STATE OF MICHIGAN
IN THE SUPREME COURT

CATHERINE WILCOX, individually, and as Next Friend of ISAAC WILCOX, a minor,

Plaintiff/sAppellants,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Appellee.

Supreme Court Case No. 138602

Court of Appeals Case No. 290515

Lower Court Case No. 08-10129-NF

PLAINTIFFS/APPELLANTS' REPLY BRIEF

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ARGUMENT

I. Introduction.

Isaac's home is not merely his shelter: it is his world. As a vent-dependent, quadriplegic child, Isaac has unique needs that can only be satisfied in a highly specialized living environment. **Appendix 32a**. Prior to his injuries, Isaac lived with his family in an extremely modest apartment. There is no factual dispute that this apartment could not accommodate Isaac's post-injury needs. Isaac's only options for shelter, and by extension his family's only options for shelter in that this nine-year-old cannot be separated from his family, are a newly-constructed house, a modifiable existing house, or institutional care. No one has suggested that Isaac should be confined to an institution, thus limiting the possibilities to a new house or a modifiable house. Isaac's parents did not own a home prior to the accident and thus submitted a claim to State Farm for the purchase of a house that had the potential to meet Isaac's needs.

The sole question before this Court is, simply, whether under these circumstances a no-fault insurer must pay the full cost, *to the extent reasonable*, of an allowable expense—even if that allowable expense is an item as large as a house—where the required causal connection of §3105(1) and §3107(1)(a) has been established. Appellants seek a clear directive from this Court that no-fault insurers may not reduce or incrementalize the payment of allowable expenses under a misinterpretation of *Griffith v State Farm*, 472 Mich 521; 697 NW2d 895 (2005). State Farm, on the other hand, wants to limit its responsibility for allowable expenses, and seizes upon a trivial phrase in *Griffith v State Farm* in an attempt to accomplish its agenda.

The parties agree that *Griffith* was correctly decided, and further agree that it requires a causal connection between accident-related injuries and items which are necessary for an injured person's care, recovery, or rehabilitation. They disagree, however, on how *Griffith* should be in-

terpreted and applied and, more specifically, about whether *Griffith* supports the incrementalist approach taken by the Court of Appeals in *Hoover v Mich Mut Ins Co*, 281 Mich App 617; 761 NW2d 801 (2008).

Appellants contend that if a claimed benefit meets the definition of an "allowable expense," then that benefit is fully compensable by the no-fault insurer to the extent it is reasonable. Reasonableness is a question of fact to be decided by a jury. State Farm, on the other hand, insists that if a claimed benefit is a "quotidian" expense, i.e. something that is as necessary for an uninjured person as for an injured person, then the no-fault insurer is responsible for payment only to the extent that the expense is greater than it would be for an uninjured person. In other words, State Farm wants this Court to approve the scheme for incrementalization of benefits set forth in *Hoover* and to eliminate even the possibility that a jury might decide that the full cost of an allowable expense is reasonable.

State Farm fails to demonstrate how *Griffith* or the Michigan No-Fault Act supports the incrementalization of allowable expenses. What is clear, however, is that State Farm is not above using scare tactics to persuade this Court that agreeing with Appellants would mean the ruination of the no-fault system, or that this case will allow for "room and board" and basic living accommodations for all severely and permanently injured accident victims. The hyperbole and mischaracterization of Appellants' position set forth in State Farm's brief is obviously designed to make its incrementalist argument look moderate by comparison.

II. State Farm Wants to Limit a Jury's Discretion in Determining Reasonableness.

State Farm maintains that housing accommodation benefits, as well as other benefits under the no-fault act, are compensable only to the extent the expenses are shown to be greater than what may have been incurred absent an injury. Appellee's Brief at 19. State Farm justifies the

avoidance of its responsibility by seizing upon a phrase used by this Court in *Griffith* and taking it out of context. In articulating the causation threshold that must be met for an allowable expense, *Griffith* stated: "[A] no-fault insurer is liable to pay benefits *only to the extent* that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident." *Griffith* at 531; emphasis added. State Farm argues that the phrase "only to the extent" permits no-fault insurers to reduce the scope of allowable expenses.

This phrase, "only to the extent," however, must be read in context. The preceding sentence states: "'Accidental bodily injury' therefore triggers an insurer's liability and defines the scope of that liability." *Id.* The next sentence merely rephrases that basic concept: "Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident." Put another way, if the claimed benefit is causally unrelated to the accidental bodily injury, it is not a no-fault expense. This language has nothing to do with the *amount* to be paid by the no-fault insurer. It has to do with whether or not a particular benefit is a covered expense. This conclusion becomes even clearer when one looks at the preceding paragraph, which introduces this discussion. It is clear in this context that the phrase "to the extent" applies to the two causation requirements that must be met before an expense can be deemed to be a no-fault benefit in the first place.

That initial decision—allowable expense or not—determines what happens next. If the claimed benefit is *not* an allowable expense, the inquiry stops there, as in *Griffith*. If it *is* an allowable expense, then a jury gets to decide what is reasonable.

State Farm, however, morphs this language into a limitation on how much it has to pay for a particular allowable expense, even before a jury makes a determination of reasonableness. Under State Farm's argument, a jury would never get to consider the reasonableness of the full

cost of an allowable expense. This is clear from how State Farm presented this issue in the trial court and how it uses that phrase in its brief. On p. 10, State Farm says that housing costs may qualify as an allowable expense, but "only to the extent of such causal connection." It then makes the leap, on p. 12, to "benefits may become payable *to the extent of such increase, but only to that extent.*" (Emphasis added.) And on p. 17: "When such expenses *exceed what would normally be expected*, they may be allowable *to that extent.*" (Emphasis added.)

There is nothing in *Griffith* that supports State Farm's interpretation of this language. The food expense at issue in *Griffith* was deemed not to be an allowable expense because it was not causally related to the accidental bodily injury and did not otherwise meet the statutory requirements. Because the food was not causally related to an accidental bodily injury, the Court did not need to address the question of whether the insurer would have been responsible for paying all or some portion of Griffith's food expense if it had been causally related to the accident.

III. *Griffith v State Farm* did not Endorse the Rejected Analysis of *Manley v DAIIE* That "Products, Services, or Accommodations Which are as Necessary for Uninjured Persons as for an Injured Person are not 'Allowable Expenses.'"

The essence of State Farm's argument is that this Court should adopt the analysis of *Manley v DAIIE* and hold that "quotidian expenses" such as housing can never fully constitute "allowable expenses" because they are as necessary for an uninjured person as an injured person. *Griffith*, however, did not adopt the black-and-white analysis of *Manley*, but instead held that a causation analysis must be undertaken in each case, based on the particular facts of that case, to determine if the claimed expense meets the threshold requirements of §3105(1) and §3107(1)(a). See *Griffith* at 530-31. If that test is satisfied, then the claimed expense is an "allowable expense" and is fully compensable to the extent it is reasonable. Accord *Begin v Mich Bell Telephone Co*, 284 Mich App 581, 594-96; 773 NW2d 271 (2009).

State Farm, however, misleads this Court about *Griffith*'s support of the *Manley* analysis:

> Endorsing the Court of Appeals' conclusion in *Manley v DAIIE*, 127 Mich App 444, 453-454; 339 NW2d 205 (1983), *rev'd in part*, 425 Mich 140 (1986), that "[p]roducts, services, or accommodations which are as necessary for an uninjured person as for an injured person are not 'allowable expenses,'" *Griffith*, 472 Mich at 528 (*quoting, Manley, supra*), the Court found the text of both §3105(1) and §3107(1)(a) as providing necessary limits on housing accommodation claims.

Appellee's Brief at 14. While it is true that the *Griffith* opinion quoted this language from *Manley*, it did so only in its preliminary review of the legal background upon which *Griffith* was decided, and it specifically noted that this Court *vacated* that exact analysis from *Manley*. *Griffith* at 529. Moreover, contrary to what State Farm claims, *Griffith* does not place any limits on housing accommodation claims as that case was limited to the issue of food expenses.

Instead, *Griffith* posed a rhetorical question regarding whether a no-fault insurer should be responsible for housing payments that remain *unaffected* by one's injuries. *See Griffith* at 539. State Farm claims that Plaintiffs infer from this rhetorical question that "if one's housing needs are affected by the accident injuries, *all* of the accident victim's housing costs thereafter must be paid by no-fault insurance." Appellee's Brief at 17. This is an absurd mischaracterization of Appellants' argument, and is factually untrue.

The Wilcoxes are willing to pay housing expenses such as utilities, taxes, maintenance, insurance, and so forth as a form of "rent" as identified in pre-*Griffith* cases such as *Kitchen v State Farm*, 202 Mich App 55, 59-60; 507 NW2d 781 (1993) (holding that it is reasonable and consistent with the goals of the no-fault act to expect the Kitchen family to pay "rent" in the form of maintenance and utilities as long as they enjoy the benefits of living in the new home) to the extent it is reasonable for them to do so. This issue, however, is a question of reasonableness, *see Payne v Farm Bureau Ins*, 263 Mich App 521, 528-30; 688 NW2d 327 (2004) and *Williams v*

AAA Michigan, 250 Mich App 249, 258-59; 646 NW2d 476 (2002), and is not relevant to the initial question of whether the house, in and of itself, is an allowable expense.

IV. A House is Necessary for Isaac's Care.

Continuing along the vein of *Manley*, State Farm claims that the primary essence of a house is to meet one's basic need for shelter; thus, the cost of a house cannot be an allowable expense. Appellee's Brief at 27. Appellants do not disagree that all individuals require shelter, or that Isaac had shelter in the form of an extremely modest apartment before his injuries. That does not lead to the conclusion, however, that the very different type of shelter that Isaac now requires because of his injuries is not an allowable expense.

State Farm is essentially asking this Court to ignore the critical difference between every person's basic need for shelter and Isaac's clearly demonstrated need for a *particular kind of shelter necessitated by his injuries*. An uninjured person's need for shelter may well be an ordinary, quotidian expense. Isaac, however, has significant accommodation requirements as a result of his injuries that cannot be met in the type of housing he and his family occupied before the accident. Short of institutional care, Isaac's needs can only be met in a house. Isaac has never lived in a house and his parents have never owned a house. It cannot be said, therefore, that for Isaac a house is a quotidian expense. Instead, the cost of the housing required to meet Isaac's needs as a result of his injuries is an allowable expense under the No-Fault Act.

Appellants are not advocating some extreme "all-or-nothing" outcome which would require no-fault insurers to pay all housing expenses for injured victims, and their family members, for life. This would be an altogether different case if Isaac's injuries permitted him to remain in the apartment his parents were renting at the time of the accident, or if another apartment was available for rent that could meet Isaac's care requirements, or if his parents already owned a

house that could be modified to meet his needs. If any one of these situations existed, then Isaac would not be claiming the full cost of a house. But these circumstances do not exist. The Wilcoxes have been forced, for the first time in their lives, to purchase a house so that Isaac's needs can be accommodated. This is exactly the type of situation, and the type of allowable expense, that the no-fault system was meant to address.

V. State Farm Improperly Focuses on the Income Earned by Isaac's Parents After the Accident.

State Farm would have this Court believe that the Wilcoxes are now living in the lap of luxury, earning exorbitant salaries as Isaac's caregivers, all at the potential risk of the affordability of the no-fault system. To this end, State Farm repeatedly and shamelessly portrays this terrible accident and Isaac's resulting injuries as somehow beneficial—"a windfall"—to the Wilcox family. Appellee's Brief at 28. Examples of this are found throughout State Farm's brief (emphasis added in each instance):

- "The **expansive residence** includes four bedrooms, two baths, a pool, a pond and substantial acreage." Appellee's Brief at 4.
- "While the Wilcox family apparently would not have been able to afford such a home purchase prior to the subject accident, ongoing payments made by State Farm since the accident for Mr. and Mrs. Wilcox's attendant care services being provided to Isaac have provided them with a **$100,000 annual income**." Id. at 4, n 5.
- "This is particularly so, given the seemingly **gratuitous size and features of the home**, its need for still more modifications costing nearly as much as the entire purchase price, and the fact that State Farm was excluded from the selection process." Id. at 5.
- "Because of the **confluence in the timing of Isaac's accident** and his parents coming into a **substantial income**, the "but for" causation between the accident and Plaintiffs' acquisition of a large, family home is **oddly fortuitous**." Id.
- "As explained, the Wilcoxes did commence earning an **annual income of $100,000** after Isaac's accident—albeit by becoming providers for their son's injuries." Id. at 5-6.

- "What is beyond doubt is that, given an income of **$100,000 or more per year**, the Wilcoxes today would be living in a **spacious home** of their own, **with or without an injury to one of their family members**." Id. at 6.

- "Likewise, **had the family already owned their dream home** when the accident occurred, and modifications were reasonably necessary to accommodate the accident victim's injuries, the reasonable charges associated with the modifications would be covered by no-fault insurance." Id.

- "Plaintiffs must acknowledge, however, that had they been earning **$100,000 or more per year** prior to the injury, they in all likelihood would have owned their own home and maintained payment of their property taxes and other obligations associated with such home ownership. The **coincidental fact** that Plaintiffs would not have come into a **$100,000 per year** income had it not been for Isaac's injury clearly is not the causal connection envisioned by the No-fault act as providing a basis for rendering housing accommodations an "allowable expense" under §3107(1)(a)." Id. at 29.

These illogical arguments are based entirely on exaggeration and speculation. Absent their son's catastrophic injuries and resulting need for round-the-clock skilled caregivers, Isaac's parents would not be earning this much-vaunted income. "All other things being equal," i.e. had Isaac not been injured, his parents would still be struggling to afford rent for a small apartment while caring for three children, as they were before the accident. There is nothing "fortuitous" about Isaac being a nine-year-old, vent-dependent quadriplegic and the fact that his parents are now being paid to care for him around the clock.

More importantly, State Farm has offered no authority that Appellants' current income, *which is earned solely because of their son's tragedy*, is at all relevant to the analysis of whether the purchase of a house is an allowable expense under the Michigan No-Fault Act. Nowhere in *Griffith*, or *Hoover* for that matter, is an inquiry made into the financial wherewithal of the claimant or his caregivers post-injury. Rather, the focus is on the claimed benefit and whether the causal connection exists.

VI. Conclusion.

Appellants have satisfied the statutory criteria of the no-fault act, as a matter of law, in order to present to a jury the factual issue of whether the full cost of the house purchased for Isaac's care is reasonable. Appellants are also entitled to have a jury determine the reasonableness of past temporary apartment rental payments and necessary modifications to the house. Neither *Griffith* nor the no-fault act exclude full payment for a claimed benefit once it has met the required causal connection simply on the basis that it is an expense that uninjured persons may also incur. *Hoover*'s conclusion that the causal connection analysis requires a comparison with a life unmarred by injury in order to determine whether, and to what extent, a benefit is an allowable expense is erroneous. State Farm, and other no-fault insurers, are not entitled to incrementalize allowable expenses that are otherwise reasonable.

Respectfully submitted,

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Judges Murphy, Sawyer, and Bandstra

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STATE FARM MUTUAL AUTOMOBILE
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_____/

SC: 138602
COA: 290515
Kent CC: 08-010129-NF

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I, Nola VanDyk, state that I am a secretary with the law firm of Varnum LLP, and on October 8, 2010, I served two copies of the Reply Brief and this Proof of Service by first class mail delivery on:

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I declare that the statements above are true to the best of my information, knowledge, and belief.

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