STATE OF MICHIGAN

IN THE IN THE SUPREME COURT

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

Plaintiff-Appellant,

and

SUNRISE HOME HEALTH SERVICES, INC.,

Intervening Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

Supreme Court Case No. 138602

Court Of Appeals Case No. 290515

Kent County Circuit Ct. Case No. 08-10129-NF

AMICUS CURIAE BRIEF OF THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary set forth in Defendant-Appellee State Farm Mutual Automobile Insurance Company's ("State Farm" or "Defendant") Brief on Appeal is complete and correct.

COUNTER STATEMENT OF QUESTION INVOLVED

I. DID THE COURT OF APPEALS PROPERLY AFFIRM THE CIRCUIT COURT'S ORDER GRANTING PARTIAL SUMMARY DISPOSITION TO STATE FARM BASED ON *HOOVER V MICHIGAN MUTUAL INS CO*, 281 MICH APP 617; 761 NW2d 801 (2008), WHICH HELD THAT UNDER THE NO-FAULT ACT, THE INSURER IS LIABLE FOR ONLY THOSE HOUSING EXPENSES THAT ARE GREATER, DUE TO THE INJURY SUFFERED IN AN AUTO ACCIDENT, THAN THEY WOULD HAVE BEEN HAD THERE BEEN NO INJURY, WHERE TO HOLD OTHERWISE WOULD:

A. REQUIRE INSURERS TO PAY EXPENSES THAT ARE NOT CAUSALLY CONNECTED TO THE INJURY AND WHICH ARE NOT NECESSARY FOR THE INJURED PERSON'S CARE, RECOVERY OR REHABILITATION; AND

B. INCREASE THE COSTS OF AUTO INSURANCE, CONTRARY TO THE GOALS OF THE NO-FAULT ACT?

The Circuit Court would answer:	Yes
The Court of Appeals would answer:	Yes
Defendant-Appellee would answer:	Yes
Amicus Curiae the MCCA would answer:	Yes
Plaintiffs-Appellants would answer:	No
This Court should answer:	Yes

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THE INTEREST OF *AMICUS CURIAE* THE MCCA

The MCCA is a statutorily created organization of all insurers engaged in writing No-Fault insurance in Michigan. The MCCA is required to reimburse member companies for the amount of personal protection ("PIP") losses they incur in excess of $480,000 per claim (*i.e.*, "catastrophic claims") under No-Fault policies issued in the State. To fund its statutory indemnification obligations, the MCCA assesses premiums on member companies in relation to the number of No-Fault policies each member writes in Michigan. In most cases, the insurers then pass these assessments along to their Michigan policyholders.

As a result, this Court's ruling regarding whether insurer are required to pay 100% of all housing and related expenses for accident victims (and in some cases, their families) will have a substantial and wide-ranging impact on the MCCA and, through the MCCA's funding mechanism, on the insurance industry and, ultimately, every person who buys No-Fault coverage in this State. If an insurer is required to pay all of the housing expenses for certain of their insureds, and these costs push the total amount of the PIP benefits paid on a claim above $480,000 (which is highly likely), the MCCA must reimburse the insurer for the remainder of the claim above $480,000 that it is required to pay under No-Fault, without limitation. In sum, the increase in the costs of benefits recoverable from No-Fault insurers translates directly into increased payments that must be reimbursed by the MCCA. Thus, the MCCA has a direct interest in this matter.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The MCCA agrees with the Statement of Facts and Proceedings set forth in Defendant's-Appellee's Brief on Appeal. The MCCA also provides the following facts regarding the creation and operation of the MCCA.

The MCCA was created by the Michigan Legislature in 1978 when it added Section 3104 to the automobile No-Fault statute.[1] MCL 500.3104. The MCCA is a private, unincorporated, non-profit association. Every insurer engaged in writing No-Fault insurance for vehicles registered in Michigan must be a member of the MCCA as a condition of its authority to write No-Fault insurance in the State. MCL 500.3104(1). The MCCA indemnifies insurers for their ultimate losses in excess of a set amount which the members sustain in PIP benefits. That amount, originally set at $250,000, increases yearly. The current level, which applies to policies issued or renewed during the period July 1, 2010 to June 30, 2011, is $480,000. MCL 500.3104(2). "Ultimate loss" is defined as "the actual loss amounts which a member is obligated to pay and that are paid or payable by the member". MCL 500.3104(25)(c). This includes medical bills, attendant care costs, home or vehicle modifications, and other benefits provided for under the No-Fault Act. In other words, once the insurer has paid $480,000 in benefits on a particular claim, the claim is deemed "catastrophic", and the MCCA then must reimburse the insurer for 100% of the benefits it is statutorily required to pay over and above the $480,000, including all benefits payable in the future. The MCCA is legally required to provide to its members, and the members are required to accept from the MCCA, this reimbursement. That is, members are prohibited from reinsuring these risks with private reinsurers or self-insuring against these risks.

[1] The Michigan Automobile No-Fault Insurance Act is found at MCL 500.3101 *et seq.*, and is referred to herein as the "No-Fault Act".

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The MCCA was created by the Legislature in response to concerns that Michigan's No-Fault provision for unlimited, lifetime PIP benefits "placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims" and caused a risk of insolvency, particularly of smaller insurers. *In re Certified Question: Preferred Risk Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 433 Mich 710, 714; 449 NW2d 660 (1989); *see also League General Ins Co v Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 340; 458 NW2d 632 (1990) ("the cost of covering an insured's catastrophic losses...could be overwhelming to an individual insurance carrier"). In addition, the MCCA was created to spread the costs of catastrophic claims throughout the automobile insurance industry and increase the statistical basis for predicting the overall costs of such claims. *In re Certified Question,* 433 Mich at 714, citing House Legislative Analysis, SB 306, March 13, 1978.

The MCCA is required to assess premiums on its members to fund its reimbursement obligations and operating expenses. MCL 500.3104(7)(d). The premium consists of two components. The first is an amount, known as the pure premium, reflecting the charge to cover the MCCA's expected losses and expenses during the assessment period. The second component is an adjustment to account for excess or deficient assessments from prior periods. *Id.* This second number is made necessary by the fact that calculating the pure premium requires the MCCA to estimate, in advance, the costs of indemnifying its members for claims it projects will be reported and incurred during the assessment period. It is therefore expected that the MCCA will adjust its actuarial assessments as claims develop over time, resulting in the modification of future cost projections for prior periods. Such adjustments lead to a recalculation, annually, of the estimated surplus or deficiency in the MCCA reserves. The statute provides for the MCCA

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to make adjustments in the assessments for excess or deficient premiums from previous periods. *Id.*

The statute goes on to state, "[p]remiums charged members by the association shall be recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized." MCL 500.3104(22). Thus, like other expenses, MCCA assessments are reflected, in whole or in part, in the rates and premiums charged by insurers to Michigan No-Fault policyholders. As a result, any increase in the MCCA's claim costs increases the assessments charged by the MCCA to its members, which then increases the premiums charged to policyholders.

ARGUMENT

I. THE STANDARD OF REVIEW

The MCCA agrees with the standard of review set forth by Defendant-Appellee. This appeal involves a matter of statutory interpretation and the review of a grant of partial summary disposition, both of which are reviewed by this Court *de novo*. *See, e.g., Robertson v DaimlerChrysler Corp*, 465 Mich 732, 739; 641 NW2d 567 (2002); *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004).

II. THE PARTIES AGREE THAT *GRIFFITH* WAS CORRECTLY DECIDED.

Isaac Wilcox, a minor, was rendered a quadriplegic following a motor vehicle accident. It is undisputed that Plaintiff's automobile insurer, State Farm, has paid Isaac's medical bills and pays his parents for the attendant care they provide to Isaac. Prior to the accident, Isaac and his family lived in an apartment. Following the accident, without consulting State Farm, the Wilcoxes purchased a 4000 square foot home with large parcels of land. Isaac's mother, Plaintiff Catherine Wilcox, individually and on behalf of Isaac, sued State Farm seeking reimbursement for the entire cost of the new home, over and above the almost two hundred

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thousand dollars in modification costs to that home that have been paid by State Farm, as well as 100% of the property taxes, utilities, homeowner's insurance, and similar costs. State Farm filed a motion for partial summary disposition, arguing that under the No Fault Act, MCL §§ 500.3105(1) and 500.3107(1)(a)[2], an insurer must only pay those expenses that are causally connected to the care, recovery or rehabilitation of the bodily injury arising from the accident. The full cost of housing for the entire Wilcox family, State Farm argued, is not part of Isaac's treatment plan and is not related to his injuries. While State Farm has paid the costs of modifications to the home to accommodate Isaac's needs, State Farm argued it is not required to pay for all of the requested housing expenses because Isaac and his family would need a home (and insurance, utilities, etc.) regardless of Isaac's injury. Plaintiff filed a cross-motion for partial summary disposition, arguing that because larger and better equipped housing was needed due to Isaac's injuries, State Farm was required to reimburse Plaintiff for the entire cost of the home and related expenses.

The Circuit Court granted State Farm's motion and denied Plaintiff's, holding that State Farm was only liable for those housing and related costs that increased as a result of the injuries to Isaac, and not the entire cost of the home and all other housing expenses. The court held that the total amount State Farm was responsible for was question for the jury. Plaintiff filed an application for leave to appeal. In lieu of granting the application, the Court of Appeals remanded the case to the trial court with instructions to employ the analysis used in *Hoover v Michigan Mutual Ins Co,* 281 Mich App 617; 761 NW2d 801 (2008), and noting that what were

[2] MCL 500.3105 states, "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, subject to the provisions of this chapter." The Act then provides that PIP benefits are payable for "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).

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allowable expenses was a question of law to be determined by the court. As discussed below, *Hoover* held that where housing expenses are the same as they would have been had the accident not occurred, benefits are not payable, but where an expense is atypical and arose solely because of the injury, benefits are payable to that extent. 281 Mich App at 628.

This Court granted Plaintiff's application for leave to appeal and asked, in the order granting leave, for the parties to address "whether, or to what extent, the defendant is obligated to pay the plaintiffs personal protection insurance benefits under the no-fault act . . . for housing expenses, modifications and accommodations, associated with the care of [Isaac] and whether *Griffith v State Farm Mutual Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005) was correctly decided." In *Griffith,* the plaintiff wife sought reimbursement for the cost of food for her husband who was injured in an auto accident and was being cared for at home. The Court held that because it was undisputed that Mr. Griffith did not require different food as part of his treatment than what he ate prior to the accident, his food costs were not related to his "care, recovery or rehabilitation", and were therefore not allowable under MCL 500.3107(1)(a). 472 Mich at 536.

Whether *Griffith* was correctly decided is undisputed by the parties. Plaintiffs-Appellants state as the very first heading in their brief: "*Griffith v State Farm* was correctly decided." (Appellants' Brief on Appeal, p. 9.) State Farm agrees, as does the MCCA. *Griffith* involved a claim for expenses that nobody alleged were different after the accident than prior thereto. Such expenses are not recoverable under No-Fault and no one argues that they should be. The issue in the instant case is when the normal expenses of living, such as food, clothing, and shelter, are affected by an injury sustained in an auto accident, how much of these expenses is the insurer

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liable for. It is that question, and not whether *Griffith* should be overturned, that is now before this Court.

III. *HOOVER* AND THE LOWER COURT DECISIONS IN THIS CASE ARE CONSISTENT WITH THE LANGUAGE OF THE NO-FAULT ACT.

Plaintiff's answer to the question posed above is that if the accident victim's normal living expenses are affected in *any* way by his or her injuries, the auto insurer must pay the *entire* cost of these expenses, regardless of the fact that certain of these expenses would have been incurred had there not been an injury. Plaintiff takes the extreme position that State Farm must pay not only the cost of modifications to the family's new home to accommodate Isaac's injuries (which State Farm has paid and which are not at issue) but the *entire* cost of purchasing the family's new home, which houses Isaac, his parents (who also get paid hundreds of thousands of dollars a year by State Farm for providing attendant care to Isaac), his siblings and even his grandmother, and the costs they all incur by living in the home, such as insurance, taxes, utilities and maintenance.

Plaintiff relies on one case, *Sharp v Preferred Risk Mutual Ins Co,* 142 Mich App 499; 370 NW2d 619 (1985), in support of her position. In *Sharp*, a twenty five year old accident victim lived in apartments while modifications were made to his mother's home to accommodate his injury. The insurer rejected the claim for reimbursement of the apartment rent and the trial court ruled that the plaintiff was entitled to the difference between the rent he incurred and what rent would have cost had he not been injured. The Court of Appeals reversed, stating, without much statutory analysis, that "as long as housing larger and better equipped is required for the injured person than would be required if he were not injured, the full cost is an 'allowable expense'" 142 Mich App at 511. It is this sentence upon which Plaintiff rests her case. Yet it is notable that in *Sharp*, the plaintiffs did not seek the full cost of, or 100% of the mortgage

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payments on, the mother's home, where the accident victim subsequently lived. Rather, it seemed sufficient in that regard that the insurer paid attendant care to the mother and the cost of home modifications, as State Farm has done in this case. The only issue in *Sharp* was payment for the plaintiff's temporary accommodations.

The facts in *Hoover,* on the other hand, are similar to the facts in the instant case. There, the accident victim was injured as a child and rendered paralyzed. He lived with his family in a new home the family built to accommodate his needs.[3] The family sought reimbursement for such expenses as their property taxes, utilities, home maintenance and homeowner's insurance. The court held that some portion, but not all, of these expenses were recoverable.

> [T]he holding in *Griffith* requires a court to determine whether expenses would not have been incurred *but for* the accident and resulting injuries. Stated otherwise, the questions is whether the expenses would have been incurred in the course of an ordinary life unmarred by an accident. And if they would have been incurred, like the ordinary food costs at issue in *Griffith*, a causal connection between the expenses and the accidental bodily injury would be lacking and it could not be said that the act of providing products, services and accommodations was necessitated by the accidental bodily injury

281 Mich App at 628 (emphasis in original).

The court then looked at each expense at issue and held that such expenses were recoverable only to the extent they were larger than they would have been had the child not been injured. For example, the court held that not all of the family's utility costs are recoverable, nor can the court deem that because the injured family member was 1/3 of the population of the house, 1/3 of the total utility costs were reimbursable, because had that person not been injured, he still would have been incurring utility charges. What the finder of fact must do is determine

[3] The plaintiff and insurer agreed to the insurer paying a portion of the construction costs for the new home and that issue was not litigated.

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how much the total utility bill increased because of the injuries (such as the cost of running medical equipment). It is that amount that is recoverable as a PIP benefit.

> In other words, a court must allocate not the portion of a utility bill attribute to the injured person's usage, but that portion of the bill attributable to the injured person's usage that is only occurring because of the injuries, e.g., power to operate Michael's ventilator.

281 Mich App at 630. The same is true of taxes, insurance, maintenance, and the like.

In our case, the Court of Appeals correctly held that *Hoover* applied and remanded the case for the necessary calculations. The *Hoover* rule is consistent with the language of the No-Fault Act. PIP benefits are payable "for accidental bodily injury", MCL 500.3105, and benefits are recoverable if they are "reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). Both parties to this case agree that when determining if PIP benefits are payable, courts perform two causation analyses. The first is whether the injuries at issue "arise out of", *i.e.*, are caused by, the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. MCL § 500.3105(1). In other words, is the insured eligible for No-Fault PIP benefits in general. The second addresses whether specific expenses are allowable and must be paid by the insurer. That too requires a causation analysis, specifically, are the benefits sought causally connected to the bodily injury. *Griffith*, 472 Mich at 531. Under the language of the statute itself, were the expenses incurred for "reasonably necessary products, services and accommodations" for the injured person's "care, recovery or rehabilitation." MCL § 500.3107(1)(a).

It simply cannot be said that every cent of the costs of housing an injured person (and, in this case, this injured person's extended family) are causally connected to the injuries. All of these costs are not necessary for the injured person's "care, recovery or rehabilitation," as they

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must be incurred, to an extent, regardless of whether there had been an injury. The only reasonable interpretation of the Act is that if an expense is incurred – whether it be a form of medical treatment, a special diet, the costs of modifying a home, or using more electricity than you otherwise would – because of the injury, it is recoverable. There is simply no justification in the statutes themselves, or, as discussed below, in the policy behind the No-Fault Act, to hold that once you or a family member is injured in an auto accident, you no longer need to pay your own basic living expenses, as such costs will hereinafter be borne by the no-fault system. [4]

IV. *HOOVER* AND THE LOWER COURT DECISIONS IN THIS CASE ARE CONSISTENT WITH THE GOALS OF THE MICHIGAN NO-FAULT ACT AND A REVERSAL AND THE ADOPTION OF PLAINTIFFS' POSITION WOULD DRAMATICALLY INCREASE COSTS TO INSURERS AND POLICYHOLDERS.

Most significant to the MCCA, the position advocated by Plaintiff is entirely inconsistent with the theory behind the No-Fault legislation and, if accepted by this Court, would result in drastically increased costs to insurers and consumers.

It is beyond debate that a primary goal of the Michigan No-Fault system is cost containment. This Court noted in *Shavers v Attorney General*, 402 Mich 554, 581; 267 NW2d 72 (1978) that the No-Fault Act was constitutional "in its general thrust", but at the time, required mechanisms "for assuring that compulsory no-fault insurance is available to Michigan motorists at fair and equitable rates". The Court directed the Legislature to take necessary action to ensure such availability, to which the Legislature responded with the passage of MCL

[4] Plaintiff's position – that if ordinary expenses are affected in any way by the accident they are reimbursable in full – would lead to absurd results if accepted. As but a few examples, an accident victim could argue that he required a new car as a result of his injuries so he must be reimbursed for the full cost of a high-end luxury vehicle he purchased and not the cost of a less expensive, but just as suitable, modified vehicle. Or that she required larger or looser clothing due to a cast or temporary injury, so the insurer must pay for an entirely new wardrobe. Or that the new automobile he had to purchase gets less gas mileage then his old vehicle, so the insurer must pay all of his gasoline costs.

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500.2100, *et seq*. This Court and the Legislature clearly were, and are, concerned with keeping the costs of the mandatory No-Fault insurance down. *See also, e.g., Davey v DAIIE*, 414 Mich 1, 17; 322 NW2d 541 (1982)(while one objective of no-fault was providing an "assured, adequate and prompt recovery for certain economic losses arising from motor vehicle accidents. . . we have also recognized a complementary legislative objective which is the containment of the premium costs of no-fault insurance"); *Tebo v Havlik*, 418 Mich 350, 367; 343 NW2d 181 (1984) ("the Legislature made a trade-off. Those who were required to participate in the no-fault scheme gave up the possibility of redundant recoveries, but they were intended to receive the benefit of lower insurance rates"); *Moore v Travelers Ins Co*, 475 F Supp 891, 895 (ED Mich, 1979) ("the aim of no-fault was to lower insurance premiums"); *Stevenson v Reese*, 239 Mich App 513, 519; 609 NW2d 195 (2000) ("a primary goal of the no-fault act is to provide an efficient, affordable system of automobile insurance").

It is a virtual certainty that, should the Court of Appeals and Circuit Court decisions be reversed, and Plaintiff's position adopted, the ultimate result will be an increase in MCCA assessments, and thus, an increase in the costs of auto insurance for the Michigan public, thwarting the cost-containment goal. As set forth above, whenever the PIP benefits payable in a case exceed $480,000, the MCCA is obligated to reimburse the insurer for all statutorily provided payments made in excess of that amount. When the amounts paid out on a claim increase, more cases meet the PIP threshold – not just new cases involving significant injuries, but also cases where the injuries occurred years ago but in which the benefits payable have significantly increased over time. Should insurers be required to pay all of the costs of housing

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an accident victim (and in some cases, his or her family), it is a virtual certainly that more claims will reach the catastrophic level.[5]

In order to fund its reimbursement obligations, the MCCA, a nonprofit association, imposes charges on its members. As discussed above, these charges consist of two elements: the pure premium, reflecting the charge to cover the MCCA's expected losses and expenses during the assessment period; and an adjustment to account for excess or deficient assessments from prior periods. MCL 500.3104(7)(d). To the extent amounts paid on a claim increase significantly (which is already anticipated as a result of the *University of Michigan v Titan Ins Co*, __ Mich ___ (2010) case) both components of the assessment charge will increase.[6] The expected losses for the assessment period will be higher, resulting in increased pure premiums, and an adjustment will likely be necessary due to deficient reserves, because the MCCA's actuarial assessments are based on a system in which insurers are not required to pay 100% of all housing expenses, in addition to lost wages, replacement costs, attendant care costs, home modification costs, medical bills and other benefits. In other words, the MCCA assessments did not anticipate a system under which No-Fault insurers would have to cover unlimited routine costs of living that have never before been their obligation. In sum, PIP claims will reach and surpass the $480,000 mark more quickly and more often and MCCA premiums will increase accordingly.

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[5] In addition, Plaintiff does not seek any time limit on the recoverability of housing expenses, such as the three year limit on wage loss benefits that may be collected under No-Fault. Charges for housing, if unlimited in time, will continue to extend over the lifetime of the patient (as opposed to hospital costs and other forms of medical bills, which are usually front-loaded, incurred in the early phases of treatment following an accident, but drop off substantially as the patient stabilizes). This would even further increase the number of claims that reach the MCCA.

[6] Indeed, MCCA assessments have increased almost 40% in recent years, from $104.58 for the period July 1, 2008 to July 30, 2009; to $124.89 for the period July 1, 2009 to June 30, 2010; and to $143.09 for July 1, 2010 through June 30, 2011.

The statute creating and governing the MCCA also provides that the premiums charged by the MCCA to member associations "shall be recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized." MCL 500.3104(22). Thus, the MCCA assessments, in whole or in part, are passed along in the rates charged by insurers to their policyholders who are *required* to purchase insurance. Indeed, insurers cannot survive without being able to pass along their increased costs of doing business. Plaintiff's argument, if accepted, will have a domino effect – it will cause increased PIP benefits paid, which will result in more claims being submitted to the MCCA, which will increase the assessments the MCCA is required to impose on its members, which will then increase the cost of No-Fault insurance premiums for the consumer.[7] Such results are inconsistent with the statutory language and public policy behind the No-Fault Act and should not be countenanced.

[7] It should also be noted that if the costs of mandatory no-fault insurance increase as a result of increased MCCA assessments, the number of uninsured drivers will likely also increase.

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RELIEF REQUESTED

The Michigan Catastrophic Claims Association joins the request of the Defendant-Appellee that the decisions of the Circuit Court and Court of Appeals be affirmed.

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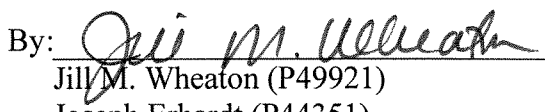
By: 

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