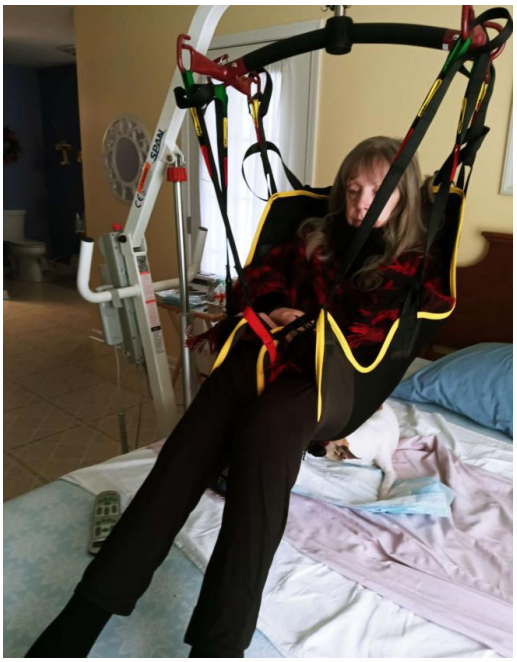
[7] See **Exhibit 7**, Judge Berens' Opinion and Order. Attached as **Exhibit 8** is an affidavit from Mikayla's nurse case manager discussing Mikayla's accident injuries, care needs, and lack of alternative care options.

State Farm is Michael's insurer. For decades, State Farm paid financially sustainable rates so that Michael could receive the care he needs to be safe and survive. But after July 1, 2021, State Farm stopped payment and later, on the basis of amended § 3157, paid substantially reduced amounts to his providers, placing Michael at risk of losing his care. Michael, through his older brother James O'Keeffe, filed suit and sought an emergency injunction. Judge George Quist, Kent County Circuit Court, granted the injunction.[8]

VI. KATHY KUBICA

Kathy Kubica suffered a spinal cord injury in a 2001 accident, rendering her a quadriplegic. Kathy depends on her care providers for all her daily needs, suffers from potentially life-threatening conditions, and requires the use of a Hoyer lift to simply get in and out of bed.

[8] See **Exhibit 9**, Judge Quist Opinion and Order. Attached as **Exhibit 10** is an affidavit from Michael's nurse case manager, explaining Michael's extensive care needs due to his accident injuries and her unsuccessful efforts to find other providers.



Kathy purchased a policy from State Farm. Until July of 2021, State Farm fully paid the reasonable rates charged by her agency provider. After July 2021, State Farm cut reimbursements, relying on § 3157. With her provider unable to continue, and with no other providers willing or able to take on her care, Kathy filed suit and moved for an emergency injunction. Judge Paul Denenfeld, Kent County Circuit Court, granted the injunction so Kathy could maintain her care.[9]

VII. SHAWN HALL

Shawn Hall is a quadriplegic as a result of an auto accident in 2000. His conditions and complications include severe muscular tone, spasticity, and autonomic dysreflexia. Shawn's conditions are so serious that his doctors prescribe him the highest level of home care – 24/7 skilled nursing care. Just recently, in late December 2021 (and as his auto insurer was refusing to pay for his care), Shawn experienced a severe episode of autonomic dysreflexia, had to be hospitalized

[9] See **Exhibit 11**, Judge Denenfeld Opinion and Order. Attached as **Exhibit 12** is an affidavit from Kathy's nurse case manager addressing Kathy's care needs and inability to find other providers.

and placed on a ventilator, and required surgery to assess the malfunction of his baclofen pump. Without his care providers, Shawn would have died.

Citizens is Shawn's no-fault insurer. Prior to July 2021, Citizens paid the reasonable rates charged for his care. After July 1, 2021, Citizens cut reimbursements by 45% and applied the hour limitation in § 3157, paying for only 56 of the 168 hours of nursing care Shawn is prescribed per week. With his provider hemorrhaging money, and with no other options, Shawn sued and moved for an emergency injunction. In one of his last rulings before retiring from the bench, Judge Scott Hill-Kennedy, Mecosta County Circuit Court, granted Shawn's motion.[10]

[10] See **Exhibit 13**, Judge Scott Hill-Kennedy Preliminary Injunction Order. Attached as **Exhibit 14** is an affidavit from Shawn's nurse case manager detailing her numerous but unsuccessful attempts to find other care providers for Shawn.

VIII. DAVID MARTIN

David Martin was injured in an automobile accident in 2006, suffering a spinal cord injury that rendered him a quadriplegic. David now has numerous complications, including wound and kidney issues and autonomic dysreflexia. At the time of his accident, David was insured by Progressive through a policy he purchased. Prior to July 2021, Progressive paid David's provider financially sustainable rates, allowing David to maintain his care and live his life.

After July 1, Progressive paid nothing for David's care for many months and then paid significantly reduced rates, pointing to amended § 3157. David's provider could not continue. No

other providers could be identified. David was forced to seek emergency injunctive relief, which Judge David DiStefano, Van Buren County Circuit Court, granted.[11]

IX. STEPHANIE DAYTON

Stephanie Dayton's accident was in 2016. She sustained a catastrophic spinal cord injury, rendering her a quadriplegic. She now battles many medical conditions.

Stephanie bought a policy of insurance from Progressive, which paid her provider's reasonable rates until July 2, 2021. After that, Progressive stopped payments and then, relying on § 3157, cut reimbursements, to the point where her provider could not continue. Stephanie filed

[11] See **Exhibit 15**, Judge DiStefano Preliminary Injunction Order and Judge DiStefano's Opinion and Order on reconsideration, explaining why the new fee caps do not retroactively apply to accident victims like David. Attached as **Exhibit 16** is the deposition transcript of David's nurse case manager explaining David's care needs (see pp. 8-10) and testifying that despite contacting 22 other agencies, none would or could take on David's care, mainly due to no-fault reform (pp. 11-15).

for emergency injunctive relief. Judge Scott Noto, Kent County Circuit Court, granted Stephanie an injunction, thereby protecting Stephanie while her case is litigated.[12]

X. SCOTT MILLER

Scott Miller is a quadriplegic, suffering a spinal cord injury in a 2000 accident. Due to his accident injuries, Scott suffers from many issues, including skin breakdown, risk of kidney infection and sepsis, and autonomic dysreflexia. Scott has received agency care for many years, allowing him to have a meaningful life with his family and friends.

Before his accident, Scott purchased a policy from Farmers Insurance Company. After July 2021, Farmers stopped paying for Scott's care and then, relying on § 3157, cut reimbursements. He could find no other providers to care for him, and his long-time agency could not financially

[12] See **Exhibit 17,** Judge Noto's Opinion and Order granting Stephanie's motion for preliminary injunction. Attached as **Exhibit 18** is an affidavit from Stephanie's nurse case manager addressing Stephanie's care needs and inability to find other providers.

continue. Scott filed suit and sought an injunction. Judge Shannon Schlegal, Clinton County, granted Scott's requested injunction, ordering Farmers to pay his provider's reasonable rates.[13]

XI. THOUSANDS OF OTHERS

There are thousands of other accident victims like the above, each with their own story of how their insurance companies' application of the no-fault reform fee caps and family-hour limitations upended their lives. Undersigned counsel could point this Court to many more individuals who, with no other options, were forced to file litigation and seek emergency relief in court, scared and desperate to protect their lives. Prior to their accidents, all of these individuals expected that their insurer would pay for the care they need and that care would be available to them. All of them relied on the provisions of the applicable policy and no-fault act as it existed at the time of the accident in arranging and living their lives. The emotional turmoil these accident victims and their families have been through since no-fault reform – fearful of losing care they need to survive and unable to find anyone willing or able to provide the care – is hard to imagine.

CONCURRING STATEMENT AS TO QUESTIONS PRESENTED

Amici Curiae concur with the Statement of Questions Presented as stated in Plaintiffs-Appellees' brief on appeal.

CONCURRING STATEMENT AS TO STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Amici Curiae concur with the Statement of Material Proceedings and Facts as stated in Plaintiffs-Appellees' brief on appeal.

[13] See **Exhibit 19,** Preliminary Injunction Order entered by Judge Schlegel. Attached as **Exhibit 20** is an affidavit from Scott's nurse case manager addressing Scott's care needs and inability to find other providers.

ARGUMENT

Amici Curiae fully support and concur with Plaintiffs-Appellees' analysis of the issues before this Court. Amici Curiae provide the following in further support.

I. THE GOAL OF THE NO-FAULT ACT IS PROMPT AND ADEQUATE COMPENSATION AND THE ACT MUST BE LIBERALLY CONSTRUED IN FAVOR OF ACCIDENT VICTIMS

The "primary goal" of the no-fault act is to "ensure prompt and adequate compensation" to accident victims. *Thomas v Tomczyk*, 142 Mich App 237, 241; 369 NW2d 219 (1985). As recognized by this Court:

> The goal of the no-fault insurance system was to provide victims of motor vehicle accidents ***assured, adequate, and prompt*** reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort.

Shavers v Kelley, 402 Mich 554, 578–79; 267 NW2d 72 (1978) (emphasis added). "The no-fault system was, in part, specifically designed to ensure prompt reimbursement to injured persons, especially those lacking in substantial financial means, and to avoid the need for litigation." *Griffin v Trumbull Ins Co*, 334 Mich App 1, 20; 964 NW2d 63 (2020).

"The no-fault act provides a comprehensive scheme for payment, as well as recovery, of certain 'no-fault' benefits, including personal protection insurance benefits." *Citizens Ins Co of America v Buck*, 216 Mich App 217, 223; 548 NW2d 680 (1996). "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle ...." MCL

500.3105(1). These so-called "PIP benefits"[14] are payable for "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).

Our appellate courts emphasize that the act is "remedial in nature" and "must be liberally construed in favor of those for whom benefit was intended, i.e., persons injured in automobile accidents." *Lee v Natl Union Fire Ins Co*, 207 Mich App 323, 327; 523 NW2d 900 (1994); see also *Griffin v Trumbull Ins Co*, 509 Mich 484, 497 (2022) (noting that "[t]he no-fault act is remedial in nature and is to be liberally construed in favor of the persons who are intended to benefit from it") (internal citations omitted). Indeed, "[i]nsurance laws and policies are to be liberally construed in favor of policyholders, creditors, and the public." *Depyper v Safeco Ins Co of Am*, 232 Mich App 433, 441; 591 NW2d 344 (1998) (internal citations omitted).

At the outset, it is important to note that the fee caps and family-hour limitations enacted as part of no-fault reform (MCL 500.3157(2), (7), and (10)) and as applied by insurers are antithetical to the primary goals of the no-fault act and how courts have interpreted that act for decades. Instead of "prompt" payment for medical expenses, insurers used amended § 3157 to delay payment well past the 30 days specified in the act. Many of the accident victims discussed in this brief went 90 days or more with no payment for their benefits. Indeed, Stephen Gedda and his family received no payments *for over six months*, despite repeated requests to State Farm to pay so that Stephen did not lose his care.

And instead of "adequate" compensation for medical expenses, insurers used the new fee caps to slash reimbursements to providers nearly in half. For the providers already charging reasonable rates, cutting reimbursements by 45% meant that the provider lost money every day it

[14] PIP stands for "personal injury protection."

provided care. Contrary to Defendants-Appellants' suggestion that providers were overcharging, the fact is that the vast majority of providers charged reasonable rates for the care provided and, in fact, *insurance companies paid those rates*, recognizing that they were reasonable and appropriate. No company that was already charging reasonable amounts for care could sustain a 45% cut in reimbursements, and that fact is made clear by the experiences of Amici Curiae, as discussed above. Far from the primary goal of "adequate compensation," insurers used amended § 3157 to pay such inadequate compensation that providers could not financially continue to provide care to the people who need it most. [15]

Finally, as recognized by this Court in *Shavers*, the no-fault act took away an accident victims' common-law remedy in tort and, instead, requires consumers to purchase insurance that is supposed to compensate them for all reasonable medical expenses arising from their accident injuries. As such, the act is recognized as "remedial" and case law emphasizes that it must be liberally construed in favor of accident victims. Yet, contrary to this law, insurers utilized amended § 3157 to compromise an accident victims' ability to obtain care they need and, further, interpreted § 3157 in the most oppressive manner possible. No-fault reform, and insurers' interpretation and application of reform, is simply not compatible with the main goals of the no-fault act. Accident victims must be able to actually obtain the care they need due to their accident injuries if the foundational goals of the no-fault act are to be met.

[15] In many of the injunction proceedings discussed above, the insurance company researched the rates being charged and agreed that what the provider was charging was reasonable. Defendants-Appellants' characterization of providers viewing accident victims as "cash cows" (p. 3 of Defendants-Appellants' brief) is not only offensive, but it is also untrue. Most providers operate on thin margins which have only become thinner with the impacts of COVID-19, upward pressure on wages, and inflation.

II. THE FEE CAPS AND FAMILY-HOUR LIMITATIONS IN AMENDED § 3157 CANNOT RETROACTIVLY APPLY AND THEREFORE THE COURT OF APPEALS SHOULD BE AFFIRMED

A. THE STATUTORY NO-FAULT PROVISIONS IN EFFECT AT THE TIME THE POLICY IS ISSUED ARE INCORPORATED INTO A NO-FAULT INSURANCE POLICY

"PIP benefits are mandated by statute under the no-fault act, and, therefore, the statute is the 'rule book' for deciding the issues involved in questions regarding awarding those benefits." *Rohlman v Hawkeye–Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993). At the same time, "[b]asic principles of insurance law provide that an insurance policy is a contract…." *Oakland Co Bd of Co Rd Com'rs v Michigan Prop & Cas Guar Ass'n*, 456 Mich 590, 600; 575 NW2d 751 (1998); *Se Michigan Surgical Hosp, LLC v Allstate Ins Co*, 316 Mich App 657, 666; 892 NW2d 434 (2016) ("Insurance policies are contracts and, in the absence of an applicable statute, are 'subject to the same contract construction principles that apply to any other species of contract'") (internal citation omitted).

The fact that both statutory and contractual terms apply to a no-fault policy is recognized by this Court, which notes that the two must be read and construed together, as though the statute is a part of the contract:

> The [insurance] policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract, for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry out its purpose.
>
> A policy of insurance must be construed to satisfy the provisions of the law by which it was required, particularly when the policy specifies that it was issued to conform to the statutory requirement….

Rohlman, 442 Mich at 525 n 3, quoting 12A Couch, Insurance, 2d (rev ed.), § 45:694, pp. 331–332. As further stated by the Court of Appeals, "[i]nsurance contracts should be construed in light

of statutory requirements, and mandatory statutory provisions should be read into insurance contracts." *Depyper,* 232 Mich App at 438 (internal citation omitted).

This is consistent with other jurisdictions and leading secondary sources. For example, in *Interinsurance Exch of Auto Club of S Cal v Ohio Cas Ins Co,* 58 Cal 2d 142, 148–49; 373 P2d 640 (1962), the California Supreme Court noted: "It is well settled that insurance policies are governed by the statutory and decisional law in force at the time the policy is issued. 'Such provisions are read into each policy issued thereunder, and become a part of the contract with full binding effect upon each party'" (internal citations omitted); see also *Stephan v Unum Life Ins Co of Am,* 697 F3d 917, 927 (CA 9, 2012) (noting that "[t]he law in effect at the time of a renewal of a policy governs the policy even if that law is subsequently changed or repealed"). In addition, one of the leading secondary sources on insurance law, Couch on Insurance, states as follows: "The rights of the parties are not ordinarily affected by the amendment or the repeal of applicable statutes which were in force when the contract of insurance was executed." 2 Couch on Ins. § 19.8.[16]

B. AN ACCIDENT VICTIM'S RIGHTS, AND AN INSURER'S OBLIGATIONS, ARE "VESTED" AND "FIXED" AS OF THE DATE OF THE ACCIDENT

"Rights created under an insurance policy become ***fixed*** as of the date of the accident." *Cason v Auto Owners Ins Co,* 181 Mich App 600, 609; 450 NW2d 6 (1989) (internal citation omitted) (emphasis added); see also, e.g., *Madar v League Gen Ins Co,* 152 Mich App 734, 742; 394 NW2d 90 (1986) (holding same). Stated otherwise, "[t]he rights and obligations of the parties" to the insurance contract/policy "***vest[]*** at the time of the accident." *Clevenger v Allstate Ins Co,*

[16] As noted above, the Michigan Supreme Court has relied on Couch on Insurance. See *Rohlman,* 442 Mich at 525 n. 3.

443 Mich 646, 655–56; 505 NW2d 553 (1993) (internal citations omitted) (emphasis added); see also, e.g., *Depyper,* 232 Mich App at 435 (holding same).

For example, in *Depyper, supra,* the plaintiff was insured by defendant Safeco, but plaintiff failed to pay a premium that was due on September 22, 1992. Plaintiff was thereafter injured in an auto accident on October 27, 1992. Safeco refused to pay for plaintiff's medical expenses, claiming that the policy was cancelled effective October 20, 1992, because the premium was not paid. Safeco produced a letter dated October 6, 1992, to support its claim that plaintiff was given notice of the impending cancellation, however that letter did not contain a statement that the insured should not operate an uninsured vehicle, as required by MCL 500.3020(5) of the no-fault act. In a footnote, the Michigan Court of Appeals stated that MCL 500.3020(5) was amended in 1995. As held by the court, however, "[t]he prior version is considered here because rights and obligations under an insurance policy vest at the time of the accident, and plaintiff's accident occurred in 1992." *Depyper,* 232 Mich App at 435 n 2 (internal citation omitted). In other words, the Court of Appeals recognized that it was the version of the no-fault act that existed at the time of the accident that controlled the parties' rights and obligations under the policy – not the version as later amended.

C. AMENDED § 3157 CANNOT APPLY RETROACTIVELY TO PRE-REFORM ACCIDENT VICTIMS

"Retroactive application of legislation presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine Saline, Inc v Chrysler Group, LLC,* 496 Mich 26, 38; 852 NW2d 78 (2014) (internal citations omitted). To determine if a statute applies retroactively, courts follow the four-factor framework set forth in *LaFontaine*:

> ***First***, we consider whether there is specific language providing for retroactive application. ***Second***, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. ***Third***, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. ***Finally***, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

These factors are colloquially known as the "*LaFontaine* factors." *Buhl v City of Oak Park*, 507 Mich 236, 244; 968 NW2d 348 (2021).

1. THE FIRST *LAFONTAINE* FACTOR DOES NOT SUPPORT RETROACTIVE APPLICATION, AS § 3157 CONTAINS NO EXPRESS STATEMENT THAT IT APPLIES RETROACTIVELY

When determining if a statute should be applied retroactively or prospectively, "'the primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.'" *Frank W. Lynch & Co v Flex Tech, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation and brackets omitted). "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012). "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155–156; 725 NW2d 56 (2006). As this Court notes, "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Lynch*, 463 Mich at 584 (citing other statutes where the Legislature explicitly stated, for example, "[t]his act shall be applied retroactively…").

Here, the first *LaFontaine* factor does not support retroactive application of amended § 3157 to pre-reform accidents. There is no language whatsoever – much less any "clear, direct, and unequivocal" language – in amended § 3157 stating that its provisions shall be applied retroactively. Had the Legislature wanted to make amended § 3157 retroactive, it would and could have clearly and easily said so, as it has with other statutory amendments. But instead, the Legislature provided that no-fault reform was "Imd. Eff. June 11, 2019," with certain provisions, such as the fee caps in amended § 3157, having a later effective date of July 2, 2021. As recognized by this Court, the Legislature's provision that a statute is to take immediate effect "only confirms its textual prospectivity." *LaFontaine, supra* at 40; see also *Johnson,* 491 Mich at 430 ("Use of the phrase 'immediate effect' does not at all suggest that a public act applies retroactively"). With no clear, direct, or unequivocal language in amended § 3157 stating that it is to apply retroactively, the strong presumption that statues only apply prospectively remains and the first *LaFontaine* factor supports the conclusion that amended § 3157 does not apply retroactively to pre-reform accident victims.

2. THE SECOND *LAFONTAINE* FACTOR IS INAPPLICABLE

"Second rule cases relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute…." *In re Certified Questions from the U.S. Court of Appeals for the Sixth Circuit,* 416 Mich 558, 571; 331 NW2d 456 (1982). "Examples of second rule cases are measuring the amount of a judicial pension not only by years served subsequent to the enactment but also by years served under a previous act, and measuring the amount of highway entitlement not only by expenditures subsequent to enactment but also by expenditures under a previous act." *Id.* (internal citations omitted). Here, pre-reform accident

victims' entitlement to care and other benefits is not dependent on services provided to them under the former no-fault act provisions and therefore this factor is inapplicable.

3. THE THIRD AND FOURTH *LAFONTAINE* FACTORS: AMENDED § 3157 AFFECTS PRE-REFORM ACCIDENT VICTIMS' VESTED RIGHTS

The third and fourth *LaFontaine* factors "relate to retrospective application of a new law to prior facts." *In re Certified Questions from the U.S. Court of Appeals for the Sixth Circuit,* 416 Mich at 572. "The third rule and the cases thereunder define those retrospective situations that are not legally acceptable, whereas the fourth rule defines those that are acceptable." *Id.*

The third factor/rule "states that retrospective application of a law is improper where the law 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.'" *Id.* (internal citation omitted); see also, e.g., *Forsythe v Valley Consol Indus,* 139 Mich App 211, 217; 361 NW2d 768 (1984) ("The presumption against retrospective application is especially true when 'giving a statute operation will interfere with an existing contract, destroy a vested right, create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed'"); *Nash v Robinson*, 226 Mich 146, 149; 197 NW 522 (1924) ("Courts, as a rule, are loath to give retroactive effect to statutes, and this is especially so when, by so doing, it would disturb contractual or vested rights"). However, under the fourth factor/rule, "a statute that can be characterized as merely remedial or procedural should generally be given retroactive application." *LaFontaine, supra* at 39, 41.

Nevertheless, "[w]here a statute 'imposes a new substantive duty and provides a new substantive right that did not previously exist…it cannot be viewed as procedural, and the presumption against retroactivity applies." *Buhl, supra* at 247 (internal citation omitted).

Irrespective whether a statute qualifies as procedural or otherwise remedial, a court may not retroactively apply the statute if this application would abrogate or impair vested rights, create new obligations, or "attach[ ] new disabilities regarding transactions or considerations that already occurred." *Grew v Knox*, 265 Mich App 333, 339; 694 NW2d 772 (2005).

Here, a review and understanding of amended § 3157 makes clear that it fits within the third factor/rule such that it must not be given retroactive application. First, the policies appliable to Amici Curiae and other pre-reform accident victims were obtained from the insurance companies prior to June of 2019. The policy premiums and reserves were set based on the no-fault law as it existed at that time, which required payment of all "reasonable" expenses, without regard to any cap or limitation as to family-provided care. These statutory provisions were therefore included as part of the parties' contract/policy and the agreement was that the insurer would pay all such reasonable charges. From there, the accident victims' right to require the insurer to pay those reasonable charges vested at the time of their accident. At that point, the insurer's obligations, and the accident victim's rights under the policy/contract, were "fixed" and "vested," such that they are entitled to payment of all reasonable charges.

If amended § 3157 is retroactively applied to pre-reform accident victims, however, it would substantially change the parties' duties and obligations under their contract. Specifically, amended § 3157 provides an insurer a new obligation/substantive right to potentially pay less than what is deemed "reasonable." It does so by attaching a new limitation on what service providers are entitled to be reimbursed. Under the new law, the metric is no longer simply "reasonableness." Rather, the new law only allows service providers reimbursement at a delineated percentage, without regard to whether that capped percentage is a "reasonable charge." The applicable percentage depends upon whether the service was payable by Medicare. For services not payable

by Medicare, the applicable percentage is 55% of the provider's charge description master or average charge in place on January 1, 2019. This is precisely what the insurers attempted to apply to Amici Curiae, only paying 55% of what the insurer viewed as a provider's average charge. The significant impact on Amici Curiae's and other pre-reform accident victims' vested right to payment of all reasonable charges is therefore crystalized by these insurers' improper action in reliance on amended § 3157, which already put many home-care companies out of business and placed insureds like Amici Curiae in a position of losing the care they need.

The changes in the no-fault law and in particular amended § 3157 impair Amici Curiae's and other pre-reform accident victim's vested rights under their policies and the No-Fault Act as it existed before June of 2019 and created new obligations and duties as to payment of PIP benefits. Therefore, amended § 3157 does not and cannot retroactively apply to Amici Curiae and pre-reform accident victims and the Court of Appeals' decision should be affirmed.

III. THE NEW FEE CAPS AND LIMITATIONS IN AMENDED § 3157 VIOLATE THE CONTRACTS CLAUSE AND THEREFORE THE COURT OF APPEALS SHOULD BE AFFIRMED

The Contracts Clause states that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, Art. 1, Sec. 10. Its purpose is to "protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." *Health Care Ass'n Workers Comp Fund v Director of the Bureau of Worker's Comp,* 265 Mich App 236, 240; 694 NW2d 761 (2005); see also, e.g., *Campbell v Michigan Judges Retirement Bd,* 378 Mich 169, 180; 143 NW2d 755 (1966) (stating that "vested rights acquired under contract may not be destroyed by subsequent State legislation or even by amendment of the State Constitution"); *In re Estate of Holycross,* 112 Ohio St 3d 203; 858 NE2d 805 (2007) (finding that a new statute providing that ending a marriage by divorce automatically

revokes a designation of a spouse as a beneficiary under a life insurance contract entered into before the effective date of the statute violated the Contracts Clause and emphasizing the date of the insurance contract, not the date of the divorce that occurred after the statute was enacted, as key for Contracts Clause analysis).

In evaluating whether the Contracts Clause has been violated, the court balances: (1) whether the state law has operated as a substantial impairment of a contractual relationship; (2) whether the legislative disruption of contract expectancies is necessary to the public good; and (3) whether the means chosen by the legislature to address the public need are reasonable. *Aguirre v State of Mich*, 315 Mich App 706, 715-16; 891 NW2d 516 (2016).

The threshold inquiry of whether a change in state law has resulted in a substantial impairment of a contractual relationship requires the court to consider three subfactors: (1) whether there is a contractual relationship, (2) whether a change in law impairs that contractual relationship, and (3) whether the impairment is substantial. *General Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105 (1992).[17] "'[O]ne of the tests that a contract has been impaired is that its value has by legislation been diminished.'" *Minden v Clement*, 256 US 126, 128; 41 S Ct 408; 65 L Ed 857 (1921). Of controlling importance in the determination of whether a law violates the contracts clause "is the foreseeability of the law when the original contract was made; for what was foreseeable then will have been taken into account in the negotiations over the terms of the contract." *Chrysler Corp v Kolosso Auto Sales, Inc*, 148 F 3d 892 (CA 7, 1998). Also important is whether the impairment "disrupts actual and important reliance interests." *Elliot v Board of School Trustees of Madison Consolidated Schools*, 876 F 3d 926, 934 (CA 7, 2017).

[17] Provisions in the Michigan Constitution are generally construed to provide the same protection as that secured by the U.S. Constitution, absent compelling reasons to impose a different interpretation. See generally, *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

Here, there are obvious contractual relationships at issue, with many of the Amici Curiae having purchased their own contractual policy of insurance from an auto insurer prior to their accident.[18] As to whether the change in the no-fault law impairs that contractual relationship, Amici Curiae and pre-reform accident victims had every expectation that they would be able to obtain the care and other services, benefits, and accommodations they would need due to an accident and every expectation that their auto insurer would have to pay "reasonable" amounts for their care. Indeed, that was the law in this state for 40+ years. In fact, even today, the no-fault act still requires payment of "allowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).

After no-fault reform, however, accident victims could not even find care providers to help them with their "care, recovery, or rehabilitation" because providers could not afford to provide care at the slashed reimbursement rates insurers were paying. The new fee caps and limitations, as interpreted by the insurance companies, therefore set up the real-life scenario experienced by Amici Curiae, where no one disputes (not even the insurance companies) that Amici Curiae need care as a result of their accident injuries, and yet despite being entitled to that benefit, there are no

[18] Defendants-Appellants argue that "this is not a contractual issue," but it cannot be reasonably disputed that insurance policies are contracts and that Amici Curiae and thousands of accident victims purchased contractual policies of insurance that are at the heart of their claims. Indeed, many of the Amici Curiae purchased the contractual policy of insurance that gave them the right to no-fault benefits from their particular insurer.

providers willing or able to provide care.[19] Pre-reform, Amici Curiae's contractual rights could be met and the goals of the no-fault act fulfilled because they could obtain the care they need. Post-reform, after the fee caps went into effect, they could not.

At the time of contracting, it could not possibly have been foreseen by either Amici Curiae or the insurance companies that the entire goal and purpose of the no-fault act would be so changed such that accident victims would be unable to obtain medically necessary care they need due to accident injuries. Amici Curiae were contractually promised payment of all reasonable expenses necessary for their care as a result of their accident injuries, paid premiums for that level of coverage, and yet they could not even obtain care that everyone – from doctors, to nurses, to the insurance companies themselves – acknowledges is needed as a result of catastrophic accident injuries. That there was a "substantial impairment" of Amici Curiae's contractual rights is evident.

Because the legislative impairment of the contractual relationship is severe, Defendants-Appellants must affirmatively show that (1) there is a significant and legitimate public purpose for the regulation and (2) the means adopted to implement the legislation are reasonably related to the public purpose. *Health Care Ass'n* 265 Mich App at 241. For the reasons articulated by Plaintiffs-Appellees, Defendants-Appellants have not made these required showings. Indeed, a legislative goal of decreasing insurance rates cannot possibly justify sacrificing the rights, health, and lives of accident victims who already paid into the system with the promise of lifetime payment of all reasonable medical expenses and whose rights vested before no-fault reform. See also, e.g., *Jack*

[19] Insurance companies' response to this problem was to say, "we don't and can't direct care," i.e., we are not responsible for finding you a care provider. At the same time, insurance companies would say, "we don't owe until an expense is 'incurred.'" Unwilling to help them find a care provider and unwilling to agree to pay a provider a financially sustainable rate on the front end, care providers would not take on the risk of providing care, knowing that insurance companies would only pay a fraction of what was "incurred." Amici Curiae were in an impossible situation. That this was (and still is) a "crisis" is not an exaggeration.

Tyler Engineering Co, Inc v SPX Corp, 294 Fed Appx 176, 179 (CA 6, 2008) (noting that "adjustments in bargaining power may serve the public interest when applied prospectively to bargains not yet struck, but create minimal public benefits when applied retroactively to contracts formed under a prior state of law") (internal citation omitted).[20]

RELIEF REQUESTED

For the reasons stated herein and in Plaintiffs-Appellees' brief on appeal, Amici Curiae respectfully request that this Court affirm the Court of Appeals' decision.

Dated: February 3, 2023

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[20] The constitutional problems with no-fault reform are not limited to the Contracts Clause. For example, consider Kiera Ogburn. In 2010, when Kiera was hit by a vehicle while walking, she and her grandmother were unable to pursue the drivers that hit her for any medical expenses because those were contractually and statutorily required to be paid by her insurer, Auto-Owners. *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003) (noting that "[t]he Michigan no-fault act… bars recovery of medical expenses from third-party tortfeasors arising out of the ownership, maintenance, or use of a motor vehicle"). As such, there was no need for Kiera's grandmother to pursue more money from the drivers in a settlement. Nor was there a need to, for example, purchase other insurance to protect against unreimbursed medical expenses. The Auto-Owners policy was supposed to provide lifetime coverage for her care and payment of all reasonable expenses for her care.

Now, after no-fault reform, a Michigan citizen injured in an auto accident can potentially pursue the at-fault driver for medical expenses that are not covered and paid for by their own insurer. See MCL 500.3135(3)(c) (enacted June 11, 2019) (noting that, now, an accident victim can sue in tort for damages for allowable expenses in excess of the applicable limits). Moreover, Michigan residents have options as to coverage levels and can even purchase a specific rider for attendant care. MCL 500.3107c(8) ("An insurer shall offer, for a policy that provides the security required under section 3101(1) to which a limit under subsection (1)(a) to (c) applies, a rider that will provide coverage for attendant care in excess of the applicable limit"). With this knowledge, Michigan citizens can make informed decisions regarding settlement of any third-party negligence claim against an at-fault driver and their insurance needs. But Kiera and her grandmother had no ability to see into the future back in 2010, when Kiera suffered her catastrophic injuries. Rather, Kiera had a policy that was supposed to provide lifetime payment of all reasonable expenses for her care. This new law treats pre-2019 accident victims different than post-2019 accident victims and results in profound unfairness.

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CERTIFICATION PURSUANT TO MCR 7.312(A)

Stephen Hulst, attorney for Amici Curiae, hereby certifies pursuant to MCR 7.212(B)(1) that this brief was typed using Microsoft Word, which has a function that can calculate the total number of words contained in a document. According to that program function, there are 7,531 allowable words in this brief, excluding the parts of the document that are exempted.

Dated: February 3, 2023

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INDEX OF EXHIBITS TO AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

EXHIBIT 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

ANDREW R. PHELPS,

Plaintiff,

v

AUTO CLUB GROUP INSURANCE COMPANY D/B/A/ AAA OF MICHIGAN,

Defendant.

Case No. 21-08830-NF

OPINION & ORDER RE: PLAINTIFF ANDREW PHELPS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND TO COMPEL PAYMENTS UNDER THE NO-FAULT ACT

/

ORDER

At a session of said Court, held in the Kent County Courthouse in the City of Grand Rapids, in said county on November 2, 2021

Present: HON. CHRISTINA ELMORE
Circuit Court Judge

Plaintiff Andrew Phelps moves for a preliminary injunction. He seeks to order Defendant Auto Club Group Insurance Company ("AAA") to process and pay all of Plaintiff's homecare provider bills from July 2, 2021 through the end of this litigation at a rate of $30.00 per hour for high-tech home care, $190.00 per visit for all nursing visits, and fully pay Plaintiff's case manager bills. For the reasons explained below, Plaintiff's Motion is GRANTED.

I. FACTS AND BACKGROUND

The underlying Complaint involves a claim of breach of contract and obligations under the no-fault act related to Defendant allegedly failing to pay reasonable, customary, and fair fees charged for Plaintiff's medical care. Plaintiff claims Defendant is refusing to fully pay Plaintiff's care provider and case manager since July 2021 imposition of fee schedules under the 2019 amendment to the no-fault law. For over twenty years, Defendant

has paid for Plaintiff's 24/7 care and accommodations due to extensive injuries caused by a motor-vehicle accident in 1998. Plaintiff is a quadriplegic and needs assistance with all activities of daily living. He also suffers from life-threatening conditions, which his caregivers monitor and must address with specialized care.

Plaintiff now requests emergency injunctive relief from this Court, ordering Defendant to pay the rates it previously paid. Without this relief, Plaintiff argues his care providers will financially be unable to continue providing care, resulting in Plaintiff losing the care he relies on and putting his safety and life at risk.

Defendant responded, arguing there is no precedent for issuance of a preliminary injunction in this case. Defendant argues Plaintiff cannot satisfy any of the four factors warranting the issuance of a preliminary injunction because he has not established an "imminent threat of irreparable harm" and is unlikely to succeed on the merits.

A hearing was held on October 29, 2021 where the parties were given the opportunity for oral argument. This Court took the matter under advisement.

II. STANDARD OF REVIEW

A party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4).

When reviewing a motion for a preliminary injunction, a court must consider the following four factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Alliance for Mentally Ill of Mich v Dep't of Cmty Health, 231 Mich App 647, 661 (1998).

III. LAW AND ANALYSIS

Plaintiff claims Defendant is clearly liable for a direct violation of MCL 500.3142 and breach of contract, so he is likely to succeed on the merits.

After hearing oral argument from both sides, a thorough reading of the parties' written arguments, and consideration of their positions; this Court finds there is ample evidence Plaintiff is likely to prevail in the underlying action.

It is obvious that Defendant contracted with Plaintiff to pay for the relevant care as evidenced by twenty (20) plus years of making payments to Plaintiff's various providers.

Furthermore, MCL 500.3142 states such payments are payable as accrued and overdue if not paid within thirty (30) days.

Plaintiff argues he will be irreparably harmed if injunctive relief is not given. "[A] particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction." *Mich Coal of State Emp Unions v Mich Civil Serv Comm'n*, 465 Mich 212, 225-226 (2001). "[A]n injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149 (2011). Furthermore, when evaluating an alleged injury, a court must consider "the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief." *Michigan AFSCME Council 25 v Woodhaven-Brownstown School Dist*, 293 Mich App 143, 149 (2011).

In this case, the risk of irreparable harm to Plaintiff appears to be extensive and possibly life-threatening. Pursuant to sworn affidavits from Plaintiff's caregivers, without the continued payment for services rendered, they will soon be financially unable to continue providing 24/7 care required for Plaintiff. Without their services or while similar services are sought, Plaintiff's life is potentially at risk while awaiting trial in this matter.

While Defendant may risk losing funds over the course of this case, in weighing the balance of harms, a person's health and safety prevail over a company's financial losses. Pursuant to *Sherman v Sea Ray Boats, Inc*, "[c]oncerns regarding physical safety are generally more pressing than concerns regarding economic loss." 251 Mich App 41, 53-54; 649 NW2d 783 (2002). Furthermore, Defendant has been paying Plaintiff's medical providers this rate for a number of years and continuing to do so would maintain the status quo.

Defendant cites *Bratton v Detroit Auto Inter-Insurance Exchange*, 120 Mich App 73, 327 NW2d 396 (1982) in arguing a preliminary injunction would severely distort the status quo. In *Bratton*, the Michigan Court of Appeals stated if payment were made to the plaintiffs and the defendant ultimately prevailed in the case, "it would be unable to recover the benefits it paid to the plaintiffs... distort[ing] considerably the status quo which existed prior to the plaintiffs commencing their actions." *Id* at 80. This Court respectfully disagrees that the circumstances of the case at bar are comparable to those in *Bratton*. Bratton was examined by a neurological surgeon after he left his job, claiming his injuries prevented him from working. *Id* at 75-76. The surgeon found Bratton was not disabled, yet the trial court granted a preliminary injunction on behalf of Bratton, ordering Detroit Auto Inter-Insurance Exchange to pay Plaintiff's PIP benefits at issue in the lawsuit. *Id* at 76. The Michigan Court of Appeals found the preliminary injunction was erroneously ordered because there was a factual dispute over whether Bratton was disabled. *Id* at 80.

In the underlying case, there is no question Plaintiff is disabled and has required 24/7 care for decades. This Court finds the severity of Plaintiff's injuries and clear necessity of his caregivers sets this case apart from the circumstances in *Bratton*, which did not demonstrate denial of a preliminary injunction could be life-threatening.

This Court further finds no harm to the public interest in ordering this preliminary injunction. Not only is there no harm to the public interest; as argued by Plaintiff, the public has a clear interest in ensuring the most vulnerable members of society receive the care they require.

In conclusion, this Court finds a preliminary injunction is appropriate. Defendant shall immediately pay for Plaintiff's homecare provider bills at the rates previously paid, i.e. $30 per hour for high-tech homecare, $190 per visit for nursing visits, and case management, from July 2, 2021 until further order of this Court.

IT IS SO ORDERED.

Dated: November 2, 2021

CHRISTINA ELMORE
Circuit Court Judge

ATTEST: A true copy

17th CIRCUIT COURT
TRUE COPY

I do hereby certify and return that I served a copy of the above order upon the parties personally at the motion hearing.

Dated:

CHNELL GUYDON, Court Clerk

EXHIBIT 2

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

ANDREW R. PHELPS,

Plaintiff,

v.

AUTO CLUB GROUP INSURANCE COMPANY D/B/A AAA OF MICHIGAN,

Defendant.

Case No. 21-08830-NF

Honorable Christina Elmore

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AFFIDAVIT OF DEEDEE PEREZ, RN, CCM

Deedee Perez, being sworn, states as follows:

1. I am the Director/Owner of Rehabilitation Management & Consulting, LLC, a company specializing in providing case management services for injured individuals.

2. I am a Registered Nurse, licensed in the state of Michigan for over twenty years.

3. I am also a Certified Case Manager (CCM) and Certified Rehabilitation Registered Nurse (CRRN).

4. I have been providing case management services to Andrew Phelps ("Andy") since December of 2016.

5. Andy is a Tetraplegic (also known as Quadriplegic) with multiple chronic conditions that frequently become acute and life-threatening complications because of his spinal cord injury.

6. Andy's care is medically complex because he has severe muscular tone, spasticity, and requires an Intrathecal Baclofen Pump to manage these symptoms.

7. In addition, Andy suffers from frequent Autonomic Dysreflexia, which can be life threatening if not addressed.

8. Autonomic Dysreflexia is the body's way of triggering a response that something is wrong. The spinal cord injury creates a barrier for messages to be sent from the body to the brain triggering this response, which can include profuse sweating; increased blood pressure often 200/100+ which puts Andy at risk for stroke or heart attack; pounding headaches; unbearable neurological pain; and often he is unable to communicate effectively during this time.

9. These triggers can be as simple as bowel and bladder management, repositioning, temperature regulation (Andy cannot self-regulate so he will get too hot or cold which triggers this reaction) and sometimes the cause is infection or unknown and only emergency IV medication will stop this reaction.

10. I have worked with spinal cord injuries for more than twenty years, and Andy's Autonomic Dysreflexia is the most severe in nature I have seen.

11. Because of the complexity of the injuries Andy sustained in his motor vehicle accident, he requires ongoing medical coordination to manage and coordinate his medical care, medications, treatments, medical equipment and supplies.

12. As Andy's case manager, I work directly with Andy, his insurer (AAA), and his extensive multidisciplinary team to ensure all of Andy's needs are met in a safe and timely manner.

13. Andy's multidisciplinary team, including his treating doctors/providers, Best Care Nursing Services, Inc. ("Best Care"), and myself, work collaboratively to manage Andy's complications to the best of our ability. This requires ongoing monitoring and medical triage from home health aides, an on-call nurse, and, if the protocols put in place are unsuccessful, Andy must be seen in the Emergency Department which does occur intermittently.

14. Andy's attendant-care aides are trained to follow a specific protocol to manage these symptoms, and if they do not resolve they contact the 24-hour on-call nurse for additional medical care and supervision.

15. In the event they cannot resolve the issue, Andy is seen in the Emergency Department.

16. Andy has experienced extreme trauma in the hospital, including a prolonged Baclofen pump overdose which was not treated properly for several days. At this recent hospitalization it took the staff nine hours to resolve Andy's Autonomic Dysreflexia successfully and his home-care nurse was called to assist them.

17. Andy was also recently hospitalized due to suicidal ideations related to the fear of losing his attendant care and being forced into a facility.

18. In my opinion, placing Andy in the hospital due to a lack of home care would be devastating for Andy.

19. Prior to July 2, 2021, Andy's case management bills/claims were paid in full within 30 days, as required.

20. Presently, Andy's case management bills that have been submitted to AAA for services post July 1, 2021, have not been paid. There have been no Explanation of Reviews received or requests for additional information from AAA to process my invoices/claims.

21. The case management bills outstanding currently total $2,585.68, but AAA has made no effort to acknowledge the status of these claims.

22. If AAA continues to not pay, Rehabilitation Management & Consulting will be financially unable to continue services.

23. Rehabilitation Management & Consulting has already terminated three full time case management positions and is in jeopardy of additional loses or closure due to non-payment of claims by insurers for more than 90 days.

24. I attempted to obtain payment from Andy's insurer, AAA, many times over the past months.

25. I sent multiple communications to AAA regarding the need for payment of Andy's providers' bills, including Best Care's bills.

26. For example, I sent AAA the email and information attached as **Exhibit 1**, providing AAA with the rate and other information AAA would need to pay Best Care's bills and notifying AAA that its failure to pay was placing Andy's health and life in jeopardy.

27. If Andy does not receive the 24/7 care he needs, his health, wellbeing, and life are at risk due to complications relating to Andy's spinal cord injury.

28. I have personally seen numerous home care providers shut down and go out of business, leaving their patients in dire circumstances, because insurance companies like AAA are not paying bills.

29. I do not believe Andy will be able to find another home care company capable of providing him the care he needs and that, if Best Care's bills are not fully and properly paid, Best Care will not be able to continue, financially, to provide him the care he needs.

30. Reimbursement of Andy's home-care bills at $16/hour, as AAA recently did, is not financially sustainable, based on my knowledge of this industry over twenty years.

31. Absent proper and full payment of Andy's providers' bills, I believe Andy will ultimately have to be placed in a hospital, which will be more costly for AAA than simply paying Andy's home-care provider's charges and will be worse for Andy, physically and mentally.

32. In addition, the ability to even place Andy in a hospital right now is extremely limited, partly because of the complex nature of Andy's care and injuries and partly because there is a national shortage of health care workers and facilities simply cannot accept new patients.

33. Andy already has an accessible home where he lives, with trained staff to care for him at home. Facilities are not equipped to take on all the spinal cord injury patients who are losing care due to insurers' refusal to pay proper amounts.

34. I believe if Andy loses his home care, it will be irreparably damaging to his health and overall wellbeing.

Deedee Perez

Subscribed and sworn to before me
Date: 10-20-2021

Notary Public, Kent County, MI
Acting in Kent County, MI
My Commission expires: Jan. 18, 2028

SHAINA SHARMA
Notary Public - State of Michigan
County of Kent
My Commission Expires Jan 18, 2028
Acting in the County of Kent

EXHIBIT 3

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT – CIVIL DIVISION
811 Port Street, St. Joseph, MI 49085 • T: (269) 983-7111 • www.berriencounty.org

JOSEPHINE WOODEN, as Guardian of KIERA OGBURN, and **PRIVATE DUTY HOME HEALTHCARE, LLC,** a Michigan limited liability company,
Plaintiffs,

CASE NO.: 2021-0280-NF

HONORABLE DONNA B. HOWARD

v.

AUTO-OWNERS INSURANCE COMPANY,
Defendant.

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OPINION AND ORDER REGARDING PRELIMINARY INJUNCTION

At a session of the Berrien County Trial Court, held
On the 28th day of February, 2022, in the City of
St. Joseph, Berrien County, Michigan

This matter comes before the Court on Plaintiff Josephine Wooden's motion for preliminary injunction[1] filed on or about January 10, 2022. On December 9, 2021, Plaintiffs filed a complaint for breach of the insurance policy held by Plaintiff Wooden, and violations of the No-Fault Act, against Defendant primarily as it relates to its benefits payments in amounts less than full costs incurred for Ms. Ogburn's home-care, after an amendment to the No-Fault Act went into effect on July 2, 2021. The motion seeks to enjoin Defendant from paying benefits covering only a percentage of the costs for ongoing home-care services under the amendments to the No-Fault Act, namely the fee schedule set under MCL 500.3157. More specifically, Plaintiff seeks to have the services provided by Plaintiff Private Duty Home Healthcare ("Private Duty") for Plaintiff Wooden's ward and granddaughter,

[1] It should be noted that the motion was filed, through counsel, on behalf of both Plaintiffs, however, after initial clarifying discussion at the January 25th hearing Plaintiffs' counsel decided to move forward with the motion solely on behalf of Plaintiff Wooden.

Kiera Ogburn to be fully, rather than partially paid by Defendant since July 2, 2021, when the fee schedule of MCL 500.3157 went into effect. Included in Plaintiff Wooden's motion is a request compelling Defendant to not only stop the application of the fee schedule (*i.e.* partial coverage of benefits), but to also pay any unpaid balance of Plaintiff Private Duty's past invoices since the statutory amendment of MCL 500.3157 went into effect on July 2, 2021. (Pltf Mot 1/10/22, p 2; Brief, p 20).

On January 25, 2022, the Court held an evidentiary hearing, and took the matter under advisement. The next week, the Court scheduled a second hearing with the parties on January 31, 2022, at which time the parties were granted an opportunity to file supplemental submissions for the Court's consideration. Plaintiff Wooden and Defendant timely filed their supplemental briefings on February 8, 2022, and February 15, 2022, respectively. The Court having considered the submissions and arguments of the parties, and otherwise being advised in the premises issues the following Opinion and Order, granting in part and denying in part Plaintiff Wooden's motion for preliminary injunction.

Injunctive relief is an extraordinary remedy. *Pharmaceutical Research & Mfrs of America v Dep't of Community Health*, 254 MichApp 397, 402; 657 NW2d 162 (2002). Granting a preliminary injunction is within this Court's sound discretion. *Mich Coalition of State Employee Unions v Mich Civil Svc Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). The Court's decision must be based in reason, must not be arbitrary, and must be based on the specific facts of the case. *Id.* The "key in each case is that the trial court provide a reasoned basis for its decision." *Mich Dep't of Transportation v Randolph*, 461 Mich 757, 767-768; 610 NW2d 893 (2000). This Court properly exercises its discretion when its decision is within the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Before granting a preliminary injunction, the Court must consider (1) the likelihood that the moving party will prevail on the merits; (2) the danger that the moving party will suffer irreparable harm if the injunction is not issued; (3) the risk that the moving party would be harmed more by the absence of an injunction than the opposing party would be harmed by the granting of the injunction; and (4) the harm to the public interest if the injunction is issued. *Pharmaceutical Research*, *supra* at 402-403, *quoting Alliance for Mentally Ill of Michigan v Dep't of Community Health,* 231 MichApp 647, 660-661; 588 NW2d 133 (1998). The moving party, here Plaintiff Wooden, has the burden to establish all four elements in order for this Court to grant a preliminary injunction. *Pharmaceutical Research*, *supra* at 403; *see also,* MCR 3.310(A)(4) & (B)(5). The showing of irreparable harm is "an

indispensable requirement" and must be "particularized." *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008). Moreover, speculative or potential injuries do not suffice. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11; 753 NW2d 595 (2008). "The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Id* at 9. Lastly, a preliminary injunction should not be granted if the moving party has an adequate remedy at law. *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 MichApp 182, 185; 375 NW2d 382 (1985).

As an initial matter, without waiving any asserted claims or defenses in the current action as they may otherwise relate to the payment of provider benefits (*eg.* timeliness of payments, overdue benefits, properly submitted invoices, propriety of services, etc.), the services provided by Private Duty are, for purposes of this motion for preliminary injunction only, considered appropriate treatment and/or skilled attendant care. With that, after consideration of the parties' written submissions and the evidence and oral argument further presented at the hearings, the Court finds that Plaintiff Wooden has sustained her burden for the requested preliminary injunctive relief, in part.

First, Plaintiff Wooden has established a colorable argument of a likelihood of prevailing on the merits. The Court's determination notes that Plaintiff has made a jury demand in this case. Based upon the evidence presented thus far, there is a likelihood that a Berrien County jury would find for Plaintiff Wooden on the merits of her statutory coverage claim[2] – that is, finding that Defendant's payments were delayed and overdue (beyond 30 days after reasonable proof of claim) under MCL 500.3142, and/or insufficient when paid, including but not limited to some or all of the current services being paid under the new fee schedule of MCL 500.3157, instead as "allowable expenses" under MCL 500.3107(1)(a). *See,* Pltf Brief **Exhibit B**, ¶¶ 16-21, **Exhibit C**, ¶¶ 11-19, **Exhibits E-G**; DIFS Bulletins, **Exhibit K**; Pltf Reply **Exhibits X-Y**; and Def Brief **Exhibit 8**, ¶¶ 11-12.

Second, as to the factor of a "irreparable harm," Plaintiff Wooden sufficiently demonstrated through the presented evidence that if Private Duty's incurred operating costs are not fully paid soon Private Duty will be forced to end providing its services to Ms. Ogburn, leaving her in a grave, potentially life-threatening health crisis while similar services are obtained. *See,* **Exhibit B**, ¶¶ 6-14, 23-24, 26 & 28; **Exhibit C**, ¶¶ 7-8, 20, 23-24 & 26; **Exhibit D**. Thus, there is an undisputed showing that Ms. Ogburn absolutely needs skilled care for her health and well-being, and would be irreparable

[2] As an aside, and without ruling on the claim as a matter of law, the Court does not similarly find a "likelihood of prevailing on the merits" for Plaintiff's breach of insurance policy claim. *See, Rohlman v Hawkeye-Sec Ins*, 442 Mich 520, 524-525; 502 NW2d 310 (1993)(PIP benefits mandated by statute so statute is "rule book" for deciding questions regarding awarding of those benefits).

harmed if Plaintiff Wooden does not obtain or continue skilled care for Ms. Ogburn. The evidence thus far suggests that Plaintiff Wooden cannot or will not pay for the balance that remains on Private Duty's service invoices, and Private Duty will soon be ceasing its services as a result.

Granted, on or about December 13, 2021, Private Duty informed Plaintiff Wooden that "Kiera's last day of services with PDHH will be January 15th 2022, if arrangements for payment in full are not made before that date. Please let us know your plan for care after January 15th as soon as possible so that we can help coordinate a smooth and safe transition of care." (Pltf Brief, **Exhibit J**). However, at the time of the January 25th & 31st hearings, it is undisputed that Private Duty was still providing the same level of necessary services to Ms. Ogburn. It is not clear from the evidence presented, what, if any, new agreement has been made between Private Duty and Plaintiff Wooden to continue its services, or whether and/or when Private Duty has set a new date for the termination of its services. Further, despite certain recent efforts by or on behalf of Plaintiff Wooden, no new care options for Ms. Ogburn have apparently been arranged or located yet. Notwithstanding no date of termination for Private Duty's services has been established, based on a consideration of the totality of the circumstances affecting Plaintiff Wooden and Ms. Ogburn, *Michigan AFSCME Council 25 v Woodhaven-Brownstone School Distr*, 293 MichApp 143, 149; 809 NW2d 444 (2011), the Court finds that the cessation of Private Duty as the care provider without full payment is not their mere apprehension or a speculative event. While there is no indication of an exact date (now that Private Duty's January 15th date passed, *see* **Exhibit J**), the stopping of services remains definitive, from the presented evidence, unless the full covered payments are restored, at least while alternative arrangements are sought and made.

With that said, this Court has not been persuaded that there is additional showing that Plaintiff Wooden or Ms. Ogburn suffered irreparable harm since July 1, 2021 to the present by the delayed or claimed insufficient payments by Defendant, as Private Duty has continued to provide the needed care for Ms. Ogburn. As mentioned above, even after Private Duty gave notice to Plaintiff Wooden of its service termination date of January 15th, Private Duty has continued to provide the necessary services for Ms. Ogburn. Additionally, to the extent Plaintiffs prevail on their respective claims Defendant will, in addition to actual damages such as the unpaid portions of the invoices, be subject to attorney fees as well as statutory 12% penalty interest. Thus, there is an available legal remedy for reimbursement for those services already incurred. Consequently, the Court finds no irreparable injury occurred warranting injunctive relief for any disputed unpaid invoicing covering July 1, 2021 to the present. *See, Psychological Services, supra.*

Certainly, as to the anticipated months of litigation ahead, the serious and potentially life-threatening harm to Ms. Ogburn not receiving the necessary skilled care, at least until suitable replacement service is found or additional funds are secured by Plaintiff Wooden, outweighs the potential harm to Defendant for "overpaying" benefits or losing money during the pendency of the injunction. The Court does not find Defendant's arguments of "aggregate claimants" in this regard persuasive as they are speculative and unclear. In addition, Defendant's claim that if it prevails in its defenses, it will not be able to recover the "extra" benefits paid during the injunctive period (Brief p 18), is simply not true. For example, if Defendant prevails, those "extra" amounts fronted could be entered as a money judgment or recovered through pro-rated deductions from Private Duty reimbursements or Plaintiff Wooden's future benefits paid. Plainly, Defendant has alternative legal remedies of recovery for its potential economic losses if it were to prevail.

Lastly, the public interest factor likewise weighs in favor of granting injunctive relief. There is no question that with the amendments to the No-Fault Act, apparently came confusion from the insureds, insurers, providers, regulatory agencies (like DIFS), and even some legislators alike as to the practical application of the No-Fault reform. From the parties' submissions, namely the various sister-courts' decisions, opinions and orders, it also appears that there may be a swell of inconsistency developing in the trial courts with the application of MCL 500.3157 to pre-existing catastrophic injured persons receiving benefits. As such, while it gets sorted in the courts and elsewhere, the public has a definite interest in protecting those, like Ms. Ogburn, who are disabled, need care, and previously received care for catastrophic injuries, to ensure they continue to receive such care.

Based on the foregoing, and previously stated on the record, the Court grants in part and denies in part Plaintiff's motion for preliminary injunction as follows:

IT IS HEREBY ORDERED that Plaintiff Wooden's motion for a preliminary injunction is **in part GRANTED**; such that **beginning March 1, 2022 through July 1, 2022 only,** or further order of this Court, Defendant is to reinstate timely payment of benefits for allowable home care services provided by Plaintiff Private Duty for Kiera Ogburn during that period at the same rates as it was covering prior to July 1, 2021 – $30/hour for high-tech home health aide care; $51/hour for the Licensed Practical Nurse; and $65 for the Registered Nurse care that Ms. Ogburn has been prescribed.

IT IS HEREBY FURTHER ORDERED that Plaintiffs shall make reasonable efforts during the stated injunction period to secure alternative care services for Ms. Ogburn, or enter into an agreement for Plaintiff Wooden to cover the anticipated unreimbursed portion of Private Duty's

services as calculated under the fee schedule prescribed in MCL 500.3157, including the new rate taking effect July 2, 2022.

IT IS HEREBY FINALLY ORDERED that the balance of Plaintiff Wooden's motion for preliminary injunction not otherwise granted above is **in that part DENIED**.

IT IS SO ORDERED.

DATE: 2/28/2022

HON. DONNA B. HOWARD (P57635)
Berrien County Trial Court – Civil Div.

Certificate of Service: The undersigned certifies that a copy of the foregoing Opinion & Order was served upon the attorneys and/or parties of record to the above cause by mailing the same to them at their respective addresses as disclosed by the file with postage fully prepaid on:

2/28/2022
Date

Deputy Clerk/Bailiff

EXHIBIT 4

AFFIDAVIT OF LORI E. SCHIPPER, RN

Lori E. Schipper, RN, being sworn, states as follows:

1. I am familiar with the facts stated in this affidavit and, if called as a witness, I am competent to testify to them.

2. I am a Registered Nurse, licensed in the state of Michigan since 2008.

3. I am a Nurse Case Manager and employed by Preferred Case Management, LLC. I have been employed by Preferred Case Management since 2015.

4. I am also a Certified Case Manager.

5. I am currently the Nurse Case Manager for Kiera Ogburn.

6. I am familiar with Kiera, the catastrophic injuries she suffered in the 2010 accident, and her care needs due to her accident injuries.

7. As Kiera's Nurse Case Manager, I am responsible for, among other services, assessing and monitoring Kiera's care needs, planning and coordinating Kiera's care needs, evaluating Kiera's options for care, and ensuring that Kiera receives the care she needs.

8. I am aware that Private Duty Home Healthcare, LLC, Kiera's current home-care provider, has indicated that it cannot financially continue to provide the care Kiera needs at the rates Kiera's auto-insurer, Auto-Owners, is paying.

9. As a result, I evaluated options for Kiera's care

10. Below are the results of my calls to agencies and facilities to see if they take auto files/claims and if they have staff available and capable of providing 24/7 care Kiera requires in the Niles/St. Joseph area:

a. A+ Nursing Inc. – I spoke with Sharon, who stated that they consider auto insurance files based on reimbursement. However, A+ will not accept reduced rates and they have no staff available in the Niles/St. Joseph area.

b. Advantage Home Health Care – I spoke with Samantha, who informed me that they do not take auto files/claims and do not have staff in the Niles/St. Joseph area.

c. Alliance Home Health Care – I spoke with Melissa, who informed that they do not take auto files.

d. Angel Hands Home Health Care LLC – I left a message and also made a second call, leaving another message.

e. AdvisaCare – I spoke with April, who informed me that they will consider auto files, but only based on proper reimbursement. She also informed me that they do not have staff available in the Niles/St. Joseph area.

f. Arcadia Home Care & Staffing – I spoke with Torrie, who informed me that they would look at auto insurance files but it would be based on reimbursement and they would not accept reduced rates. She also stated that they do not have staff available in the Niles/St. Joseph area.

g. Home Care Transitions – I spoke with Amber, who informed me that they do not take auto files.

h. Fresh Perspective Home Care – I spoke with Shelly, who informed me that they do not take auto files and have no staff available in the Niles/St. Joseph area.

i. HomeJoy of Kalamazoo – I spoke with Dacey, who informed me that they do not take auto files.

j. Lakeshore Home Health Care Services – I spoke with Susie, who informed me that they do not take auto files.

k. Quality Nursing Services – I spoke with Ebony, who informed me that they do not take auto files and do not have staff available in the Niles/St. Joseph area.

l. BrightStar Caring – I spoke with Cheyenne, who informed me that they do not take auto files and do not have staff available in the Niles/St. Joseph area.

m. Select Specialty Hospital (Long Term Acute Care (LTAC) facility) – I spoke with Nicole Simpson, who informed me that if the insurer pays the Cofinity Rate, which she said Auto-Owners does, it is $2,200.00/day. If they do not, it is 100% of their rate. Nicole further told me that they do have staffing, however the length of stay can only be 31 days. After that time, Kiera would have to be transferred to another facility. Nicole stated that she would be concerned trying to find a facility that would take her and would have the appropriate care that she needs.

n. Ascension Borgess Pipp Hospital (LTAC) – I left a message and received no return call yet.

o. Pine Ridge Nursing & Rehab (Skilled Nursing Facility (SNF)) – I spoke with Rochelle, who stated they would need a prior authorization from the insurer before taking the patient and they have no beds available at this time.

p. West Woods of Niles (SNF) – I spoke with Melissa, who stated they would need a prior authorization from the insurer before taking the patient and they have no availability at this time.

q. West Woods of Bridgman (SNF) – I spoke with Carol, who stated they would need a prior authorization from the insurer before taking the patient and they have no beds available at this time.

11. In summary, I have been unable to locate any viable options for Kiera's care.

12. I informed Auto-Owners of my contact with the above companies/facilities and that I have been unable to find a viable option for Kiera's care.

13. In my role as Kiera's Nurse Case Manager, I also assessed options and providers for the transportation services Kiera needs to her medical appointments.

14. I contacted a number of transportation companies and received the following responses:

a. Area Wide Transport – they have been Kiera's transportation company but informed me that they will not deal with auto insurance at this time.

b. Mobility 1 Transport – they informed me that they do not deal with auto insurance at this time.

c. Good Samaritan Medical Transportation in Byron Center – they will transport but will charge at least 80 empty miles both ways, 60 cents per mile for the total trip, plus $60.00/hour for the person, plus $60.00/hour wait time.

d. Medic 1 Ambulance in Benton Harbor – they will transport but require payment up front.

15. I informed Auto-Owners of these responses.

16. To date, I have not been able to obtain another transportation company for Kiera, who needs transportation services in order to attend her medical appointments.

17. I became a nurse to care for people. It is my passion.

18. I feel, morally and ethically, that I cannot leave a patient without the care that they need to be safe and survive. I strive to do my best for all of my patients, including Kiera.

19. Kiera requires 24/7 care and it is imperative that Kiera receive the care and services she needs, as they are necessary for her care and to ensure she is safe.

20. As a Nurse Case Manager in Michigan, I am aware that other home-care companies have gone out of business due to payment issues by insurance companies.

21. Based on my unsuccessful efforts to find alternative care options for Kiera, I am highly concerned that if Kiera's current provider ceases care, Kiera will not be able to obtain necessary and proper care from another provider in her home.

22. It is my professional opinion that the best option for Kiera is to remain in her home and receive the care she needs there. Kiera has many special care needs, including percussion vest therapy, cough assist, feeding needs, range of motion issues, and seizure issues, and I am concerned that she would not receive the level of care she needs if she goes to a facility. As noted above, I have not been able to find a facility or nursing home that could take Kiera at this time.

TARA L. POWELL
Notary Public, Branch County, MI
My Commission Expires July 17, 2027

Lori Schipper RN
Lori Schipper, RN

Subscribed and sworn to before me
Date: February 3, 2022

Tara L Powell
Notary Public, Branch County, MI
Acting in Branch County, MI
My Commission expires: July 17, 2027

EXHIBIT 5

STATE OF MICHIGAN
IN THE TRIAL COURT FOR THE COUNTY OF WASHTENAW
CIVIL DIVISION

MATTHEW GEDDA, as Guardian for
STEPHEN GEDDA,
Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Defendant.
/

Case No.: 22-152-NF
Hon. Archie C. Brown

ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

At a Session of the Court held on

April 20, 2022

Before the Court is Plaintiff's Motion for Preliminary Injunction and to Compel Proper Payments Under the No-Fault Act. An answer/response/objection has been filed. Plaintiff has filed a reply. Pursuant to MCR 2.119(E)(3), the Court dispenses with oral argument on this motion and will decide the matter based upon the written submissions of the parties.

The Court finds Plaintiff's Motion to be persuasive and grants the relief requested, in part. The Court further finds that

1. MCL 500.3157 does not apply retroactively to an injury that occurred in 2011. The legislature's silence as to retroactivity speaks loudly to this Court.
2. The new fee scheduled found under no fault reform is unconstitutional.
3. Plaintiff is eligible for payment or reimbursement per MCL 500.3157(15)(f)
4. The legislature did not intend that high-tech/trained health care providers be paid at the same rate as a teenager working in the fast-food industry.

5. Plaintiff's irreparable harm is not economic, but the irreparable harm is to Plaintiff's health and life. The Court agrees that there can be no injury more irreparable than lasting illness or death. Plaintiff's physical and mental safety outweigh Defendant's possible economic loss.

6. Per MCR 3.310, regarding the four factors to determine if a preliminary injunction should issue, all factors are supported through Plaintiff's argument. Furthermore, factors 1 and 2 weigh heavily in Plaintiff's favor.

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Preliminary Injunction and to Compel Proper Payments Under the No-Fault Act is GRANTED, in part.

2. Defendant shall process and pay all of Plaintiff's home-care bills from July 2, 2021, until further order of the Court, at a rate of $29.50/hour for Plaintiff's high-tech care and $72.50/hour for nursing care.

3. The hearing scheduled for April 20, 2022 is cancelled.

IT IS SO ORDERED.

Hon. Archie C. Brown, Trial Court Judge

EXHIBIT 6

AFFIDAVIT OF MERCEDES BAILEY, RN, CCM

Mercedes Bailey, RN, CCM, being sworn, states as follows:

1. I am familiar with the facts stated in this affidavit and, if called as a witness, I am competent to testify to them.

2. I am a Registered Nurse, licensed in the state of Michigan since 1985.

3. I am a Nurse Case Manager and employed by Bailey Care Consulting, LLC.

4. I am also a Certified Case Manager.

5. I am currently the Nurse Case Manager for Stephen Gedda and have been for about seven years.

6. I am familiar with Stephen, the spinal cord injury he suffered in the 2011 accident, and his complex care needs due to his accident injuries.

7. Stephen requires 24/7 care by a nurse and high-tech aide and relies on his care givers for all his daily needs. Stephen requires and has nurses and high-tech aides that have experience in identifying life-threatening complications which require immediate attention.

8. Stephen has experienced autonomic dysreflexia and also been hospitalized for urinary tract infections due to complications relating to his accident injuries.

9. As Stephen's Nurse Case Manager, I am responsible for, among other services, assessing and monitoring Stephen's care needs, planning and coordinating Stephen's care needs, evaluating Stephen's options for care, and ensuring that Stephen receives the care he needs.

10. I am aware that Stephen's current care provider has indicated that it cannot financially continue to provide the care Stephen needs due to a lack of payment by Stephen's auto insurer, State Farm.

11. I have evaluated and attempted to find other care providers for individuals like Stephen, who have complex care needs.

12. I have not been able to find any other home-care providers able or willing to take on the type of care Stephen needs. The responses I have received from other home-care providers is that they either will not work with auto insurers like State Farm due to payment issues and/or they do not have sufficient staff to cover the type of care Stephen needs.

13. Stephen requires the 24/7 care ordered by his doctor and it is imperative that Stephen receive the care and services he needs, as they are necessary for his care and to ensure he is safe.

14. Based on a lack of alternative care options for Stephen, I am highly concerned that if Stephen's current provider ceases care, Stephen will not be able to obtain necessary and proper care from another provider.

15. It is my professional opinion that the best option for Stephen is to remain in his home and receive the care he needs there from his current provider.

16. I am very concerned that if Stephen loses his home care and has to go to the hospital or some other facility that Stephen would not survive. Stephen cannot even push the emergency call button when he is in the hospital and needs a nurse with him at all times.

Mercedes Bailey, RN, CCM

Subscribed and sworn to before me
Date: [illegible]

Notary Public, [illegible] County, ~~MI~~ [illegible]
Acting in [illegible] County, ~~MI~~ [illegible]
My Commission expires: [illegible]

EXHIBIT 7

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

MIKAYLA CLARK, et al.,

Plaintiffs,

v.

Hon. Sally J. Berens

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Case No. 1:22-cv-756

Defendant.

OPINION AND ORDER

This matter is before the Court on Plaintiff's Emergency Motion for Preliminary Injunction and to Compel Proper Payments under the No-Fault Act (ECF No. 14). Upon review of the motion and related filings, and after an evidentiary hearing held October 27, 2022, the motion (ECF No. 14) is **granted**.

FACTUAL BACKGROUND

Plaintiff Mikayla Clark incurred a traumatic brain injury when she was hit by a car in 2016. As a result, she is prescribed a home health aide and skilled nursing care 24 hours a day. Plaintiffs Elite Nurse Staffing, LLC ("Elite"), and FirstLight Home Care of Grand Rapids ("FirstLight") provide that care. Defendant State Farm Mutual Automobile Insurance Company is the no-fault auto insurer responsible for paying for the care resulting from her injury.

On July 2, 2021, amendments to Michigan's No-Fault Act, Mich. Comp. Laws § 500.3157, went into effect, limiting reimbursement for expenses covered by personal protection insurance following automobile accidents. The change in the law has led to litigation regarding whether its new terms are retroactive to people like Ms. Clark who incurred their injuries before the Act's amendment. Defendant State Farm has taken the position that the changes are retroactive and has

reduced the reimbursements it makes to Ms. Clark's home-care providers. Before July 2, 2021, State Farm paid Elite $61 per hour for Ms. Clark's RN nursing care, $48 per hour for LPN nursing care, and paid FirstLight $27 per hour for aide care. After the change in the law, State Farm has reduced those rates to as little as $39.32 per hour for RN care, $33.24 per hour for LPN care, and $21.61 per hour for aide care. Plaintiffs argue that the law does not apply retroactively as a matter of statutory interpretation, and even if it did, retroactive application would violate the Michigan Constitution.

On August 25, 2022, the Michigan Court of Appeals published its decision in *Andary v. USAA Casualty Insurance Company*, No. 356487, 2022 WL 3692767 (Aug. 25, 2022). That court held (over a dissent) that the new reimbursement caps in Section 3157 do not apply retroactively to people like Ms. Clark who were injured prior to the amendment of the No-Fault Act. The Michigan Supreme Court, by order dated September 29, 2022, agreed to hear the case during its March 2023 session. However, it denied the insurance company appellants' motion to stay the precedential effect of the court of appeals decision. (ECF No. 30-1, PageID.631.) On October 5, 2022, the Michigan Department of Insurance and Financial Services (DIFS) issued Bulletin 2022-17-INS, stating that because of the Court of Appeals decision (and the Supreme Court's decision not to stay the precedential effect), "MCL 500.3157(7) and MCL 500.3157(10) may not be applied to claims related to persons injured in accidents prior to June 11, 2019." (ECF No. 30-2, PageID.633.)

Following the decision in *Andary*, Ms. Clark moves for a preliminary injunction to require State Farm to pay her caregivers at the rate it was reimbursing them before the change in Michigan's No-Fault Act. She offers evidence that, if State Farm does not pay reimbursements at those levels, her caregivers will have no choice but to cease providing her care. She also offered

evidence that there are no other providers willing to care for her at the reimbursement rates that State Farm is now paying. She claims that if State Farm does not revert to the rates it was paying previously (and had then deemed reasonable), she will lose the 24-hour-a-day care that she is prescribed, which may result in adverse health effects or death. In support of her motion, Ms. Clark provided affidavits demonstrating that she does require 24-hour-a-day care at the level that has been prescribed since her injury in 2016. That does not appear to be meaningfully disputed. It is also not in dispute that, without that care, she will suffer adverse health consequences, including potentially death. What State Farm disputes is whether she will lose her health care imminently if State Farm is not ordered to pay the rates in effect before the amendment of the No-Fault Act. Instead, it claims her potential injury is speculative, and a preliminary injunction should not issue because the law remains in flux, and State Farm might not be able to recoup excess reimbursement payments if ultimately the Michigan Supreme Court decides that the amendments to the No-Fault Act are retroactive.[1]

PRELIMINARY INJUCTION STANDARD

"A preliminary injunction is an extraordinary remedy, which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). In ruling on a motion for a preliminary injunction, a court considers four factors: "(1) whether the plaintiffs are likely to succeed on the merits, (2) whether the plaintiffs will suffer irreparable injury in the absence of an

[1] Interestingly, in another case, *Bassett v. State Farm Mutual Automobile Insurance Company*, Case No. 22-6966 (Ottawa County Cir. Oct. 20, 2022), following the *Andary* decision, State Farm stipulated that it would re-process the plaintiff's home-care bills from July 1, 2021, to the present at reasonable rates without regard to the fee caps/schedules in amended Section 3157. (ECF No. 30-3, PageID.636-38.) At the hearing in this case, defense counsel was unable to articulate how that *Bassett* is distinguishable from this case to explain why State Farm was taking a different approach here.

injunction, (3) whether granting the injunction will cause substantial harm to others, and (4) whether the issuance of the injunction is in the public interest." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997). These are not prerequisites that must be satisfied for relief to issue, but rather factors that must be carefully balanced by the district court in exercising its equitable powers. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). The grant of a preliminary injunction is committed to the district court's discretion. *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993). When, as here, a court is sitting in diversity, it applies federal law as to all preliminary injunction factors except as to whether the plaintiff has demonstrated a likelihood of success on the merits, which is determined by state law.[2] *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007).

The general purpose of a preliminary injunction is to maintain the status quo pending determination of the action on the merits. *Burniac v. Wells Fargo Bank, N.A.*, 810 F.3d 429, 435 (6th Cir. 2016). However, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable

[2] State Farm contends that the Court should follow *Bratton v. Detroit Automobile Inter-Insurance Exchange*, 120 Mich. App. 73 (1982), and conclude that an injunction is not warranted in this action. (ECF No. 25, PageID.402.) The Court declines to do so for several reasons. First, *Bratton* applied Michigan law, whereas this Court must apply federal law in determining whether injunctive relief is appropriate. Second, as set forth below, the Court finds that Plaintiff has met her burden of demonstrating irreparable harm, whereas the *Bratton* court found that the plaintiffs had not demonstrated irreparable harm. *Id.* at 79–80. The harm to Plaintiff—potentially jeopardizing her health or life if she cannot receive the required care—is much more substantial and irreparable than any harm the plaintiffs had shown in *Bratton*, which related to whether plaintiffs should receive payments pending a determination of whether they could return to work. The circumstances here are closer to those in *Melrose v. Nationwide Mutual Insurance Co. of Am.*, 2020 WL 6253346 (Mich. Ct. App. Oct. 22, 2020), which persuasively distinguished *Bratton*.

injury." *Stenberg v. Cheker Oil Company*, 573 F.2d 921, 925 (6th Cir. 1978) (internal citations omitted). Thus, "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id.* Applying this reasoning, the court in *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998), found "little consequential importance to the concept of the status quo," concluding instead that "the balancing of equities" is the proper focus for preliminary injunctive relief, both mandatory and prohibitory. *Id.* at 348.

ANALYSIS

1. Likelihood of Success

Plaintiff contends that the decision of the Michigan Court of Appeals in *Andary*, 2022 WL 3692767, establishes that she is likely to prevail on the merits and, therefore, her right to benefits is controlled by the No-Fault Act as it existed prior to July 1, 2021. That would mean, she argues, that benefits would be payable at the former rates at which State Farm reimbursed before the amendment of the Act. Moreover, DIFS has ordered that the caps in Mich. Comp. Laws § 500.3157(7) and (10) not apply to claims by persons related to accidents before June 11, 2019. (PageID.633.) State Farm responds that Plaintiff has not shown a likelihood of success because "the Michigan Supreme Court could very well" side with the dissent in *Andary* and reverse the court of appeals decision. (ECF No. 25, PageID.398.)

Given *Andary*'s precedential value and the DIFS advisory bulletin, for present purposes Plaintiff has shown a likelihood of success, although it is certainly still possible that the Michigan Supreme Court will side with *Andary*'s dissent on one or more issues. The Sixth Circuit has observed that "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movant[] will suffer absent the [injunctive relief]. *Northeast*

Ohio Coal. for Homeless and Service Employees Intern. Union, Local 1199 v. Blackwell, 467 F.3d 999, 1009 (6th Cir. 2006) (citing *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). Here, the injury to the movant would be grave. That the current state of the law, including as determined by the applicable Michigan agency, favors Plaintiff is sufficient to surmount the likelihood of success hurdle. *See also Melrose*, 2020 WL 6253346, *4.

State Farm also argues that the DIFS October 5, 2022 Bulletin notes that, even after *Andary*, claims remain subject to the "reasonable" standard set forth in Mich. Comp. Laws § 3157(1). It argues that, even if the amendments to Section 3157(7) and (10) do not apply, Plaintiff may still not be entitled to the rates being paid before July 1, 2021, because of other changes in the law, and it is entitled to pay lower rates while it disputes those charges. However, it has offered no argument that the hourly rates that it was paying before July 1, 2021—and which Plaintiff asks be continued—were not reasonable. And it has not explained why Plaintiff is incorrect that, even if *Andary* were reversed, she and her providers would be entitled to higher reimbursement rates under the current version of Mich. Comp. Laws § 500.3157(2)(a)-(c), which allows for payment of benefits of "200% of the amount payable to the person for the treatment or training under Medicare" through July 2, 2022, "195% of the amount payable to the person for the treatment or training under Medicare" through July 2, 2023, and "190% of the amount payable to the person for the treatment or training under Medicare" thereafter. Plaintiff has provided evidence that the rates State Farm was reimbursing Plaintiffs before July 2021 fall below these rates (*see, e.g.*, ECF No. 15-6, PageID.161), and State Farm has not provided contradictory evidence. State Farm makes reference to setting its rates based on a charge description master in effect as of January 1, 2019. But it does not even attempt to argue that that those rates would be less than the reimbursement

rates it paid before July 2021. And Jeremy Fellows, the owner of FirstLight and Elite, provided and affidavit stating that State Farm is not paying "reasonable rates or per Medicare rates or Elite's charge description master, for post-July 1, 2021 services." (ECF No. 15-6, PageID.161.)

State Farm argues that it would be impermissible burden shifting for the Court to order payment of the pre-July 2021 rate without requiring Plaintiff to prove each of its post-July 2021 claims are entitled to that prior rate. However, Plaintiff has made a showing that it has a likelihood of success in proving that it is entitled to higher rates than what State Farm is currently paying. That is sufficient for this factor to favor Plaintiff.

2. Irreparable Harm

Irreparable harm is the most important factor in the analysis. The mere possibility of harm is not enough. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Rather, an applicant for injunctive relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* (italics in original). Speculation is insufficient. The applicant "must show irreparable harm that is 'both certain and immediate, rather than speculative or theoretical' to satisfy its burden to receive preliminary injunctive relief." *NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App'x 929, 943 (6th Cir. 2007) (quoting *Griepentrog*, 945 F.2d at 154).

Plaintiff's loss of care from her providers would be irreparable, and she has provided evidence from her doctor to support this. Further, at the hearing, Mr. Fellows testified that FirstLight and Elite planned to begin the process of discontinuing care as of January 1, 2023, by sending discharge letters to the affected patients and helping them to transition away from FirstLight and Elite staff within 30 days. He was uncertain precisely how long the process would take for each patient, but he stressed that his companies would terminate services.

State Farm argues that it remains uncertain how long that process would take. The Court agrees that information was missing from the affidavits submitted with Plaintiff's motion. But Mr. Fellows's testimony at the hearing was unequivocal that FirstLight and Elite could not support continued provision of services at the rates State Farm was paying and had made a decision to discontinue services after January 1, 2023. Moreover, his affidavit submitted in support of the motion provided information demonstrating the margins at which the business operated, namely that Plaintiff's caregivers' hourly rates were at or only slightly lower than the rates State Farm began paying as of July 2021. (ECF No. 15-6, PageID.160-163.) Mr. Fellows also testified that 70-80 percent of his business was from auto accidents. Considering other costs of operating the company, including those associated with billing and collecting from State Farm, this information corroborates his testimony that it not "financially feasible" to continue providing Plaintiff's care under the rates State Farm is currently paying. (*Id.*)

State Farm also argues that, because Ms. Clark waited a year to bring her lawsuit and some additional months to move for a preliminary injunction, that means that she is not facing irreparable harm. It further argues that the "status quo" is the reimbursement rates that State Farm is currently paying. But it was not unreasonable for Ms. Clark to wait to file her lawsuit while it worked with State Farm to determine what reimbursements it would make after the amendment of the No-Fault law and to wait until the irreparable harm was imminent before moving for a preliminary injunction. That it took some time for her caregivers to be forced to consider discharging her as a patient does not suggest that she does not now face irreparable harm.

Plaintiff has demonstrated that, in the absence of an injunction, State Farm will continue to pay only reduced reimbursement rates; her caregivers will notify her by January 1, 2023, that they must discharge her as a patient; and her caregivers will terminate services shortly thereafter.

Because it is unlikely that the Michigan Supreme Court will decide *Andary* before that occurs, Ms. Clark has demonstrated that she will be irreparably harmed in the absence of a preliminary injunction.

3. Harm to Other Parties

State Farm claims that it will be irreparably harmed if it is required to pay increased amounts that later are determined to be more than what is required under the No-Fault Act. It claims that Plaintiff's argument for a preliminary injunction is tantamount to an argument that she should win her case entirely before the case is even litigated and without discovery. Plaintiff argues in response that the prior reimbursement rates would be deemed reasonable because they are less than twice the amount payable to the provider under Medicare. As noted above, State Farm has not explained why Plaintiff is not correct that the prior rates would be deemed reasonable.

More importantly, it is not at all clear why State Farm would not be able to recoup its excess payments through a charge back process or set off from future payments if it were ultimately to prevail. Moreover, State Farm is a large insurance company with resources well in excess of the potential loss. The harm to Plaintiff's health, safety, and life, on the other hand, is readily apparent if she loses her medical care. *Melrose*, 2020 WL 6253346, at *5 ("concerns regarding physical safety are generally more pressing than concerns regarding economic loss"). So, the Court need not decide the question of what reimbursements would be required should the amendments to the No-Fault Act be deemed retroactive in order to evaluate this factor.

This factor favors Plaintiff.

4. Public Interest

The public has an interest in ensuring that accident victims continue to receive the care that they need. This factor also favors Plaintiff.

CONCLUSION

Because the Court finds that each factor of the analysis favors Plaintiff, the Court will grant the motion for a preliminary injunction as follows:

State Farm is ordered to re-process and pay the bills of Ms. Clark's home-care provider West Michigan Home Care Services, Inc., d/b/a/ FirstLight Home Care of Grand Rapids, from July 2, 2021, through the end of this litigation or until further order of the Court at a rate of $27 per hour for Ms. Clark's home-health-aide care.

State Farm is ordered to re-process and pay the bills of Ms. Clark's home-care provider Elite Nurse Staffing, LLC, d/b/a Elite Nursing, from July 2, 2021, through the end of this litigation or until further order of the Court at a rate of $61 per hour for Ms. Clark's RN care and $48 per hour for Ms. Clark's LPN care.

This order will be in effect until further order of this Court, as it may be subject to change based on the Michigan Supreme Court's decision in *Andary*.

State Farm shall re-process and pay Ms. Clark's past home-care bills from July 1, 2021, to the present day within 30 days of the date of this Order. Going forward, State Farm must timely pay the above rates within 30 days after State Farm receives reasonable proof of the claim.

IT IS SO ORDERED.

Dated: November 3, 2022

/s/ Sally J. Berens
SALLY J. BERENS
U.S. Magistrate Judge

EXHIBIT 8

AFFIDAVIT OF COURTNEY HERSHA, RN

Courtney Hersha, RN, being sworn, states as follows:

1. I am familiar with the facts stated in this affidavit and, if called as a witness, I am competent to testify to them.

2. I am a Registered Nurse, licensed in the state of Michigan since 2001.

3. I am a Nurse Case Manager and employed by Preferred Case Management

4. I am also a Certified Case Manager.

5. I am the Nurse Case Manager for Mikayla Clark.

6. I am familiar with Mikayla, the traumatic brain injury she suffered in the November 29, 2016 accident resulting in major cognitive disorder with behavioral disturbance, muscle weakness, and her complex care needs due to her accident injuries.

7. Mikayla requires 24/7 care and relies on her care givers for all of her daily needs.

8. As Mikayla's Nurse Case Manager, I am responsible for, among other services, assessing and monitoring Mikayla's care needs, planning and coordinating Mikayla's care needs, evaluating Mikayla's options for care, and ensuring that Mikayla receives the care she needs.

9. I am aware that Mikayla's current care provider has indicated that it may not be able to continue to provide the care Mikayla needs due to a lack of payment by Mikayla's auto insurer.

10. In my role as nurse case manager, I am aware that many home-care companies have gone out of business due to payment issues with auto insurers.

11. In my role as nurse case manager, I have evaluated and attempted to find other care providers for individuals like Mikayla, who have complex care needs.

12. I have not been able to find any other home-care providers able or willing to take on the type of care Mikayla needs. The responses I have received from other home-care providers is that they either will not work with auto insurers due to payment issues and/or they do not have sufficient staff to cover the type of care Mikayla needs.

13. Mikayla requires the 24/7 care ordered by her doctor and it is imperative that she receive that care.

14. Based on a lack of alternative care options for Mikayla, I am highly concerned that if Mikayla's current provider ceases care, Mikayla will not be able to obtain necessary and proper care from another provider.

15. It is my professional opinion that the best option for Mikayla is to remain in her home and receive the care she needs there from her current providers, Elite Nurse Staffing ("Elite") and West Michigan Home Care Services, Inc. ("WMHCS"). Mikayla has care givers that know her particular issues and needs and it is in her best interest to keep those care givers with Elite and WMHCS.

16. I am very concerned that if Mikayla loses her home care and has to go to the hospital or some other facility that Mikayla would not survive.

Courtney Hersha, RN BSN CCM

Subscribed and sworn to before me
Date: 8/01/2022

Notary Public, Kalamazoo County, MI
Acting in Kalamazoo County, MI
My Commission expires: 05/15/2026

RACHEL TRAVERS
Notary Public, State of Michigan
County of Kalamazoo
My Commission Expires 05/15/2026
Acting in the County of Kalamazoo

EXHIBIT 9

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

JAMES O'KEEFFE, as guardian of MICHAEL O'KEEFFE, GAUTHIER FAMILY HOME CARE, LLC, and ELITE NURSE STAFFING, LLC,

Plaintiffs,

vs

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Defendant.

HON. GEORGE JAY QUIST

Case No. 22-05555-NF

ORDER/OPINION RE: EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND TO COMPEL PROPER PAYMENTS UNDER THE NO-FAULT ACT BY JAMES O'KEEFFE, AS GUARDIAN OF MICHAEL O'KEEFFE

_____/

At a session of said Court, held in the Kent County Courthouse in the City of Grand Rapids, in said county on September 2, 2022

Present: HON. GEORGE JAY QUIST
Circuit Judge

OPINION AND ORDER

I. Issue Presented and Disposition

Plaintiffs filed the instant Emergency Motion for Preliminary Injunction and to Compel Proper Payments Under the No-Fault Act by James O'Keeffe, as Guardian of Michael O'Keeffe, on August 22, 2022. Defendant State Farm Mutual Automobile Insurance Company filed a response on August 30, 2022. Plaintiffs filed a reply on August 31, 2022. The Court heard oral argument on September 2, 2022. After reviewing the material facts and applicable law, Defendant's motion is **GRANTED**.

II. Material Facts

Plaintiff James O'Keeffe is the guardian of Michael O'Keeffe, who suffered a traumatic brain injury in a motor vehicle accident in 1981 and requires a 24/7 high-tech aide and nursing

care. Plaintiffs Gauthier Family Home Care, LLC ("GFHC") and Elite Nurse Staffing, LLC ("Elite") are both involved in Michael's care.

Defendant State Farm Mutual Automobile Insurance Company is Michael's Michigan no-fault auto insurer and has been responsible for paying for Michael's home-care expenses for the last 40 years. Prior to July 2, 2021, Defendant recognized the rates for Michael's various health aides to be reasonable and paid: $26/hour to GFHC for Michael's home-health aide care, $50/hour to Elite for LPN care, $70/hour for RN care, and $95/hour for 2-hour nursing visits.

In June of 2019, the Michigan Legislature passed no-fault reform legislation that included the implementation of certain fee caps/schedules that went into effect July 2, 2021. Following the implementation of the new fee schedules, Defendant stopped payments for Michael's care. Eventually, Defendant began making payments again, but at much lower rates than before. GFHC and Elite allege that they may soon be forced to cease care of Michael without full payments for his treatment.

Plaintiffs now request a preliminary injunction ordering Defendant to process and pay all of Michael's home-care provider bills from July 2, 2021, through the end of this litigation at a rate of $26/hour for Michael's high-tech home-health aide care, $50/hour for his LPN care, $70/hour for his RN care, and $95/hour for 2-hour nursing visits. Without this relief, Plaintiffs assert Michael will suffer irreparable harm.

III. Standard of Review

A party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4). Michigan courts must evaluate the following four factors to determine whether:

(1) the moving party made the required demonstration of irreparable harm,

(2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party,

(3) the moving party showed that it is likely to prevail on the merits, and

(4) there will be harm to the public interest if an injunction is issued.

Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit, 482 Mich 18, 34; 753 NW2d 579 (2008).

IV. Law and Analysis

Plaintiffs argue the four factors listed above weigh in favor of the Court granting a preliminary injunction. The Court agrees.

First, Plaintiffs have demonstrated Michael will suffer irreparable harm if the preliminary injunction is not issued. In addition to suffering a traumatic brain injury that left him a quadriplegic, Michael requires a G-tube and suffers from renal failure, as well as other numerous, serious, potentially life-threatening conditions that require 24/7 monitoring and care. If they do not receive payments at the full and proper rates, GFHC and Elite allege that they will be financially unable to continue caring for Michael. Plaintiffs provided affidavits from Michael's doctors and care team members averring he will suffer irreparable harm to his health, safety, and life if his care is discontinued. Therefore, this factor weighs in favor of granting the injunctive relief requested.

Second, Plaintiffs have demonstrated that the harm to Michael if injunctive relief is not granted outweighs any harm to Defendant if the injunction is granted. Defendant paid the previous rates for 40 years, demonstrating it is well within their ability to pay those amounts. Furthermore, Defendant's interest in this matter is financial, whereas Michael's life is at risk if his care were discontinued. Michigan courts have long recognized that "[c]oncerns regarding physical safety are generally more pressing than concerns regarding economic loss." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 53-54; 649 NW2d 783 (2002). Furthermore, preserving the status quo of Michael receiving the care he needs, and his providers being paid as they were before July 2, 2021, is appropriate to ensure Michael is safe. Therefore, the possible harm to Michael far outweighs Defendant's financial concerns.

Third, Plaintiffs have successfully demonstrated they are likely to succeed on the merits. Plaintiffs argue the new fee schedules set forth in the 2019 no-fault reform legislation do not apply to Michael. Plaintiffs' position was recently affirmed by the Michigan Court of Appeals in the case of *Andary v USAA Cas Ins Co*, Docket No. 356487 (Mich App 2022) wherein the Court held the 2019 no-fault reform legislation contains no explicit retroactive language and, therefore, could not be applied to legacy cases where individual's rights had vested prior to the enactment of these legislative reforms. The Court further held that in addition to the lack of explicit language in the legislation, comments from the director of Michigan's Department of Insurance and Financial Services as well as various legislators confirm the no-fault legislative reforms were

never intended to apply retroactively. The no-fault reform legislation did not change the requirement that insurance companies pay for "allowable expenses consistent of reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). Moreover, Defendant had previously agreed to and made payments at those rates. Therefore, Plaintiffs are likely to succeed on the merits in establishing Defendant is liable under Michigan's No-Fault Act.

Fourth, Plaintiffs have demonstrated the public interest supports injunctive relief. The public has a clear interest in ensuring the most vulnerable in our society receive the care they need. Continuing Michael's care is, therefore, in the public interest, which supports granting the injunctive relief requested.

Defendants argue that *Andary* was wrongly decided and that the 2019 no-fault legislative reforms' fee schedules should apply retroactively in this case. However, *Andary* is binding precedent. Michael is a traumatic brain injury patient whose benefits vested in 1981, when his accident occurred, like the plaintiffs in *Andary*. Therefore, the no-fault reforms' fee schedule cannot be applied retroactively to Michael.

IV. Conclusion

Based on the above analysis, Plaintiff's Emergency Motion for Preliminary Injunction and to Compel Proper Payments Under the No-Fault Act is **GRANTED**. Defendant shall process and pay all of Michael's home-care provider bills from July 2, 2021, through the end of this litigation at a rate of $26/hour for Michael's high-tech home-health aide care, $50/hour for his LPN care, $70/hour for his RN care, and $95/hour for 2-hour nursing visits.

IT IS SO ORDERED.

9-2-22

DATE

GEORGE JAY QUIST, Circuit Judge (P43884)

PROOF OF SERVICE

Service of a copy of this document was made by ordinary and electronic mail this date upon the parties who have appeared, or their attorneys of record.

9-2-22
DATE

Marceedes Langlois
Marceedes Langlois, Judicial Clerk

EXHIBIT 10

AFFIDAVIT OF COURTNEY HERSHA RN

Courtney Hersha, RN, being sworn, states as follows:

1. I am familiar with the facts stated in this affidavit and, if called as a witness, I am competent to testify to them.

2. I am a Registered Nurse, licensed in the state of Michigan since 2001.

3. I am a Nurse Case Manager and employed by Preferred Case Management.

4. I am also a Certified Case Manager.

5. I am the Nurse Case Manager for Michael O'Keeffe.

6. I am familiar with Michael, the traumatic brain injury (TBI) he suffered in the 1981 accident rendering him unable to care for himself in any capacity, and his complex care needs due to his accident injuries. Michael is medically fragile, currently requiring the use of a G-tube for fluid balance to maintain renal function and sodium balance. Michael's mobility, range of motion of extremities, balance, and coordination have all been severely affected by his TBI and require intensive in-home care to include skilled nursing, attendant care, Physical Therapy, Occupational Therapy, Speech Therapy, Recreational Therapy, and Behavior Therapy. In addition to the physical impairments, Michael can have extreme mood volatility with grabbing, hitting, pinching, biting, kicking, yelling, throwing objects which presents safety concerns to staff and himself.

7. Michael has renal failure requiring close monitoring secondary to long-term use of Lithium to control his undesired behaviors as noted by Dr. Haines. Michael's renal damage is managed by strict monitoring of daily fluid intake as well as nightly fluids via G-tube. Labs are closely monitored and evaluated for needed changes in the care plan. G-tube fluids, G-tube site management, and assessments are completed by skilled nursing only.

8. Michael requires 24/7 care and relies on his care givers for all of his daily needs.

9. Michael requires 2 caregivers at all times, secondary to volatile moods and aggression for his safety and the safety of staff.

10. As Michael's Nurse Case Manager, I am responsible for, among other services, assessing and monitoring Michael's care needs, planning and coordinating Michael's care needs, evaluating Michael's options for care, and ensuring that Michael receives the care he needs.

11. I am aware that Michael's current care provider has indicated that it may not be able to continue to provide the care Michael needs due to a lack of payment by Michael's auto insurer.

12. In my role as nurse case manager, I am aware that many home-care companies have gone out of business due to payment issues with auto insurers.

13. In my role as nurse case manager, I have evaluated and attempted to find other care providers for individuals like Michael, who have complex care needs.

14. I have not been able to find any other home-care providers able or willing to take on the type of care Michael needs. The responses I have received from other home-care providers is that they either will not work with auto insurers due to payment issues and/or they do not have sufficient staff to cover the type of care Michael needs.

15. Michael requires the 24/7 care ordered by his doctor and it is imperative that he receive that care. Michael failed a trial at a long-term care facility following Covid as evidenced by re-admission to the hospital as they were unable to balance his sodium/renal function. One on one care with ability to perform complex assessments are required to meet Michael's ever changing complex needs.

16. Based on a lack of alternative care options for Michael, I am highly concerned that if Michael's current provider ceases care, Michael will not be able to obtain necessary and proper care from another provider.

17. It is my professional opinion that the best option for Michael is to remain in his home and receive the care he needs there from his current providers, Elite Nurse Staffing, LLC ("Elite") and Gauthier Family Home Care, LLC ("GFHC"). Michael has caregivers that know his particular issues and needs, and it is in his best interest to keep those caregivers with Elite and GFHC.

18. I am very concerned if Michael loses his home care and is forced to transition to a care facility, that his longevity and quality of life will be drastically decreased. Michael has been both in the hospital and in long-term care in the past and failed as evidence by re-admission to the hospital. The current level of care provider affords Michael a higher-level care with opportunity to quickly address clinical concerns and change his care plan accordingly. One on one care is not routinely provided in the hospital nor in long-term care, thus his safety and longevity would be comprised. I would also like to note Michael's current in-home care affords him a quality life with social interactions and outings not possible if forced into a facility.

Courtney Hersha RN BSN CCM

Courtney Hersha, RN BS CCM

Subscribed and sworn to before me
Date: July 18, 2022

Shanon Adler

Notary Public, Kalamazoo County, MI
Acting in Kalamazoo County, MI
My Commission expires: Jan 10, 2028

SHANON ADLER
Notary public, State of Michigan
County of KALAMAZOO
My commission expires 10-Jan-2028
Acting in the County of Kalamazoo

EXHIBIT 11

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR THE COUNTY OF KENT

KATHLEEN KUBICA and HC ASSOCIATES, INC.,

Plaintiffs,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

Case No. 22-01508-NF

Hon. Paul J. Denenfeld

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OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

I. Introduction

Before the Court is Plaintiffs' Emergency Motion for a Preliminary Injunction. Plaintiffs are a home health care provider, HC Associates, Inc. ("HC"), and one of its patients, Kathleen Kubica ("Kubica"), who suffered severe injuries, including a spinal cord injury rendering her a quadriplegic, in a 2001 motor vehicle accident. At the time of the accident, Kubica was insured by Defendant State Farm Mutual Automobile Insurance Company ("State Farm"). Since 2001, State Farm

has paid Kubica's first-party no-fault benefits pursuant to her policy of insurance and the no-fault act.

Plaintiffs now allege that when the fee schedules of amended MCL 500.3157 took effect on July 2, 2021, State Farm initially delayed payment of HC's charges for Kubica's home health care and then resumed paying but at a significantly reduced rate. State Farm contends that it properly reduced its payments based on the new fee schedules in MCL 500.3157(2). HC disagrees and now requests the Court enter a preliminary injunction order requiring State Farm to process and pay all of Kubica's home-care provider bills beginning July 2, 2021 at the rates State Farm previously recognized as reasonable under the no-fault act.

II. Factual Background

Almost all the basic facts are undisputed. Both sides agree that Kubica was catastrophically injured in a 2001 motor vehicle accident. There is no dispute that State Farm was Kubica's no-fault carrier legally responsible to pay first party no-fault benefits, including payment for reasonable medical benefits. It is agreed that State Farm has been doing so since the accident.

It is also not in dispute that the final phase of the 2019 no-fault amendments—which included fee schedules for medical reimbursement rates—took effect on July 2, 2021. Shortly after that date, State Farm began delaying payment to HC for Kubica's home health care charges. And later, State Farm unilaterally reduced the rates that it was willing to reimburse HC for its care of Kubica. *See* Lori Wier affidavit (attached to Plaintiffs' brief at Ex E). The parties do not dispute that the nature of Kubica's home health care needs have not markedly changed over the 20 years she has required care.

At the hearing on this motion for a preliminary injunction, a representative of HC testified that, because of the reduced rates State Farm is now paying, HC can no longer afford to pay HC caretakers a reasonable rate and continue to

provide the necessary home care to Kubica. Therefore, HC has informed Kubica that it will no longer be able to provide her care after May 2022. And Kubica's nurse care manager, Amy Dewitt, testified in her affidavit that she has not been able to find any other home-care providers able or willing to take on the type of care Kathleen needs.

III. Legal Analysis

An injunction "'represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.'" *Davis v Detroit Financial Review Team*, 296 Mich App 568, 613 (2012). Because Plaintiffs Kubica and HC have sought the injunction, they bear "the burden of establishing that a preliminary injunction should be issued." See MCR 3. 310(A)(4). There are four factors that the Court must consider in determining whether to grant any injunctive relief: (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. *Id.* at 613. In analyzing these four considerations, the Court must not forget that injunctive relief is only appropriate if "there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Id.* at 614.

a. Likelihood of Success on the Merits

In analyzing the likelihood of success on the merits, the Court must focus on the new fee schedules set forth in amended MCL 500.3157, which provides in relevant part as follows:

> (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.
>
> ***
>
> (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%.

Under this subsection, the Court must first determine whether there is an applicable Medicare rate for the treatment HC is providing.

This Court has already grappled with this issue in a recent case involving different parties, *Advisacare v Farm Bureau*, Kent County Circuit Court Case No. 21-01054 (February 10, 2022) (opinion attached to HC's brief as Exhibit ("Ex") T) (motion for reconsideration denied). There, this Court concluded that "there is an amount payable for home health aide care under Medicare." This holding was based in part on MCL 500.3157(15)(f), which defines "Medicare" as meaning "fee for service payments under part A, B, or D of the federal Medicare program established under subchapter XVIII of the social security act, 42 USC 1395 to 1395*lll*, **without regard to the limitations unrelated to the rates in the**

fee schedule such as limitation or supplemental payments related to utilization, readmissions, recaptures, bad debt adjustments, or sequestration." (Emphasis added).

State Farm now argues that home health care of the sort HC provides Kubica is not reimbursable by Medicare on a "fee for service" basis and hence Medicare does not provide payments for such services. State Farm relies solely on a decision by the US Court of Appeals, *United States ex rel Prather v Brookdale Senior Living Communities*, 838 F3d 750 (CA 6 2016). *Prather* involved a federal False Claims Act claim alleging that the defendant had submitted to Medicare claims for reimbursement that failed to comply with the mandated Medicare requirements. In its discussion of the claim, the Sixth Circuit provides its summary of Medicare's payment system for home health care.

Prather has limited value to this Court. First, it is a federal decision that is not precedentially binding. MCR 7.215(C)(1). Second, it had nothing to do with Michigan's no-fault act or its amendments that are at issue in the instant matter. State Farm concedes that there is no controlling Michigan appellate authority that adopts its theory.[1] And, as this Court previously held, "it is unlikely the Legislature intended to impose all Medicare requirements, or for Courts to examine each coverage issue, in determining whether Medicare provides an amount payable." Accordingly, for the reasons argued by HC and those previously accepted by this Court, the Court finds that HC is likely to succeed on the merits regarding its argument that Medicare provides an amount payable for Kubica's care.

[1] To be sure, there is no controlling Michigan appellate authority on the question at all; this Court's decision in the *Advisacare v Farm Bureau* case was result based on its best efforts to analyze these complex issues. We all await from our appellate courts controlling published authority on this and other no-fault amendment issues.

b. Irreparable Harm

Michigan law regards the likelihood of irreparable harm as an indispensable element of any request for injunctive relief. See *Michigan Coalition of State Employee Unions v Civil Service Comm'n*, 465 Mich 212, 225 (2001). Moreover, a "mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9 (2008).

Here, without minimizing the concerns that have been established by Plaintiffs' attached exhibits, the affiants' opinions are about possible *future* harms. See, e.g., Fechtner Affidavit (Ex B) (*if* Kubica's "care is not properly monitored and treated, [her] conditions *can become* life-threatening) (emphasis added); Ford Affidavit (Ex C) ("*[i]f* Kathy loses her 24/7 home care, she will not survive in a nursing home or hospital environment) (emphasis added); DeWitt Affidavit (Ex D) ("I am very concerned that *[i]f* Kathleen loses her home care and has to go to the hospital or some other facility that [she] would not survive)" (emphasis added); ; environment [and her] health, safety, and life are at serious risk" (emphasis added).

But the Court concludes that, given HC's notice to Kubica that it will no longer be able to provide her current care at the end of May 2022—about 3 weeks from now—any slide into actual or foreseeable physical harm or even death to Kubica would constitute irreparable harm. The exhibits establish that Kubica would likely never be able to regain that which would likely be lost without judicial relief to at least preserve the status quo. That meets the definition of "irreparable harm."[2]

[2] State Farm insists that there is an adequate remedy at law that precludes injunctive relief here. But while there may be such a remedy for HC, the instant motion is brought solely by Kubica. The remote possibility of her receiving money in the future is cold comfort if her fragile medical condition has deteriorated and cannot be restored.

c. Balance of Harms to the Opposing Parties

In considering injunctive relief, the Court must balance the potential harm to each side in the presence or absence of an injunction. See *Davis*, 296 Mich at 613. Here, "defendant may face a financial loss if it is ultimately determined that it may reduce the benefit and is unable to recover the amount paid during the pendency of the litigation. But concerns regarding physical safety are generally more pressing than concerns regarding economic loss." *Melrose for Estate of Melrose v Nationwide Mutual Insurance Co*, 2020 WL 6253346 at *5, citing *Sherman v. Sea Ray Boats, Inc.*, 251 Mich. App. 41, 53-54 (2002) (discussing the rationale supporting the economic loss doctrine).

The Court ought not cause injury to State Farm by requiring it to accept an unreasonably low rate, but the Court's refusal to provide any injunctive relief could cause significant and potentially permanent harm to Kubica. Our Court of Appeals reminded the trial courts that "a preliminary injunction should only issue to preserve the status quo, not to change it." *Busuito v Barnhill*, ___ Mich App ___, 2021 WL 2171156 at *7. By merely enjoining State Farm from paying a lesser rate than that which it had previously agreed was reasonable preserves the status quo at the time of the dispute.

d. Potential Harm to the Public Interest

In terms of the potential harm to the public interest that may flow from injunctive relief, the Court sees none. To the contrary, it is in the public interest to exercise narrow judicial relief in a way that is intended to protect the life and health of Kubica (and potentially those similarly situated to her) until this Court, or an appellate court, decides the manner in which the fairly new and complex no-fault rate amendments should be applied in this or similar cases.

Moreover, the Court's preliminary injunction will assure that no-fault patients' medical providers will receive reasonable rates for their provided care

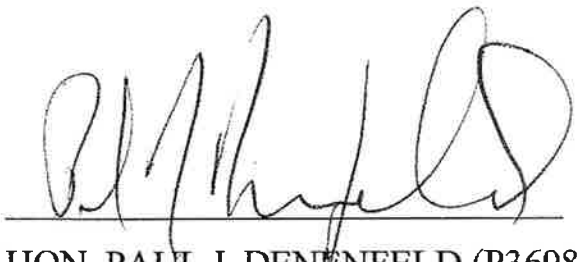
while first-party no-fault carriers will be able to pay reasonable, not exorbitant, rates of reimbursement to those providers. Therefore, no public interest outweighs the need for injunctive relief established by the record in this case.

IV. Conclusion

For the reasons stated in this opinion, IT IS ORDERED that, beginning immediately,[3] Defendant State Farm shall pay HC's submitted medical bills for Kubica's motor-vehicle-accident-incurred home health care at the rate it paid prior to July 2, 2022. This injunction shall remain in effect until further order of the Court.

IT IS SO ORDERED.

Dated: May 9, 2022



HON. PAUL J. DENENFELD (P36982)
Kent County Circuit Court Judge

[3] The Court is not currently ordering relief regarding the reduced rates State Farm has been paying HC. That claim remains but need not be addressed through a motion for injunctive relief.

EXHIBIT 12

AFFIDAVIT OF AMY DEWITT, RN

Amy Dewitt, RN, being sworn, states as follows:

1. I am familiar with the facts stated in this affidavit and, if called as a witness, I am competent to testify to them.

2. I am a Registered Nurse, licensed in the state of Michigan since 2014.

3. I am a Nurse Case Manager and employed by Ridgemoor Case Management Services.

4. I am also a Certified Case Manager.

5. I am the Nurse Case Manager for Kathleen Kubica.

6. I am familiar with Kathleen, the spinal cord injury she suffered in the 2001 accident, and her complex care needs due to her accident injuries.

7. Kathleen requires 24/7 care and relies on her care givers for all of her daily needs.

8. As Kathleen's Nurse Case Manager, I am responsible for, among other services, assessing and monitoring Kathleen's care needs, planning and coordinating Kathleen's care needs, evaluating Kathleen's options for care, and ensuring that Kathleen receives the care she needs.

9. I am aware that Kathleen's current care provider has indicated that it may not be able to continue to provide the care Kathleen needs due to a lack of payment by Kathleen's auto insurer.

10. In my role as nurse case manager, I am aware that many home-care companies have gone out of business due to payment issues with auto insurers.

11. In my role as nurse case manager, I have evaluated and attempted to find other care providers for individuals like Kathleen, who have complex care needs.

12. I have not been able to find any other home-care providers able or willing to take on the type of care Kathleen needs. The responses I have received from other home-care providers is that they either will not work with auto insurers due to payment issues and/or they do not have sufficient staff to cover the type of care Kathleen needs.

13. Kathleen requires the 24/7 care ordered by her doctor and it is imperative that she receive that care.

14. Based on a lack of alternative care options for Kathleen, I am highly concerned that if Kathleen's current provider ceases care, Kathleen will not be able to obtain necessary and proper care from another provider.

15. It is my professional opinion that the best option for Kathleen is to remain in her home and receive the care she needs there from her current provider, Health Care Associates. Kathleen has care givers that know her particular issues and needs and it is in her best interest to keep those care givers with Health Care Associates.

16. I am very concerned that if Kathleen loses her home care and has to go to the hospital or some other facility that Kathleen would not survive. For example, Kathleen was just recently in the hospital and the hospital did not have Kathleen's BIPAP machine on at night to help her breath and even though she had pneumonia.

Amy Dewitt, RN

Subscribed and sworn to before me
Date: 4-8-2022

Marlene Krueger
Notary Public, Kent County, MI
Acting in Kent County, MI
My Commission expires: 9-15-2027

EXHIBIT 13

STATE OF MICHIGAN
IN THE CIRCUIT FOR THE COUNTY OF MECOSTA

SHAWN HALL and ROLL ON REHAB, INC.

Plaintiffs,

v.

CITIZENS INSURANCE COMPANY,

Defendant.

Case No. 22-26318-NF

Honorable Scott Hill-Kennedy

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PRELIMINARY INJUNCTION ORDER

At a session of said Court held in the County of Mecosta, State of Michigan on June 9, 2022.

PRESENT: HONORABLE SCOTT HILL-KENNEDY
CIRCUIT COURT JUDGE

Plaintiff Shawn Hall filed an *Emergency Motion for Preliminary Injunction and to Compel Proper Payments Under the No-Fault Act*, along with supporting documentation and affidavits. Defendant Citizens Insurance Company filed a response on or around June 1, 2022. Shawn Hall filed a reply on or around June 3, 2022. A hearing on the motion was held on June 8, 2022. Upon reviewing the motion and supporting documentation, and the Court being otherwise fully advised in the premises, the Court makes the following findings:

The Court finds that Shawn Hall will suffer irreparable harm in the absence of injunctive relief by this Court, including irreparable harm to Shawn Hall's health, safety, and overall wellbeing.

The Court finds that Shawn Hall will suffer greater harm in the absence of an injunction than Defendant Citizens would if relief is granted. The Court also finds that preserving the status quo – of Shawn Hall receiving the care he needs – is appropriate to ensure that Shawn Hall is safe.

Plaintiff Shawn Hall has established a likelihood of success on the merits.

The Court finds that the public interest favors granting relief so as to preserve Shawn Hall's ability to receive care in his home and preserve his health, safety, and life.

Therefore, for the reasons stated above and on the record and the Court being otherwise fully advised in the premises, the Court hereby GRANTS Plaintiff Shawn Hall's motion for preliminary injunction and enters a Preliminary Injunction Order as follows:

A. Defendant Citizens is ordered to process and pay all of Shawn Hall's home-care provider Roll On Rehab's bills from January 10, 2022 through the end of this litigation at a rate of $71.57/hour for all hours of skilled nursing care Shawn Hall requires (24/7 – 168 hours per week).

B. Citizens is ordered to process and pay the above amounts for all of ROR's bills as to Shawn Hall from January 10, 2022 to the present day by or before June 22, 2022. Going forward, Citizens must timely pay the above amounts/rates within 30 days, as required by the Michigan No-Fault Act.

C. Pursuant to MCR 3.310(C)(4), this Order is binding on the parties to this action, their officers, agents, servants, employees, and attorneys, and on those persons in active

concert or participation with them who receive actual notice of the order by personal service or otherwise.

D. No bond is required, as this Order maintains the status quo which, before this dispute, was that Shawn Hall received the care and services he required.

E. This is not a final order and does not close the case.

SO ORDERED.

6/09/2022

Honorable Scott Hill-Kennedy
Circuit Court Judge

Stipulated as to form and for entry:

Stephen J. Hulst (P70257)
Attorney for Plaintiffs

(P70257) for

Donald C. Brownell (P48848) with permission see attached
Noah S. Zeidan (P82950)
Attorneys for Defendant

EXHIBIT 14

SUPPLEMENTAL AFFIDAVIT OF DEEDEE PEREZ, RN, CCM

Deedee Perez, RN, CCM, being sworn, states as follows:

1. I am familiar with the facts stated in this affidavit and, if called as a witness, I am competent to testify to them.

2. This Affidavit supplements my previous Affidavits relative to Shawn Hall and dated 12.6.21 and 5.24.22. As noted, I am Shawn's Nurse Case Manager.

3. I understand that Citizens claims that "there are numerous cheaper alternatives which would provide Shawn Hall substantively the same care as that which Roll on Rehab provides," and that, in support, Citizens cites to an "HHC HHA/RN Agency Attendant Care Market Survey" dated 12.7.20 and performed by Lisa Sawinski of Manageability ("the Manageability Market Survey").

4. I have many clients who have Citizens as their auto insurer.

5. Since July 2, 2021, Citizens has continually cut reimbursements to providers, often times by *more* than 45%.

6. When I have attempted to find altenertative home-care providers for my clients who are insured by Citizens, providers refuse to take on the care, knowing that Citizens will cut their rates by 45%.

7. I have personally contacted the providers listed in the Manageability Market Survey. Not one said they would be willing and/or able to take on Shawn Hall's care. Specifically:

   a. Asona Home Health said they are not accepting auto insurance at this time.

   b. Compassionate Care Home Health Services does not have skilled nursing and will only accept auto insurance with an agreed upon bill rate prior to services rendered.

c. Aunti A.C. E. Staffing Inc./A.C.E. Home Health Care does not provide skilled nursing care and will not accept Citizens insurance.

d. Family Home Health Care does not have skilled nursing and will only accept auto insurance with an agreed upon bill rate prior to services rendered.

e. Christian Home Services, Inc. does not have skilled nursing available in the area right now for 24 hour care and will only accept auto insurance with an agreed upon bill rate prior to services rendered.

f. ComForCare Home Care does not provide skilled nursing care and will not accept less than their bill rate, they have discharged multiple mutual clients in August of 2021 due to the 55% reimbursement rate.

g. A&D Home Health Care does not provide skilled nursing care or service the Canadian Lakes area. They are not accepting auto at this time due to the 55% reimbursement rate.

h. Michigan Medicine Visitng Nurses – U of M does not service the Canadian Lakes area. They do not provide 24 hour skilled nursing. They are accepting auto payors if the auto insurance will provide an agreed upon bill rate prior to services rendered.

i. Comfort Keepers Home Health Care does not provide skilled nursing care.

j. Heatlh Care Associates and Community Care Givers does not have skilled nursing services in the Canadian Lakes area for 24 hour care and they are not accepting new auto insurance clients at this time.

8. Citizens' claim that these providers would or could provide Shawn with the care he needs is not true.

9. I also understand that Citizens is only paying for 56 hours of the 168 hours of skilled nursing care Shawn needs per week. I am confident that no other provider would take on Shawn's care if they were only paid for 56 out of 168 hours of care per week.

Deedee Perez

Subscribed and sworn to before me
Date: 6-5-22

Notary Public, Grand Traverse County, MI
Acting in Grand Traverse County, MI
My Commission expires: 4-11-2023

JULIE A POWELL
Notary Public - State of Michigan
County of Grand Traverse
My Commission Expires Apr 11, 2023
Acting in the County of Grand Traverse

EXHIBIT 15

STATE OF MICHIGAN
IN THE CIRCUIT FOR THE COUNTY OF VAN BUREN

DAVID E. MARTIN and INTEGRITY BACK AND BRAIN, LLC,

Plaintiffs,

v.

PROGRESSIVE MICHIGAN INSURANCE CO.,

Defendant.

Case No. 22-071643-NF

Honorable David J. DiStefano

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PRELIMINARY INJUNCTION ORDER

PRELIMINARY INJUNCTION ORDER

At a session of said Court held in the
County of Van Buren, State of Michigan
on March 1, 2022.

PRESENT: HONORABLE DAVID J. DISTEFANO
CIRCUIT COURT JUDGE

Plaintiff David Martin filed an emergency motion for preliminary injunction and to compel proper payments under the No-Fault Act, along with supporting documentation and affidavits. A hearing on the motion was held on March 1, 2022. Upon reviewing the motion and supporting documentation, and the Court being otherwise fully advised in the premises, the Court makes the following findings:

The Court finds that David Martin will suffer irreparable harm in the absence of relief by this Court, including irreparable harm to David Martin's health, safety, and overall wellbeing.

The Court finds that David Martin will suffer greater harm in the absence of an injunction than Defendant Progressive would if relief is granted. The Court also finds that preserving the status quo – of David Martin receiving the care he needs and his provider being paid as they were pre-July 2, 2021 – is appropriate to ensure that David Martin is safe.

Plaintiff has established a likelihood of success on the merits, including his claim that Defendant Progressive unlawfully failed to make timely payment of David Martin's benefits under the No-Fault Act and unlawfully reduced the amounts payable to David Martin's home-care provider, Integrity Back and Brain, LLC.

The Court finds that the public interest favors granting relief so as to preserve David Martin's ability to receive care in his home.

Therefore, for the reasons stated above and on the record and the Court being otherwise fully advised in the premises, the Court hereby GRANTS Plaintiff's motion and enters a Preliminary Injunction Order as follows:

A. Defendant Progressive is ordered to process and pay all of David Martin's home-care provider Integrity Back and Brain, LLC's bills from July 2, 2021 through the end of this litigation at a rate of $30/hour for the high-tech home care David Martin requires and $120/hour for nursing care.

B. Progressive is ordered to process and pay the above amounts for all of Integrity Back and Brain, LLC's bills as to David Martin from July 2, 2021 to the present day within ~~seven~~ 21 days. Going forward, Progressive must timely pay the above amounts/rates within 30 days, as required by the Michigan No-Fault Act.

C. Pursuant to MCR 3.310(C)(4), this Order is binding on the parties to this action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

D. No bond is required, as this Order maintains the status quo, which, before this dispute, was that David Martin received the care and services he required and Progressive paid for those services.

E. This is not a final order and does not close the case.

SO ORDERED.

3/1/2022

Honorable David J. DiStefano
Circuit Court Judge

STATE OF MICHIGAN
IN THE THIRTY-SIXTH CIRCUIT COURT FOR THE COUNTY OF VAN BUREN

DAVID MARTIN and INTEGRITY BACK & BRAIN, LLC, Plaintiffs, v. PROGRESSIVE MICHIGAN INSURANCE COMPANY, Defendant.	Case No. 22-071643-NF Hon. David J. DiStefano

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OPINION AND ORDER DENYING DEFENDANT PROGRESSIVE MICHIGAN INSURANCE COMPANY'S MOTION FOR RECONSIDERATION

At a session of said Court held in the Village of Paw Paw, County of Van Buren, State of Michigan on: May 13, 2022
PRESENT: Hon. David J. DiStefano

In a motion filed March 22, 2022, Progressive Michigan Insurance Company asks the Court to reconsider its decision to enter a preliminary injunction that requires Progressive to pay for attendant care provided to plaintiff David Martin by plaintiff Integrity Back & Brain, LLC during the pendency of this case. Motions for reconsideration are governed by MCR 2.119(F). A party bringing a motion for reconsideration must show there has been a palpable error and that a different disposition would result from correction of the error. MCR 2.119(F)(3). Generally, and without restricting the discretion of the Court, a motion for reconsideration which presents the same issues

ruled on, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3); *Auto-Owners Ins Co v Compass Healthcare PLC*, 326 Mich App 595, 607-608; 928 NW2d 726 (2018); but see *Macomb County Dept of Human Services v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014) (MCR 2.119(F) "does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled on").

"The purpose of a preliminary injunction is to preserve the status quo pending a final hearing regarding the parties' rights." *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 647-48; 825 NW2d 616 (2012). A party seeking a preliminary injunction bears the burden of proving four elements: (1) that the injunction will not harm the public interest, (2) that the harm to the moving party in the absence of an injunction outweighs the harm to the nonmovant under an injunction, (3) that the moving party is likely to succeed on the merits, and (4) that the moving party will be irreparably harmed if the request for a preliminary injunction is denied. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008).

In its motion for reconsideration, Progressive argues the plaintiffs' argument that applying the 2019 no-fault to them would be a retroactive application of the law misled the Court about the plaintiffs' likelihood of success on the merits. Relying on case law interpreting other statutory benefit schemes, Progressive argues that the 2019 no-fault reform legislation applies to claims for PIP benefits that come due after the effective date of the reform. The cases Progressive relies on to support its interpretation of the no-fault reform are distinguishable. In *Dow Chem Co v Curtis*, 431 Mich 471, 474; 430 NW2d 645 (1988), the Supreme Court held that eligibility for unemployment benefits would be determined by reference to the version of the Michigan Employment Security Act in effect at the time the benefits came due. However, that holding was "mandated by the unique statutory scheme embodied in the MESA," not any general principal of statutory interpretation that

would apply to the no-fault act. *Id.* at 485 (ARCHER, J., concurring). Specifically, the majority held that because "[t]he MESA is so structured that if the law changes or if facts change an interested party has [a statutory] right to demand that eligibility or qualification, or both, be determined anew," claims made after the effective date of an amendment to MESA are "controlled by the new criteria set forth in the amendment." *Id.* at 483. Progressive has not identified comparable statutory language in the no-fault act. Progressive also relies on *Romein v Gen Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990). In *Romein*, the Supreme Court held that an employer has no vested right in the amount of workers' compensation liability established at the time of an injury and that the Legislature could "increase the burden on the employer for disability or expenses occurring or continuing after the date of enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time." *Id.* at 531, quoting *Lahti v Fosterling*, 357 Mich 578, 592; 99 NW2d 490 (1959). However, the Court cautioned that it was taking no position on the constitutionality of a reduction in benefits, which is the scenario presented in this case. *Romein*, 436 Mich at 531 n 14. Finally, the question presented in *Szymczak v Holland Community Hosp*, 187 Mich App 142; 466 NW2d 352 (1991), was how to allocate the responsibility for paying disability benefits in light of a post-injury amendment to the worker's disability compensation statute that reduced the portion of the benefits payable by the employer and increased the portion payable by the Second Injury Fund. Like the *Romein* case, *Szymczak* is notably different from the case at bar because it did not involve any diminution of benefits payable to the injured party.

The diminution of benefits appears to be the critical point in this case, because case law suggests that when the Legislature amends a disability compensation statute to decrease payments beneficiaries receive, the amendment should apply only to injuries that occur on or after the

amendment's effective date absent a clear legislative intent to the contrary. *Hurd v Ford Motor Co*, 423 Mich 531, 535; 377 NW2d 300 (1985). Progressive argues that clear evidence the Legislature intended no-fault reform to apply to the plaintiffs can be found in MCL 500.2111f(8), which provides:

> An insurer shall pass on, in [premium rate] filings to which this section applies, savings realized from [MCL 500.3157(2)-(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 500.2111f(8).]

The Court is not persuaded that this statute is a clear statement of legislative intent regarding retroactivity. "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Buhl v City of Oak Park*, 507 Mich 236, 244-45; 968 NW2d 348 (2021). The Legislature knows how to clearly state that a statute will apply retroactively. *Id.* at 245. So, when relying on statutory language to draw conclusions about retroactivity, courts generally look for "specific language providing for retroactive application" or an "express designation" of retroactivity. *Id.* at 244. MCL 500.2111f does not contain specific language providing for retroactive application of MCL 500.3157, and it is compatible with prospective application of MCL 500.3157. The statute instructs insurers to calculate the reduction in their PIP benefit liability attributable to the new fee schedule provisions found at MCL 500.3157(2)-(12) and "pass on" those "savings" 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." Progressive suggests that this scheme "would have no meaning" unless the fee schedules apply to accidents occurring before July 2, 2021. But MCL 500.3157(2)-(12) will realize at least some savings regardless of whether

MCL 500.3157 applies to all claims for PIP benefits or only to the subset of claims that arise out of post-reform accidents. Under either interpretation, those savings could be allocated to services rendered to individuals who suffered accidental bodily injury from motor vehicle accidents that occurred before July 2, 2021. Therefore, MCL 500.2111f(8) is not enough to overcome the presumption that the 2019 no-fault reform applies prospectively. The Court concludes that the plaintiffs have a reasonable likelihood of success on the merits under *Hurd*, which suggests that if the no-fault reform is not retroactive, it should only apply to injuries that occur on or after the reform's effective date.

Moving on from the likelihood of success on the merits, Progressive next argues that the injunction is inappropriate because it harms the public interest by nullifying savings the no-fault reform was intended to bring about. Setting aside the fact that this argument begs the question regarding proper interpretation of the retroactivity of the no-fault reform, any harm to the public interest caused by the particular injunction entered in this case is de minimis at best. The injunction only requires Progressive to pay for a single person's attendant care during the pendency of this lawsuit at rates comparable to what Progressive was paying under pre-reform cost schedules. Progressive has presented no evidence that this narrowly tailored, temporary obligation will burden the public at large, and Progressive's private financial interests are not tantamount to the "public interest." See *Alliance for Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 666; 588 NW2d 133 (1998). For these reasons, the Court is not persuaded it erred when it concluded the injunction does not harm the public interest.

Finally, Progressive cursorily suggests that the harms it suffers under the injunction outweigh the harms the plaintiffs would suffer if no injunction were issued. In their motion, the plaintiffs made a particularized showing that Progressive's failure to pay no-fault benefits creates

real and imminent danger of irreparable harm to plaintiff David Martin's physical health and wellbeing. The owner of Mr. Martin's current care provider, plaintiff Integrity Back & Brain, LLC, has signed an affidavit indicating that the amounts Progressive believes are owing under the amended no-fault law are not sufficient to allow the company provide services to the plaintiff. Mr. Martin's nurse case manager testified at a deposition that she has contacted over twenty at-home and in-patient care providers, none of whom were able to provide care to Mr. Martin at the post-reform rates Progressive proposed to pay. The plaintiffs have introduced affidavits and exhibits from nurses and doctors indicating that the level of care Mr. Martin currently receives is medically necessary due to complications relating to his quadriplegia. A diminished level of care places his health, wellbeing, and life at risk. In the face of this evidence, Progressive has only offered the bare assertion that "Plaintiff is not harmed by the implementation of the revised No-Fault Act." To the contrary, there is ample evidence Mr. Martin will be significantly harmed if Progressive's interpretation of the no-fault reform is correct. On the other hand, the worst harm Progressive stands to suffer is the financial burden of paying for Mr. Martin's attendant care during the pendency of this litigation. On balance, the harms favor an injunction. Progressive's reliance on *Bratton v DAIIE*, 120 Mich App 73, 78; 327 NW2d 396 (1982) is unavailing for the reasons stated in *Melrose v Nationwide Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2020 (Docket No. 352843), p 2; 2020 WL 6253346. Progressive has not shown the Court erred in its balancing of the harms.

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant Progressive Michigan Insurance Company's Motion for Reconsideration is DENIED.

This order does not resolve the pending claims or close the case.

Dated: 5/13/2022

Hon. David J. DiStefano

EXHIBIT 16

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF VAN BUREN

DAVID MARTIN AND INTEGRITY BACK & BRAIN, LLC,

Plaintiffs,

vs

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant.
_____/

CASE NO. 22-071643-NF

JUDGE DAVID DISTEFANO

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VIDEOCONFERENCE DEPOSITION OF ANDREA STEINBACH, R.N., Taken by the Plaintiff before Debra M. Cummings, Court Reporter (CSR-6037) and Notary Public for the County of Livingston, acting in the County of Livingston, Michigan, on Monday, February 21, 2022 at 716 Jackson Street, Grand Rapids, Michigan at 4:30 p.m.

APPEARANCES:
(ALL PARTIES VIA VIDEOCONFERENCE)
MR. STEPHEN J. HULST P70257
Rhoades McKee PC
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Appearing on behalf of the Defendant.

DEBRA M. CUMMINGS, CSR 6037
Certified Shorthand Reporter

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(Exhibit attached to Transcript)

Grand Rapids, Michigan
Monday, February 21, 2022
at or about 4:30 p.m.

THE REPORTER: My name is Debbie Cummings, certified stenographic reporter and notary public in the State of Michigan. This deposition is being held via videoconferencing equipment. The witness and reporter are not in the same room.

The parties and their counsel consent to the arrangement and waive any objections to this manner of reporting. Please indicate your agreement by stating your name and your agreement on the record and please announce anyone else in the room with you.

MR. HULST: This is Steve Hulst, attorney for plaintiffs and I agree. No one else is in the room with me.

MS. EVERETT: Michelle Everett, attorney for Progressive, I agree and no one's in the room with me either.

ANDREA STEINBACH, R.N.,
having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

BY MR. HULST:

Q. Good afternoon, Ms. Steinbach. My name is Steve Hulst. I represent David Martin and I appreciate you making time

today. I know you're busy but just wanted to ask you a few questions about Mr. Martin's particular claim.

Can you hear me okay?

A. Yes. I can.

Q. Just briefly in terms of process here, I'm going to be asking you some questions. If you could just wait until I complete my question until you answer. That way the transcript will be clear. Okay?

A. Okay.

Q. If you don't understand a question I ask just let me know, I'll try to rephrase or restate it but if you give me an answer I'm going to assume you understood my question. Okay?

A. Okay.

Q. Can you please provide us your educational background?

A. Yes. I graduated from Grand Valley State University with a bachelor's of science in nursing in 2013.

Q. Any other education after Grand Valley?

A. No. No other formal schooling education after that.

Q. And were you then licensed as a registered nurses as of 2013?

A. Yes.

Q. And what did you do after graduating from Grand Valley?

A. After graduating from Grand Valley I was employed as a staff nurse at Butterworth Hospital Spectrum Health emergency

department for four and a half years.

Q. So that would take us to about 2017 or 2018.

What did you do after working for Butterworth?

A. I then relocated to the east side of the state and I worked at a small -- Metro East Substance Abuse Treatment. It's a small opioid treatment center for adults. And I worked there for about two years.

Q. And where did you go after that?

A. After that I relocated back to Grand Rapids and I started working at Grace Hospice as a registered nurse case manager.

Q. You said Grace Hospice?

A. Yes. Grace Hospice.

Q. All right. How long did you work for Grace Hospice?

A. I started there in May of 2020 and I am technically still employed by them as a PRN employee. I pick up as I can.

Q. What sort of work do you do for Grace Hospice?

A. Through Grace Hospice I am a nurse case manager so I coordinate various services. I also do provide hands-on nursing care to hospice patients within my scope of practice.

Q. All right. And of course you're also a nurse case manager with Indequest, correct?

A. Correct.

Q. And when did you start working with Indequest?

A. I started working with Indequest in December of 2020.

Q. Looks like we lost your video there. There you are.

What made you decide to pursue the job with Indequest?

A. I found out very quickly that Hospice is much more work that than I anticipated, a lot of on-call, a lot of weekend hours so I was looking for something else.

Q. Why did you decide to become a nurse?

A. I have a passion for helping people.

Q. Okay. So as a nurse case manager with Indequest can you describe your role for us?

A. Yes. I help coordinate services for clients involved mostly in car accidents. I help schedule and attend doctors appointments. I coordinate DME orders, I coordinate attendant care, I coordinate referrals for clients to specialists, I keep their insurance adjuster updated on their care plan and treatment plan.

No hands-on care nursing in this position, mainly just coordinating services for my clients, anything that they might need related to their car accident.

Q. As part of your work as a nurse case manager do you speak with someone's treating doctors?

A. Yes.

Q. And what sort of things do you talk about with a treating doctor?

A. Clarification of orders placed. If a renewed order is

needed after a year we usually renew our orders, any referrals that need to be made for the client. We do a lot of communicating and specific orders as far as attendant care and nursing, anything like that.

Q. Do you view your job as trying to help the injured person?

A. Yes.

Q. Who hires you as a nurse case manager?

MS. EVERETT: Objection to form.

BY MR. HULST:

Q. Go ahead, Ms. Steinbach.

A. I am notified by my corporate office when a referral comes in. I am not usually aware of the source of the referral.

Q. So obviously this case involves David Martin and I understand that you are the nurse case manager for Mr. Martin, is that correct?

A. Yes.

Q. And how long have you been Mr. Martin's case manager?

A. I have been managing his case since February of 2021.

Q. And what can you tell me about David's particular injuries and then care needs?

A. Yes. David, he is a quadriplegic patient. He has very little use – he has no use at all of his lower extremities, he has very little use of his hands and upper extremities, he requires a daily bowel regimen and he has a Foley catheter, he requires assistance for transfers, he uses a

mechanical lift.

David, he requires assistance with all of his activities of daily living, bathing, dressing, feeding. He is able to transport himself.

He has a converted vehicle that enables him to drive with what little mobility he does have but he also has very complicated needs as far as he has several wounds on his lower extremities requiring regular dressing changes from nursing staff.

He requires daily irrigating of his Foley catheter by nursing staff. He suffers from many UTIs and complications of that.

Q. And in speaking to that, has David been hospitalized for any sort of complications with UTIs?

A. Yes.

Q. Do you recall any specifics about that hospitalization?

A. I know he was hospitalized last summer, 2021, he was on IV antibiotics at the time. I believe he was also discharged home on oral antibiotics.

Q. And that was related to some sort of infection relating to his bladder issues?

A. Yes. It was following a kidney stone removal surgery he had to have prior. David has really had UTIs almost constantly over the last year.

Q. And then what about you mentioned David's need for wound

care, has David had to have been hospitalized relating to issues with his wounds?

A. Not -- I was going to say I've only been with his case for one year. I know he has a remote history of being hospitalized for his wounds. He did go to Bronson emergency department specifically for his wounds. He was sent there by the wound clinic in December of 2021.

Q. And is there some current issue or discussion about possible amputation of a foot or something along those lines?

A. Yes.

Q. What can you tell us about that?

A. David received news last week at a wound clinic appointment at Metro in Grand Rapids that there is osteomyelitis present in his left foot toes and that surgical amputation may be suggested but has not been decided on for sure yet.

Q. So my recollection is David has a prescription for home care that includes both high tech aides as well as skilled nursing, is that accurate?

A. Yes.

Q. And have you now become aware that -- well, first of all, you understand David's current home care providers is Integrity Back & Brain, right?

A. Correct.

Q. And have you been informed that Integrity Back & Brain may need to cease services?

A. That is my understanding from my client. I have not received this information from Integrity.

Q. Okay. But David Martin has informed you that Integrity may have to stop due to financial issues?

A. Yes.

Q. So then as the nurse case manager for Mr. Martin then have you done some research and evaluation of what other options may be out there for David in terms of his care?

A. Yes.

Q. All right. I'm going to try sharing my screen. Just a second. Let's see if this works. All right.

Are you able to see my screen there, Ms. Steinbach?

A. Yes.

Q. So we're going to mark this as Exhibit 1 to your deposition. It's an e-mail string. I think you're going to tell me it's an e-mail string between yourself and David Martin. This first one is February 18, 2022 and then if we go further down we'll see an e-mail from David Martin to yourself February 17, 2022.

Do you see that?

A. Yes.

DEPOSITION EXHIBIT NUMBER 1 WAS MARKED BY THE REPORTER FOR IDENTIFICATION.

BY MR. HULST:

Q. And are these e-mails you've exchanged with David part of your job as a nurse case manager?

MS. EVERETT: I'd just like to interject. Have you had the opportunity to review these e-mails and confirm that they are indeed e-mails between you and Mr. Martin?

A. Yes.

MS. EVERETT: Okay.

BY MR. HULST:

Q. So Ms. Steinbach, if we go to David's e-mail to you on February 17, 2022, I'm not going to read this whole thing but in essence he's telling you he's concerned that Integrity may not financially be able to provide care and asking for you to do some research to see if you can find other companies that can provide him care.

Is that pretty much the gist of it?

A. Yes.

Q. And then we go up to your response here on February 18 where you indicate you're compiling a list of agencies you contacted and your response is that you've done many other searches for other clients in Benton Harbor and Berrien Springs and so far you have not been able to obtain a single positive response from any companies, is that right?

A. Correct. At the time of this writing. Yes.

Q. Yeah. And then you include a list of 22 companies that you apparently contacted?

A. Yes.

Q. And then you provide what response you received but from my review of this it seems like a lot of these companies don't have the staff that David would need, is that accurate?

A. Yes.

Q. And a lot of these companies simply won't accept auto insurance, is that accurate?

A. Yes.

Q. And do they elaborate at all any further on why they won't accept auto insurance?

A. Some have, mostly due to the no-fault auto reform and the rate reduction.

Q. And have many of these companies or any of these companies indicated they would need preapproval of their rates before they agree to provide care?

A. Yes. Some have.

Q. And in your experience have you been able to get insurance companies to preapprove rates?

A. No.

Q. Do you know specifically -- is this Progressive? It's Progressive, isn't it?

A. Yes.

Q. Do you know specifically if Progressive will preauthorize rates?

A. As far as I know no.

Q. All right. You obviously have other clients besides Mr. Martin, right?
A. Yes.
Q. Have you found this situation to be true for other clients as well in terms of being able to find alternative care options for them?
A. Yes.
Q. Since July of 2021 has it become more difficult to find other care providers for your patients?
A. Yes.
Q. What concerns if any do you have for David Martin if he loses his home care provider Integrity Back & Brain?
MS. EVERETT: Objection. Calls for speculation.
BY MR. HULST:
Q. Go ahead.
A. David would like to remain in his home. He would not like to go into a facility if needed but I fear that that is where he would probably have to go as an alternative.
Q. Do you even know if there are facilities that would take Mr. Martin?
A. I do not know that for sure. I did speak with Mary Free Bed Rehabilitation Hospital and it may be a possibility but I don't have a yes on that yet.
Q. Do you know that those type of facilities sometimes only allow someone to stay for 30 days?

A. Yes.
Q. In your opinion does David need his home care to be safe?
A. Yes.
Q. Would you have concerns about his health and well-being if he lost his home care?
A. Yes.
Q. And is that because of his complications from his injuries and his specialized care needs?
A. Yes.
Q. What do you think is the best option for David for his care needs?
A. I think David would like to remain in his home with his current home care company.
Q. As his nurse case manager do you think that would be the best option for him?
A. Yes.
MR. HULST: All right. Thank you, Ms. Steinbach. That's all the questions I have for you at the moment.
MS. EVERETT: Before I start can you e-mail me that Exhibit 1? I may have some questions about it but obviously I haven't been able to read the whole thing yet.
MR. HULST: Yeah. I may have to send it from my – yeah. I'm going to have to log into my system here on my laptop but I can send it to you.
MS. EVERETT: Okay.

(An off the record discussion was held).
EXAMINATION
BY MS. EVERETT:
Q. Good afternoon. My name is Michelle Everett and I represent Progressive Insurance Company. I have some followup questions for you. Just going to kind of start, now Mr. Hulst brought up an e-mail correspondence between you and Mr. Martin and you said that Mary Free Bed Hospital is a possibility of a place that Mr. Martin could go, is that correct?
A. Yes. That was a place David had mentioned himself.
Q. Okay. And did you have any conversations with Mary Free Bed Hospital?
A. Yes. I spoke briefly with their admissions liaison on Friday the 18th.
Q. And did they discuss anything with you regarding a 30 day time limit for him to stay?
A. No. Not at that time.
Q. Have you looked at any group homes in the area for Mr. Martin to stay?
A. No. I have not had a chance to do that yet.
Q. Okay. And I'm just going to pull up that e-mail so I can see what that says. Just one moment.
Now, this looks like in that e-mail you talk about

a place called Apricus that Mr. Martin could possibly stay, is that correct?
A. No. Apricus is not a place. Apricus is a third-party benefits coordinator that works with Progressive to help secure care.
Q. Okay. So would this be in-home care or would he be inpatient somewhere?
A. Ideally in-home.
Q. Okay. Now, it looks like in the e-mail you were quoted 42.25 for home health aide and 149.50 for an RN.
For that particular facility are you still working to try and, you know, secure assistance at Mr. Martin's home?
A. That was in reference to another case that I have been working on in a different geographical area. I do not have the contact information for that facility at all. All communication is done strictly between Apricus and the facility once they are involved. They would not release that.
Q. So are you still talking with Apricus to try and get this home health aide into Mr. Martin's home?
A. Yes.
Q. Okay. And also provide for RN services that he needs as well, correct?
A. Yes.

Q. Are there any other home health agencies that you're currently working with to try to get them into Mr. Martin's home?
A. Yes.
Q. What are the names of those places?
A. The first is Compassionate Helpers.
Q. And have they indicated they can either get home health aides and RNs into Mr. Martin's home to continue care?
A. Yes. They have indicated that.
Q. Who else have you spoken with that may be able to do this?
A. The only other company I've spoken to could not provide nursing care. It would be only home health aides and they are unskilled. It's In-Home Companions.
Q. Are you still trying to work something out with In-Home Companions or based on the type of care they can provide have you determined that they aren't really a viable option?
A. Yes. I have determined they're not really viable for Mr. Martin.
Q. Okay. And so are there any other agencies that you're working with --
A. No.
Q. -- to try and get home health care besides the Compassionate Helpers and the Apricus?
A. No.
Q. Okay. And now we talked about the Mary Free Bed option

earlier.
Are there any other facilities that you're trying to work with to try to get Mr. Martin housed and for care?
A. Yes.
Q. What are the other facilities?
A. The name of the -- it's an inpatient rehab facility, Park Village Pines.
Q. And they've indicated they would be able to provide the care that Mr. Martin requires?
A. No. I have reached out to them but I have not gathered -- they have not responded to me yet.
Q. Okay. So that one is still kind of up in the air?
A. Um-hum.
Q. Is that a yes?
A. Yes. I'm sorry.
Q. The court reporter is typing everything that we say so if she types um-hum we don't really know what that means.
A. I'm sorry.
Q. Just to be clear. We're not trying to be rude.
Are there any other facilities that you've been in touch with to try and coordinate inpatient care for Mr. Martin?
A. No.
Q. Okay. So right now it's just the Park Village you're waiting for a response and then Mary Free Bed Hospital as

well, correct?
A. Correct. Yes.
Q. Okay. Now, the current provider for Mr. Martin is Integrity Back & Brain, is that the name?
A. Yes.
Q. Okay. And to be clear, they have not given a date they are going to terminate care to Mr. Martin, is that correct?
A. That is correct. They have not given a date.
Q. Have you -- has Mr. Martin forwarded anything to you in writing from Integrity Back & Brain that they may have to terminate services to Mr. Martin?
A. No. Not that I am aware of.
Q. Do you know the last time Mr. Martin had a communication with Integrity Back & Brain where they said that they may have to terminate care?
A. No. I do not know when the last time was.
Q. When was the last time Mr. Martin brought it up to you?
A. I believe in our e-mail correspondence on the 17th and 18th he had mentioned it but there were no dates or hard -- any concrete information of when.
Q. Okay. I'm just going to pull that back up. Just a moment. Okay. Now, I'm going to share my screen. Okay.
So we're looking at Exhibit 1. It's the e-mail from February 17th, 2022 from Mr. Martin to you.
Do you see that?

A. Yes.
Q. In his first sentence he says in talking to a few other people I am extremely concerned about Integrity's ability to stay afloat.
Do you see that?
A. Yes.
Q. Do you know what people he's referring to?
A. No. I do not besides the owner of the company. That's my only -- but that's speculation.
Q. Okay. And you were asked earlier about what you thought the best place for Mr. Martin would be is at home.
Do you recall testifying that way?
A. Yes.
Q. Okay. Would it be fair to say that the best care for Mr. Martin is the care that's keeping him safe and alive?
A. Yes.
Q. Okay. And do you believe that a facility like Mary Free Bed Hospital could safely care for Mr. Martin?
MR. HULST: Objection to foundation.
BY MS. EVERETT:
Q. You can answer.
A. Yes. I believe they could safely care for Mr. Martin.
Q. And do you believe any other like facility that provides inpatient care to individuals such as Mr. Martin, do you believe they could provide safe care to Mr. Martin?

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MR. HULST: Object to form and foundation.
BY MS. EVERETT:
Q. You can still answer.
A. Yes. I do believe that he could obtain safe care there.
Q. Okay. Now, you were asked some questions about hospital amputation and I just want to clarify:
Is that amputation of the foot or amputation of one or more of the toes?
A. Amputation of one or more of the toes.
Q. Okay. So it wouldn't be the entire foot?
A. Not at this point to the best of my knowledge.
Q. And you were asked if insurance companies generally and then Progressive specifically if they ever approve rates.
Do you recall that?
A. Yes.
Q. Okay. Are you familiar with insurance companies issuing an open claim letter?
A. Yes.
Q. Okay. And I just want to clarify, I think when Mr. Hulst was asking you questions about Mr. Martin losing home care he would still be safe in another facility, correct?
MR. HULST: Object to form and foundation.
BY MS. EVERETT:
Q. You can answer.
A. Correct. He would still be safe. It would not be his

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preference, though.
Q. And it would probably be fair to say that there's probably some facilities that have additional medical personnel and treatment options that he doesn't have in his home, is that correct?
MR. HULST: Object to form and foundation again.
BY MS. EVERETT:
Q. You can answer.
A. I don't know that I would say that. David Martin receives many services on an outpatient basis right now. He receives PT, OT. I don't know that a facility could provide more than what he currently has.
Q. Well, I guess I'm kind of comparing it, if you compare Mr. Martin's home to an emergency room, for example.
An emergency room is going to provide more care, correct?
A. Correct.
Q. Okay. And do you know if Mr. Martin has reached out to any friends or family members to see if they can assist with providing any in-home care?
A. I did talk to Mr. Martin about this today and no, he lives alone and there are no family members that could assist with his care.
Q. Okay. So at this point you're continuing to explore options to find continuing care if his current provider terminates

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services, is that correct?
A. Yes.
MS. EVERETT: Okay. Those are all the questions that I have for you. Thank you for your time. Mr. Hulst may have some followup.
RE-EXAMINATION
BY MR. HULST:
Q. Yeah. Just briefly, Ms. Steinbach.
On the Apricus entity that you refer to in these e-mails, the rates quoted from Apricus, are those higher than what Integrity charges?
A. I do not believe so but that agency was -- I don't know what that agency was and it was not one specific to David's care. That was just another set of rates that I had to put out there as comparable.
Q. Because the e-mail it seems like you say $42.25 per hour for home health aide and $149.50 per hour for an RN, are those rates quoted through this Apricus entity?
A. Yes. An unnamed agency that Apricus sought.
Q. Okay. And do you know what Integrity charges Progressive for the care provided to David?
A. Actually no. I do not know specifically.
Q. Okay. Another entity you indicated you were still trying to work with is Compassionate Helpers, is that right?
A. Yes.

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Q. Do you know at this point whether Compassionate Helpers actually works with auto insurance companies?
A. They do work with auto insurance companies. Yes.
Q. Do you know what rates Compassionate Helpers charges?
A. They did present some base rates. Home health aide base rate is $25 per hour, registered nurse base rate ranges from $50 to $65 per hour.
Q. Have they provided specific rates as to David Martin's care?
A. No. They have not.
Q. So what they would actually charge for David Martin's care you don't know at this point?
A. Correct. Yes. I don't know.
Q. Has Compassionate Helpers indicated they would need preauthorization from the insurance company to start care?
A. No but they did say that they will negotiate rates before they start care.
Q. Did they indicate -- did Compassionate Helpers indicate they want to know what they would be paid before they'd sign up to provide the care?
A. Yes. They did.
Q. And in terms of Mary Free Bed do you know whether or not Mary Free Bed would actually take on Mr. Martin's care?
A. No.
Q. And do you know how long, if Mary Free Bed even allowed Mr. Martin to come there how long he'd be able to stay, do you

know that?
A. No.
Q. Same thing for this, I think you said Park Village, was it Pines?
A. Yes.
Q. Do you have knowledge of if they'd actually accept David Martin as a patient?
A. No.
Q. And do you have knowledge that even if they were to accept David Martin how long he could stay there?
A. No.
MR. HULST: All right. Thank you. That's all the questions I have.
RE-EXAMINATION
BY MS. EVERETT:
Q. I just have one followup regarding Compassionate Care.
You testified that you weren't given the specific rates that they would charge for Mr. Martin but based, for example, on the RN rate they stated 50 to 65 per hour.
Do you believe the rate would be between that range?
A. Yes. I do.
Q. Okay. And then for the home health aide you testified 25 per hour.
Do you believe that the home health aide rate does

not change or is not variable?
A. I don't know.
MS. EVERETT: That's all I have. Thank you.
A. Thank you.
MR. HULST: Thanks, Ms. Steinbach. That's all we have.
(The deposition was concluded at 5:10 p.m.)

STATE OF MICHIGAN)
COUNTY OF VAN BUREN)

I Debra M. Cummings, CSR 6037, and Notary Public, certify that this transcript, consisting of 28 pages, is a complete, true, and correct record of the testimony of ANDREA STEINBACH, R.N., held in this case on Monday, February 21, 2022.

I also certify that prior to taking this deposition, ANDREA STEINBACH, R.N. was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for the party; or a relative or employee of an attorney for a party; or financially interested in the action.

Debra Cummings

Debra M. Cummings CSR 6037
Notary Public: Livingston County, Michigan
My Commission expires: 7-18-2023
DATED: February 22, 2022

EXHIBIT 17

STATE OF MICHIGAN
IN THE 17TH CIRCUIT COURT FOR KENT COUNTY

STEPHANIE DAYTON and
NEUROCARE HOME HEALTH, LLC,

Plaintiff,

v.

PROGRESSIVE MICHIGAN INSURANCE CO.,

Defendant.
_____/

Case No. 22-04263-NF

Hon. Scott A. Noto

OPINION AND ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND TO COMPEL PROPER PAYMENTS UNDER THE NO-FAULT ACT

At a session of said Court, Kent County Courthouse, City of Grand Rapids, County of Kent, State of Michigan on September 13, 2022.

Present: Hon. Scott A. Noto
Circuit Court Judge

Before the Court is Plaintiff Stephanie Dayton's Emergency Motion for Preliminary Injunction and to Compel Proper Payments Under the No-Fault Act. Plaintiff filed the motion on August 29, 2022. Defendant Progressive Michigan Insurance Co. ("Progressive") filed a response in opposition to the motion on September 6, 2022. Plaintiff filed a reply brief in support of her motion on September 7, 2022.[1]

[1] Per MCR 2.119(A)(2)(b), except as permitted by the court or as otherwise provided in the Michigan Court Rules, no reply briefs, additional briefs, or supplemental briefs may be filed. The Court did not permit Plaintiff to file a reply brief in advance of its filing. The Court, therefore, will not consider the reply brief.

I. Background and Material Facts

Most of the underlying facts of this case are undisputed. This case arises out of an automobile accident in which Plaintiff Stephanie Dayton suffered a spinal cord injury that rendered her a quadriplegic. As a result of her injuries, Ms. Dayton requires 24/7 high-tech home-health aide and nursing care per the order of her doctors.

Ms. Dayton's home care is provided by Plaintiff NeuroCare Home Health, LLC ("NeuroCare"). **(See Pl's Mot, p 2.)**

At the time of her accident, Ms. Dayton was insured by Defendant Progressive. Progressive has paid for Ms. Dayton's home health aide and nursing care since her accident in 2016. Prior to July 2, 2021, Progressive paid NeuroCare at the rate of $32.19 per hour for Ms. Dayton's home health aide and nursing care, recognizing that rate as reasonable under the Michigan No Fault Insurance Act.[2] **(Pl's Mot, p 3.)**

In June 2019, the Michigan Legislature amended the No Fault Act. The amendments included fee schedules that limited a provider's medical reimbursement rates, which took effect on July 2, 2021. See MCL 500.3157. In her motion, Ms. Dayton alleges that, beginning on July 2, 2021, Progressive ceased payment for Ms. Dayton's care and, ultimately, made only partial and late payments on some of the invoices NeuroCare submitted. **(See Pl's Mot Ex E, ¶¶10-17.)** When Progressive did make payment, it did not pay at the rate of $32.19 per hour as before, but at a reduced rate of $19.47 per hour. Ms. Dayton alleges this rate would force NeuroCare to

[2] The Michigan No Fault Insurance Act requires that personal protection insurance ("PIP") policies provide for payment of "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).

stop providing care to her. **(Pl's Mot Ex E, ¶¶18-19.)** In an affidavit attached to her motion, Ms. Dayton's nurse care manager, Vicki Olafson, stated she could not find another agency able or willing to provide this care. **(Pl's Mot Ex C, ¶12.)** Ms. Dayton seeks a preliminary injunction to require Progressive to process and pay all of her home-care provider bills from July 2, 2021 onward at a rate of $32.19 per hour. **(Pl's Mot, p 19.)**

II. Discussion

A. Standard of Review.

Michigan courts must evaluate the following four factors to determine whether injunctive relief is appropriate: (1) whether the moving party made the required demonstration of irreparable harm; (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party; (3) the moving party showed that it is likely to prevail on the merits; and (4) there will be harm to the public interest if an injunction is issued. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008). The party seeking injunctive relief bears the burden of establishing that the preliminary injunction should be issued. MCR 3.310(A)(4). Injunctive relief "is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613-14; 821 NW2d 896 (2012).

B. Demonstration of Irreparable Harm.

The fact and extent of Ms. Dayton's injuries are undisputed. She has required 24/7 high-tech home-health aide since her accident in 2016. If Progressive does not pay at the prior rate of $32.19 per hour, NeuroCare cannot continue to provide care to Ms. Dayton. There is no other

care provider who could provide the required care to Ms. Dayton. These facts are set forth in the affidavits attached to Ms. Dayton's motion. Progressive presented nothing to rebut these facts.

The harm to Ms. Dayton is not merely economic, as Progressive suggests in its brief **(see Def's Resp, p 13).** Rather, the consequence of Progressive's actions directly impact the care NeuroCare provides to Ms. Dayton. This is not conclusory, speculative, or conjectural. Cf. *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (2007). Ms. Dayton has demonstrated she will suffer irreparable harm to her health and safety if her care ceases. Accordingly, this factor weighs in favor of granting injunctive relief.

C. Whether the Harm to the Plaintiff Would Outweigh the Harm to Progressive.

Going back to the time of Ms. Dayton's injury in 2016 and until the time it began to pay for Ms. Dayton's care at a reduced rate, Progressive generally paid NeuroCare at a rate of $32.19 per hour, what it determined and agreed was reasonable under the No Fault Act. As the payor, Progressive has a financial interest in this matter. While one could argue that Plaintiff NeuroCare does, too, because it is Ms. Dayton's care provider, the same cannot be said for Ms. Dayton, the recipient of the care. Concerns regarding physical safety are generally more pressing than concerns regarding economic loss. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 53-54; 649 NW2d 783 (2002). See also *Melrose v Nationwide Mut Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2020 (Docket No. 352843), p 4.[3] Like the plaintiff in *Melrose*, unpub op at 4, the care that Ms. Dayton has been receiving

[3] The Court recognizes that it is not bound by the unpublished opinions cited herein. See MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994). The Court views them as persuasive or illustrative. *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

establishes a baseline for what care she needs. Therefore, the harm to Ms. Dayton outweighs the harm to Progressive.

D. The Likelihood of Success on the Merits.

In *Andary v USAA Cas Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2022), the Michigan Court of Appeals held that legislative amendments to the No Fault Act, MCL 500.3101 *et seq.* limiting reimbursement for expenses covered by personal protection insurance do not apply retroactively so as to limit benefits to those injured before the effective date of the amendments. Because *Andary* is designated for publication, the Court is bound by this precedent.[4] See MCR 7.215(C)(2). The amendments, therefore, do not apply retroactively to limit the benefits of Ms. Dayton, as her injury occurred and vested in 2016. Moreover, insurance companies are still required to pay for "allowable expenses consistent with reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). From 2016 to July 2, 2021, Progressive generally paid for Ms. Dayton's care at the rate of $32.19 per hour, which it deemed reasonable under the No Fault Act. Based on *Andary* and Progressive's prior payments, Plaintiffs are likely to succeed on the merits of their claim regarding Progressive's liability under the No Fault Act.

E. The Harm to the Public Interest

Ms. Dayton was severely injured in an automobile accident in 2016. According to her

[4] In its response brief, Progressive argues extensively why the Court of Appeals erred in its decision in *Andary*. However, Progressive does not posit any facts that would render *Andary* distinguishable or to otherwise demonstrate it is not on point with the facts of this case. Progressive's arguments may have merit, but they are better suited for the appellate courts.

medical providers, she needs around-the-clock care as a result. If a reduction of the hourly rate for such care will render an entity like NeuroCare unable to provide for injured people like Ms. Dayton, then continuing the care at the current rate is in the public interest and therefore supports granting injunctive relief. See *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 386-87; 25 NW2d 891 (1994) ("The performance of medical services is of great importance to the public, and is a matter of practical necessity for some members of the public.")

F. Maintenance of the Status Quo.

Although not one of the four delineated factors this Court must consider in determining whether a party is entitled to injunctive relief, it is well-settled that the purpose of a preliminary injunction is to preserve the status quo pending a final hearing regarding the parties' rights. *Mich State AFL-CIO v Secretary of State*, 230 Mich App 1, 14; 583 NW2d 701 (1998). The status quo is the "last actual, peaceable, noncontested status which proceeded the pending controversy." *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 61; 380 NW2d 53 (1985). In this case, the status quo is the payment of Ms. Dayton's care at the rate of $32.19 per hour, as that is the rate at which Progressive paid prior to July 2, 2021. Granting a preliminary injunction in this case would preserve the status quo.

III. Conclusion

For the foregoing reasons, Plaintiff Stephanie Dayton's Emergency Motion for Preliminary Injunction and to Compel Proper Payments Under the No-Fault Act is GRANTED. Defendant Progressive Michigan Insurance Company shall process and pay all of Ms. Dayton's home care provider bills from July 2, 2021, through the end of this litigation at a rate of $32.19 per hour for her high-tech home-health aide care.

This preliminary injunction shall remain in effect until further order of the Court.

IT IS SO ORDERED.

Date: 9/13/22

Scott A. Noto
Hon. Scott A. Noto
Circuit Court Judge

PROOF OF SERVICE

I certify this date that copies of the Order were served on the parties and/or their attorneys by ordinary mail at their last known addresses. and email.

Date: 9/13/22

Deputy County Clerk

EXHIBIT 18

AFFIDAVIT OF VICKI OLAFSON

Vicki Olafson, RN, being sworn, states as follows:

1. I am familiar with the facts stated in the affidavit and, if called as a witness, I am competent to testify to them.

2. I am a Registered Nurse, licensed in the state of Michigan since 2003.

3. I am a Nurse Case Manager and employed by Ridgemoor Case Management Services.

4. I am also a Certified Case Manager.

5. I am the Nurse Case Manager for Stephanie Dayton. I am also a Certified Rehabilitation Registered Nurse (CRRN).

6. I am familiar with Stephanie, the spinal cord injury she suffered in the 2016 accident rendering her quadriplegic, and her complex care needs due to her accident injuries. She has medical complications of spinal cord injury including neurogenic bowel and bladder, restrictive lung disease, spasticity, neurogenic skin, tendency for pressure wounds and pyoderma gangrenosum. She has an extensive list of medications. She cannot be left alone.

7. Stephanie requires 24/7 care and relies on her care givers for all of her daily needs.

8. As Stephanie's Nurse Case Manager, I am responsible for, among other services, assessing and monitoring Stephanie's care needs, planning and coordinating Stephanie's care needs, evaluating Stephanie's options for care, and advocating that Stephanie receives the care she needs.

9. I am aware that Stephanie's current care provider has indicated that it may not be able to continue to provide the care Stephanie needs due to a lack of payment by Stephanie's auto insurer.

10. In my role as nurse case manager, I am aware that many home-care companies have gone out of business due to payment issues with auto insurers.

11. In my role as nurse case manager, I have evaluated and attempted to find other care providers for individuals like Stephanie, who have complex care needs.

12. I have not been able to find one home-care provider able or willing to take on the type of care nor number of hours of care that Stephanie needs. The responses I have received from other home-care providers is that they either will not work with auto insurers due to payment issues and/or they do not have sufficient staff to cover the type of care Stephanie needs.

13. Stephanie requires the 24/7 care ordered by her doctor and it is imperative that she receive that care.

14. Based on a lack of alternative care options for Stephanie, I am highly concerned that if Stephanie's current provider ceases care, Stephanie will not be able to obtain necessary and proper care from another provider.

15. It is my professional opinion that the best option for Stephanie is to remain in her home and receive the care she needs there from her current provider, NeuroCare Home Health. Stephanie has care givers that know her particular issues and needs and it is in her best interest to keep those care givers with NeuroCare Home Health.

16. I am very concerned that if Stephanie loses her home care and has to go to the hospital or some other facility that Stephanie's condition would deteriorate and potentially she would not survive.

Vicki Olafson RN CRRN

Vicki Olafson, RN CRRN

Subscribed and sworn to before me
Date: 6/7/2022

Notary Public, Kent County, MI

ELIZABETH J STRIEGLE, Notary Public
State of Michigan, County of Kent
My Commission Expires 12/4/23
Acting in the County of Ottawa

EXHIBIT 19

STATE OF MICHIGAN
IN THE CIRCUIT FOR THE COUNTY OF CLINTON

SCOTT J. MILLER and INTEGRITY BACK AND BRAIN, LLC,

Plaintiffs,

v.

FARMERS INSURANCE EXCHANGE.,

Defendant.

Case No. 22-12147-NF

Hon. Shannon L.W. Schlegel

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PRELIMINARY INJUNCTION ORDER

At a session of said Court held in the
County of Clinton, State of Michigan
on May 24, 2022.

PRESENT: HONORABLE SHANNON L.W. SCHLEGEL
CIRCUIT COURT JUDGE

Plaintiff Scott Miller filed an emergency motion for preliminary injunction and to compel proper payments under the No-Fault Act, along with supporting documentation and affidavits. A hearing on the motion was held on May 24, 2022. Upon reviewing the motion and supporting documentation, and the Court being otherwise fully advised in the premises, the Court makes the following findings:

The Court finds that Scott Miller will suffer irreparable harm in the absence of relief by this Court, including irreparable harm to Scott Miller's health, safety, and overall wellbeing.

The Court finds that Scott Miller will suffer greater harm in the absence of an injunction than Defendant Farmers would if relief is granted. The Court also finds that preserving the status quo – of Scott Miller receiving the care he needs and his provider being paid as they were pre-July 2, 2021 – is appropriate to ensure that Scott Miller is safe.

Plaintiff has established a likelihood of success on the merits, including his claim that Defendant Farmers unlawfully failed to make timely payment of Scott Miller's benefits under the No-Fault Act and unlawfully reduced the amounts payable to Scott Miller's home-care provider, Integrity Back and Brain, LLC.

The Court finds that the public interest favors granting relief so as to preserve Scott Miller's ability to receive care in his home.

Therefore, for the reasons stated above and on the record and the Court being otherwise fully advised in the premises, the Court hereby GRANTS Plaintiff's motion and enters a Preliminary Injunction Order as follows:

A. Defendant Farmers is ordered to process and pay all of Scott Miller's home-care provider Integrity Back and Brain, LLC's bills from July 2, 2021 through the end of this litigation at a rate of $31/hour for the high-tech home care Scott Miller requires.

B. Farmers is ordered to process and pay the above amounts for all of Integrity Back and Brain, LLC's bills as to Scott Miller from July 2, 2021 to the present day within fourteen days. Going forward, Farmers must timely pay the above amounts/rates within 30 days, as required by the Michigan No-Fault Act.

C. Pursuant to MCR 3.310(C)(4), this Order is binding on the parties to this action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

D. No bond is required, as this Order maintains the status quo, which, before this dispute, was that Scott Miller received the care and services he required and Farmers paid for those services.

E. This is not a final order and does not close the case.

SO ORDERED

Honorable Shannon L.W. Schlegel
Circuit Court Judge

EXHIBIT 20

AFFIDAVIT OF CHRISTINE CALL, RN

Christine Call, RN, being sworn, states as follows:

1. I am familiar with the facts stated in this affidavit and, if called as a witness, I am competent to testify to them.

2. I am a Registered Nurse, licensed in the state of Michigan since 1997.

3. I am a Nurse Case Manager and employed by On Call Case Management, LLC.

4. I am the Nurse Case Manager for Scott Miller.

5. I am familiar with Scott, the spinal cord injury he suffered in a 2000 accident, and his complex care needs due to his accident injuries.

6. Scott requires 24/7 high-tech care and relies on his care givers for all of his daily needs.

7. Scott is a quadriplegic and wheelchair bound. He needs help with all transfers; turning every two hours to decrease the risk of pressure sores/wounds; straight catheterization every two hours to avoid bladder and kidney infections and sepsis; assistance with all activities of daily living, such as grooming, bathing, and cleaning; assistance with meal preparation and feeding to prevent choking; assistance with his medications; help with transportation and in getting to medical appointments; and care for his safety and supervision.

8. As Scott's Nurse Case Manager, I am responsible for, among other services, assessing and monitoring Scott's care needs, planning and coordinating Scott's care needs, evaluating Scott's options for care, and ensuring that Scott receives the care he needs.

9. I am aware that Scott's current care provider has indicated that it will not be able to continue to provide the care Scott needs due to a lack of payment by Scott's auto insurer.

10. In my role as nurse case manager, I am aware that many home-care companies have gone out of business due to payment issues with auto insurers.

11. In my role as nurse case manager, I have evaluated and attempted to find other care providers for individuals like Scott, who have complex care needs.

12. I have not been able to find any other home-care providers able or willing to take on the type of care Scott needs. The responses I have received from other home-care providers is that they either will not work with auto insurers due to payment issues and/or they do not have sufficient staff to cover the type of care Scott needs.

13. Scott requires the 24/7 care ordered by his doctor and it is imperative that he receive that care. If Scott loses his home care, his health, wellbeing, and life will be negatively impacted.

14. Based on a lack of alternative care options for Scott, I am highly concerned that if Scott's current provider ceases care, Scott will not be able to obtain necessary and proper care from another provider.

15. It is my professional opinion that the best option for Scott is to remain in his home and receive the care he needs there from his current provider, Integrity Back and Brain. Scott has care givers that know his particular issues and needs and it is in his best interest to keep those care givers.

16. I am very concerned that if Scott loses his home care and has to go to the hospital or some other facility that Scott would not survive. Scott needs constant supervision and monitoring and is susceptible to infections, and a hospital simply does not have the staff necessary to provide Scott the high level of care he needs.

Christine Call, RN

Christine Call, RN

Subscribed and sworn to before me
Date: 04/29/2022

Notary Public, Kalamazoo County, MI
Acting in Kalamazoo County, MI
My Commission expires: 04/13/2024

SUSAN C. COLLINS
NOTARY PUBLIC, STATE OF MI
COUNTY OF KALAMAZOO
MY COMMISSION EXPIRES Apr 13, 2024
ACTING IN COUNTY OF Kalamazoo

affidavit of christine call -ocm_3537233 (1)