

STATE OF MICHIGAN  
IN THE SUPREME COURT

COALITION PROTECTING AUTO NO-FAULT,  
BRAIN INJURY ASSOCIATION OF  
MICHIGAN, ILENE IKENS, RICHARD IKENS,  
KENNETH WISSER, SUSAN WISSER,  
GREGORY WOLFE, KAREN WOLFE,

~~Plaintiffs-Appellees-Cross-~~  
Appellants,

v

MICHIGAN CATASTROPHIC CLAIMS  
ASSOCIATION,

~~Defendant-Appellant-Cross-~~  
Appellee.

OK

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RC 7-22-14

No. 314310  
Ingham Circuit Court  
LC No. 12-000068-CZ

ILENE IKENS, DR. KENNETH & SUSAN  
WISSER, GREGORY A. & KAREN M.  
WOLFE, AND OTHER SIMILARLY  
SITUATED MICHIGAN AUTOMOBILE  
POLICY HOLDERS

Plaintiffs-Appellants,

v.

THE MICHIGAN CATASTROPHIC  
CLAIMS ASSOCIATION (MCCA),

Defendant-Appellee.

150001 APPLICATION FOR LEAVE TO APPEAL OF PLAINTIFFS-APPELLANTS  
APK  
9/23 COALITION PROTECTING AUTO NO-FAULT ("CPAN"),  
BRAIN INJURY ASSOCIATION OF MICHIGAN ("BIAMI")  
1344321 AND NAMED INDIVIDUALS

THIS APPEAL REQUESTS A RULING THAT A MICHIGAN STATUTE  
IS UNCONSTITUTIONAL AND INVALID

FILED

AUG 29 2014

LARRY S. ROYSTER  
CLERK  
MICHIGAN SUPREME COURT

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**STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

1. Whether, given the clear language and plain meaning of MCL 15.231(d), the MCCA, an entity created by state authority and funded through state authority, is a public body subject to the disclosure requirements of FOIA?

MCCA says "no."

CPAN, BIAMI and the Individual Plaintiffs say "yes."

The Court of Appeals assumed MCCA was a public body but did not address this issue.

The Trial Court said "yes."

2. Whether, given the clear language and plain meaning of MCL 500.134 and MCL 15.243(1)(d), the Court of Appeals erred in concluding that MCCA is wholly exempt from FOIA?

MCCA says "no."

CPAN, BIAMI and the Individual Plaintiffs say "yes."

The Court of Appeals said "no."

The Trial Court said "yes."

3. Whether provisions of MCL 500.134 and MCL 15.243(1)(d), if applied to wholly or partially exempt the MCCA's records from FOIA, violate Article IV, §25 of the Michigan Constitution because they amend, alter and revise FOIA without reenacting or republishing FOIA and, subsumed within this issue, whether the Legislature can avoid the strictures of this constitutional provision by enacting a law which permits FOIA exemptions to be placed in other statutes such that those other statutes would not be viewed as "altering, amending or revising" FOIA?

MCCA says "no."

CPAN, BIAMI and the Individual Plaintiffs say "yes."

The Court of Appeals found no violation.

The Trial Court did not decide this issue.

4. Whether provisions of MCL 500.134 and MCL 15.243(1)(d), if applied to wholly or partially exempt the MCCA's records from FOIA, violate the title-object clause of Article IV, §24 of the Michigan Constitution due to the failure to give fair notice of the Legislature's intent to alter FOIA?

MCCA says "no."

CPAN, BIAMI and the Individual Plaintiffs say "yes."

The Court of Appeals said "no."

The Trial Court did not decide this issue.

5. Whether, considering this Court's recognition in *Shavers v Attorney General* that due process requires No-Fault policyholders to have access to ratemaking information to ensure that compulsory No-Fault insurance is available at fair and equitable rates, the Court of Appeals erred in concluding: (1) that the rights recognized in *Shavers* were mooted by the Essential Insurance Act, (2) that the concerns expressed in *Shavers* do not exist here because a "detailed regulatory scheme" in MCL 500.3104 governs MCCA premiums, and (3) due process does not compel MCCA to disclose requested ratemaking information and documents?

MCCA says "no."  
CPAN, BIAMI and the Individual Plaintiffs say "yes."  
The Court of Appeals said "no."  
The Trial Court said "yes."

6. Whether the disclosure of MCCA's records is required by the common law right to information?

MCCA says "no."  
CPAN, BIAMI and the Individual Plaintiffs say "yes."  
The Court of Appeals said "no."  
The Trial Court said "yes."

7. Whether FOIA preempts the long-recognized common law right to information?

MCCA says "yes."  
CPAN, BIAMI and the Individual Plaintiffs say "no."  
The Court of Appeals said "yes."  
The Trial Court implicitly said "no."

**STATEMENT IDENTIFYING THE ORDER  
APPEALED FROM AND RELIEF SOUGHT**

This lawsuit may very well be the most important piece of litigation regarding the Michigan Automobile No-Fault Insurance Act since that statute was adopted 42 years ago. In the media, this case is referred to as “*the transparency case*,” and for good reason. It will decide two fundamentally important issues regarding the “*public’s right to know*.” Those issues are:

(1) Whether Michigan auto insurance ratepayers will be denied the right to access critically important ratemaking data utilized by the MCCA in formulating the annual rate assessments that Michigan citizens are compelled to pay upon penalty of criminal conviction and imprisonment; and

(2) Whether the Michigan Freedom of Information Act (“FOIA”) will become a virtually useless statutory device for Michigan citizens seeking information from public bodies like the MCCA, because our Court of Appeals has sanctioned the use of impermissible procedural maneuvers that would substantially restrict the scope of FOIA without complying with the constitutional requirements pertaining to the amendment of existing Michigan statutes.

This is a prototype case for this Court’s consideration. The due process right to information regarding the computation of auto insurance premiums, recognized by this Court nearly four decades ago in *Shavers v Attorney General*, forms the premise for this appeal. The interpretation, constitutional validity and preemptive effect of MCL 500.134, a statutory exemption to FOIA, is also at issue, along with the well-embedded common law right to access information. These questions arise in a context that will impact millions of automobile policyholders in Michigan, and most particularly, the catastrophically injured.

At the heart of this dispute is the fundamental right of Michigan auto insurance policyholders to know how their premiums have been calculated. The statutorily-created

Michigan Catastrophic Claims Association (“MCCA”), which holds a **\$14 billion** reserve of compulsory assessments paid by Michigan policyholders, says it does not have to disclose the actuarial assumptions and rate calculation information underlying the charges it assesses. But without this information, policyholders cannot determine whether MCCA’s compulsory assessments are fair and equitable, or whether MCCA, in its present form, is financially sustainable. The Trial Court directed the MCCA to produce the requested information. The Michigan Court of Appeals reversed. *See Coalition Protecting Auto No-Fault v. Michigan Catastrophic Claims Association*, - Mich App - ; - NW2d –, 2014 Mich App LEXIS 916 (Exhibit 1). Plaintiffs-Appellants now seek leave to appeal that decision.

Thirty-five years ago, in the landmark case of *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978), this Court held that because of the compulsory nature of Michigan’s No-Fault insurance program, the constitutional guarantees of due process and equal protection mandate that auto insurance ratemaking information be available to policyholders to ensure that their rates are fair and equitable. The Michigan No-Fault Automobile Insurance Act, MCL 500.3101, *et seq*, requires every Michigan motor vehicle owner to purchase No Fault insurance or be subject to criminal prosecution and imprisonment for up to one year. The Act eliminates a common law tort remedy except for the most seriously injured accident victims in exchange for the guarantee that all reasonable charges for the injured person’s care, rehabilitation and recovery will be paid by the victim’s insurer without regard to fault, including lifetime benefits for catastrophically injured claimants.

To spread the financial burden of catastrophic injury among all insurers and thereby secure the financial viability of the No-Fault system, the Legislature created MCCA in 1978. *See* MCL 500.3104. MCCA’s primary role is to reimburse Michigan insurance companies for

allowable expense benefits paid on behalf of catastrophically injured persons in excess of the statutory retention amount, which is currently \$530,000. Each insurer is required to fund MCCA through the payment of annually-adjusted assessments based upon the number of vehicles the insurer covers in any given year. The assessments are determined by MCCA on a per-vehicle basis and *passed on* to the policyholders as a line item on their insurance premium invoices. Policyholders must pay these charges in order to operate a vehicle in this state; a lapse in insurance risks the penalty of criminal prosecution.

In light of the MCCA's important role in securing the financial stability of the No-Fault system, it is critically important for auto policyholders to obtain the rate calculation information and actuarial assumptions needed to understand MCCA's per-vehicle assessments. Plaintiffs exercised several legal rights to obtain this information: FOIA requests, the due process right to information recognized by this Court in *Shavers*, the common law "right to information," and constructive and resulting trust principles. All were understood and applied by the Trial Court in directing MCCA to produce. But in the seemingly result-driven reversal of the Court of Appeals, due process rights were disregarded, the relevant provisions of FOIA were rewritten, and long-standing common law principles were abandoned. Equally unsettling, the Court of Appeals permitted the Legislature to evade the reenact/republish provision of the Michigan Constitution by giving itself permission to embed statutory amendments to FOIA in other statutes. Under those circumstances, the Court said, FOIA amendments are not amendments and do not trigger the constitutional reenact/republish requirements.

The result of the Court of Appeals' collective errors is to allow MCCA to avoid accountability to the very policyholders that fund its existence. MCCA has frankly acknowledged that the avoidance of accountability is what has motivated this otherwise

enigmatic legal dispute. When the Trial Court queried how MCCA would be harmed if the information was disclosed, MCCA (through counsel) explained:

Your Honor, what it means is, instead of doing the things that we are charged with doing under the statute, *it means that we have to devote all of our attention to whether or not the actuarial reserves that were set in each and every one of what are dozens and dozens of assumptions are correct or not correct ...*

\* \* \*

But the issue isn't the argument about whether it exists or not, or whether we can give it to them or not, the issue is what happens to the information after it's released, and the fact that *we will then have to spend all of our time defending the information that is contained in those assumptions, have to be defending each and every aspect of very complicated actuarial findings....*

This avowed desire not to be held accountable is antithetical to FOIA and the underpinnings of due process. MCCA now holds a **\$14 billion** reserve of compulsory premium assessments paid by Michigan policyholders, yet it claims that its current system of operation is financially unsustainable. Michigan policyholders cannot evaluate this claim, or determine whether the per-vehicle assessment is fair and equitable, without the ratemaking information MCCA refuses to disclose. Based upon the *compulsory* nature of No-Fault insurance, this Court held in *Shavers* that policyholders are constitutionally entitled to relevant information affecting the premiums they are compelled to pay. The Court of Appeals was not empowered to disavow or disregard that right, to deem it mooted by the Essential Insurance Act, or to eliminate it by a skewed interpretation of FOIA and MCL 500.134. The numerous errors of jurisprudential significance contained within the Court of Appeals' decision include the following.

*First*, reading some words into the statutes and reading other words out, the Court of Appeals has given a meaning to MCL 500.134 and MCL 15.243(1)(d) that is not embraced by the statutory language and which defies the important contextual purpose of FOIA. This Court has repeatedly disavowed these result-driven tactics of statutory interpretation stating that a court

may not substitute its own words for that of the Legislature and must apply every word as written.

*Second*, in rejecting the Article IV, §25 challenge to MCL 500.134, the Court of Appeals assumed without deciding that it was permissible for the Legislature to statutorily exempt itself from the constitutional limitation upon its lawmaking authority by placing in FOIA a provision (MCL 15.243(1)(d)) which allows the Legislature to create exemptions to FOIA by inserting those exemptions in other statutes. This is directly contrary to the command of Article IV, §25 of the Michigan Constitution. The Court of Appeals offered no authority to support its unspoken premise. No such authority exists.

*Third*, in deeming inapplicable the due process protections recognized in *Shavers*, the Court of Appeals erroneously concluded that the Essential Insurance Act mooted the constitutional impact of *Shavers* and further assumed that an extensive regulatory scheme governs the MCCA's determination of premium assessments, thereby rendering the constitutional concerns identified in *Shavers* non-existent here. This Court expressly stated in *Shavers II* that its order "should not be construed as foreclosing future attacks on the constitutionality of the act based upon the concerns expressed in our opinion." 412 Mich 1105; 315 NW2d 130 (1982). Further, there is no statutory authority or factual record to support the conclusion that MCCA's premiums are statutorily regulated. Nothing in MCL 500.3104 or MCCA's Plan of Operation requires the MCCA to obtain antecedent approval of, or to be subject to any oversight in, the setting of premium assessments. The record establishes that MCCA answers to no one, not even the Michigan Insurance Commissioner, when it sets rates. To the extent there was any evidence to the contrary, a question of fact exists, requiring remand to develop a proper evidentiary record.

*Fourth*, the Court of Appeals' ruling that FOIA preempts the common law right of access to information runs afoul of FOIA's express provision that the Act "does not authorize the withholding of information *otherwise required by law* to be made available to the public" (MCL 15.243(3)), and offends FOIA's intent to make it easier for Michigan citizens to obtain information from public bodies. The Court of Appeals neither mentioned nor acknowledged the plain language and purpose of FOIA's savings clause, and has now interpreted FOIA in such a way as to draw a veil of secrecy around important public matters.

*Fifth*, the Court of Appeals mischaracterized and misapplied Plaintiffs' common law claims, including the long-standing right of access to information. The Court of Appeals' holding that no such right exists literally undoes centuries of the common law.

These are issues of significant public interest and monumental importance to the jurisprudence of this State and clearly satisfy the grounds for appeal set forth in MCR 7.302(B).<sup>1</sup> CPAN, BIAMI and the individual Plaintiffs respectfully urge this Court to grant leave to appeal and peremptorily reverse, or reverse after hearing, the Court of Appeals decision and reinstate the Trial Court order compelling MCCA to disclose its ratemaking information.

#### **STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

Plaintiff-Appellant Coalition Protecting Auto No-Fault ("CPAN") commenced this action to compel the MCCA to provide information CPAN initially requested under FOIA. CPAN is a broad-based coalition composed of fifteen well-respected and highly regarded medical associations, professional and provider organizations, and labor and veterans groups which represent constituencies with widely divergent political views. Each shares the common

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<sup>1</sup> This Application raises "a substantial question as to the validity of a legislative act," involves "legal principles of major significance to the state's jurisprudence," and seeks to reverse a "clearly erroneous" and materially unjust decision of the Michigan Court of Appeals.

objective of protecting and preserving the vitality of Michigan's No-Fault automobile insurance system and the comprehensive coverage it provides to auto accident victims.<sup>2</sup> The individual Plaintiffs-Appellants are all Michigan residents and the owners of motor vehicles required to be insured under Michigan's No-Fault Act. Each has paid the statutorily required per vehicle charge set by MCCA. *See, e.g.,* Plaintiffs' Affidavits and Declarations (Exhibit 2).

CPAN's FOIA request initially sought information from MCCA regarding the payment of allowable expense benefits for catastrophically injured insureds. *See* CPAN 11/22/11 Letter to MCCA (Exhibit 3). MCCA denied CPAN's FOIA request, asserting that it was wholly exempt from FOIA under MCL 500.134. *See* MCCA 11/30/11 Letter to CPAN (Exhibit 4). CPAN thereafter commenced this action on January 23, 2012, alleging entitlement to the requested information under FOIA and the constitutional rights recognized on behalf of No-Fault policyholders in *Shavers*. *See* Complaint (Exhibit 5). The Complaint broadened CPAN's request for documents to include records and information relating to MCCA's operations and sought other relief as well. The Complaint also included claims that MCL 500.134 (the statutory exemption MCCA relied upon to deny Plaintiffs' FOIA request) violates Article IV, §25 of the Michigan Constitution because it amended FOIA without reenacting and republishing FOIA, and also violates the Constitution's title-object clause, set forth in Article IV, §24.

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<sup>2</sup> CPAN members include the Michigan State Medical Society, Michigan Osteopathic Association, Michigan Health & Hospital Association, Michigan Orthopaedic Society, Michigan Association of Chiropractors, Americare Medical, Michigan Association of Centers for Independent Living, Eisenhower Center, Michigan Academy of Physician Assistants, Michigan Brain Injury Providers Council, Michigan Dental Association, Michigan Nurses Association, Michigan Home Health Association, Michigan Rehabilitation Association, Spectrum Health, Brain Injury Association of Michigan, Michigan Association for Justice, Michigan Citizens Action, Michigan Protection and Advocacy Services, Michigan Paralyzed Veterans of America, and the Michigan State AFL-CIO.

Plaintiffs-Appellants Brain Injury Association of Michigan, Richard K. and Ilene Ikens, Dr. Kenneth and Susan Wisser, and Gregory A. and Karen M. Wolfe (sometimes referred to collectively as "BIAMI"), also commenced an action against MCCA to enforce their common law request for information. BIAMI's members include persons supportive of BIAMI's mission to enhance the lives of those affected by brain injury and to reduce the incidence of brain injury. Mr. and Mrs. Ikens, Dr. and Mrs. Wisser, and Mr. and Mrs. Wolfe own motor vehicles required to be insured under Michigan's No-Fault statute and each has been assessed and paid the statutorily required per vehicle charge for catastrophic coverage set by MCCA pursuant to MCL 500.3104. BIAMI requested the same information and materials CPAN requested along with "the rationale, historical or otherwise, to use of the 25% factor in setting Incurred But Not Reported (IBNR) claim reserves." BIAMI's 5/18/12 Letter to MCCA (Exhibit 6). In response, MCCA asserted that it had no common law obligation to disclose the requested information, adding that "the detailed records you seek regarding claimants and actuarial standards used to establish reserves are private records and are not subject to disclosure." MCCA's 5/29/12 Letter to BIAMI (Exhibit 7).

BIAMI's action against MCCA was filed on June 19, 2012 and was consolidated with CPAN's action on July 6, 2012. BIAMI alleged that it was entitled to receive the information under the "public access" doctrine and also pled entitlement on grounds of constructive and/or resulting trust. *See* BIAMI Complaint (Exhibit 8). CPAN amended its complaint on July 16, 2012 to add Martha A. Levandowski, Gerald E. and Mary Ellen Clark, A. Michael and Paulina M. Deller, and M. Thomas Deller as plaintiffs and to incorporate the allegations contained in BIAMI's Complaint. *See* CPAN's Amended Complaint (Exhibit 9). All parties filed cross-motions for summary disposition.

The motions were argued on October 24, 2012 before the Honorable Clinton Canady III. 10/24/12 Tr. (Exhibit 10). On December 26, 2012, Judge Canady issued an Opinion and Order granting in part CPAN's and BIAMI's motions for summary disposition and denying MCCA's motion for summary disposition. See 12/26/12 Order (Exhibit 11). As a result, the Court ordered disclosure of "general rate calculation information such as amount of funds contained in MCCA reserves, number of claimants, administrative costs, nature and type of investments of the reserves, amount currently paid by insurers and specific accounting as to increase/decrease in yearly rate calculated, etc." *Id.* at 12-13.

Consistent with the 12/26/12 Trial Court Order and the scope of information the Court directed MCCA to disclose, Plaintiffs served MCCA with a Request for Production ("Request") on February 11, 2013, which was drafted with the assistance of Jay Angoff, the former insurance commissioner for the State of Missouri and deputy insurance commissioner for the State of New Jersey. See Request, attached to the Angoff Affidavit (Exhibit 12).<sup>3</sup> The Request demanded various categories of actuarial assumptions, computations, methodologies, projections, estimates and underlying data necessary to assess the financial sustainability of MCCA and to determine whether MCCA's assessments are fair and reasonable.<sup>4</sup> MCCA refused to substantively respond

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<sup>3</sup> Mr. Angoff also served as the first Director of the U.S. Department of Health and Human Services Office of Consumer Information and Insurance Oversight in 2010-2011, and as Senior Advisor to the Secretary and Regional Director of HHS Region VII in 2011-2012. Angoff Affidavit ¶ 2.

<sup>4</sup> The Request included the following: (1) the actuarial computation utilized in the determination of the unpaid losses and loss adjustment expenses described in a MCCA audit; (2) the documents supporting the actuarial computation including those containing (a) the calculation of the present value of disbursements expected to be made in the ultimate settlement of the claims reported; (b) the actuarial tables used to reflect the probabilities of each claimant surviving to incur the projected costs; (c) the calculation of MCCA's provision for incurred but not reported losses; (d) the actuarial assumptions and calculation producing the 5.5% short-term discount rate and the 7.5% long-term discount rate MCCA used; (e) the forecasts producing the (Footnote continued . . .)

to the Request, having filed on January 16, 2013 an Application for Leave to Appeal to the Michigan Court of Appeals and a Trial Court motion to stay proceedings. Judge Canady denied the stay request on February 28, 2013. On March 8, 2013, the Court of Appeals granted the application for leave to appeal, stayed proceedings, and expedited briefing and hearing.

On May 20, 2014, a panel consisting of Presiding Judge Donald Owens, Judge Elizabeth Gleicher and Judge Stephen Borrello reversed the order compelling disclosure and remanded the case for entry of an order awarding summary disposition to MCCA. *See Coalition Protecting Auto No-Fault v. Michigan Catastrophic Claims Association*, - Mich App - ; - NW2d -, 2014 Mich App LEXIS 916. In its opinion, the Court of Appeals reached the following conclusions:

First, the Court assumed that MCCA was a public body for purposes of FOIA but concluded that it was “not required to disclose any of its records because the records are expressly exempted from FOIA by statute.” *Id.* at \*8. In reaching this conclusion, the Court relied upon MCL 15.243(1)(d), which it described as providing that “[a] public body may exempt from disclosure as a public record under this act ... [r]ecords or information specifically described and exempted from disclosure by statute” (emphasis added by court), and MCL 500.134, which the Court noted was “a subsection of the Insurance Code” (not FOIA) and which

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economic assumptions for claim cost inflation and investment returns; (f) the current economic data and historic long-term Consumer Price Index data producing the inflation assumptions for the 15 different cost component categories referred to in the Audit; (g) the loss development analysis undertaken by MCCA’s actuaries in connection with the provision for unpaid losses and loss adjustment expenses; (h) the trend analysis for both frequency and severity undertaken by MCCA’s actuaries in connection with the provision for unpaid losses and loss adjustment expenses; (3) the annual actuarial evaluation for the fiscal year ending June 30, 2012 as described in MCCA’s Annual Report; (4) the Annual Assessment Reports of the 10 largest Michigan auto insurance companies by premium volume, referenced in MCCA’s Annual Report; (5) documents setting forth the annuity model used by MCCA’s Opining Actuary, as described in MCCA’s Annual Report; and (6) the Explanatory Memoranda prepared by MCCA’s actuaries to justify MCCA’s per-vehicle assessment.

“specifically describes and exempts MCCA’s records from FOIA disclosure ...” *Id.* at \*8-9. The Court dismissed discrepancies between this statutory meaning and the statutory language as “minimally differing.”

Second, the Court rejected the argument that MCL 500.134 violated Article IV, §25 of the Michigan Constitution, concluding that the Legislature “drafted FOIA in a manner to allow future statutory exemptions without the need to revise or amend FOIA” and “[t]herefore, when the Legislature enacted MCL 500.134(4), the statute did not amend or revise FOIA, but rather worked ‘pursuant to’ FOIA and there was no duty to reenact and republish FOIA.” *Id.* at \*15.

Third, the Court rejected the title-object challenge of Article IV, §24, stating that “[t]he title indicates that part of the purpose of the act is to define the rights, powers, and immunities of associations involved in the insurance business”, “MCCA is an association involved in the insurance business”, and “the FOIA exemption in MCL 500.134(4) concerns the rights, powers, and immunities of such associations” and it “cannot be said that the title and body of the act are so ‘diverse in nature that they have no necessary connection’ between each other.” *Id.* at \*19.

Fourth, the Court was dismissive of *Shavers*, explaining that the Legislature responded to *Shavers* by enacting the Essential Insurance Act and thereby “corrected the no-fault act’s constitutional deficiencies.” *Id.* at \*21.

Fifth, the Court also concluded that the concerns in *Shavers* were “non-existent in this case” because “[u]nlike the no-fault premiums at issue in *Shavers*, this case involves premiums MCCA charges to its member insurers” and “[c]ontrary to the regulatory scheme that was deficient in *Shavers*, here, there is a detailed regulatory scheme that governs MCCA and the premiums it charges to its members [citing MCL 500.3104].” *Id.* at \*21.

Sixth, the Court summarily disposed of the common law right to information on preemption grounds. Recognizing “this state’s long-standing public policy that citizens have access to certain public records,” the Court nonetheless ignored the savings language of section 13(4) of FOIA and concluded that “by enacting FOIA and MCL 500.134(4) and (6), the Legislature clearly intended to preempt any preexisting common law right to access MCCA’s records.” *Id.* at \*23.

Seventh, the Court concluded that even if MCCA were to be considered a private entity, the common law right to access would not apply because one case, *Nowack v Auditor General*, 243 Mich 200; 219 NW 749 (1928), “does not support the proposition that a citizen has a right to access private records.” *Id.* at \*28. Nor, the Court said, does a “special interest” vest an individual with that right. *Id.* at \*28-29.

Eighth, the Court dismissed the resulting trust argument, finding it “wholly unrelated to an individual’s right to know how insurance premiums are calculated, and the “constructive trust” claim on the basis that “[a] constructive trust is not an independent cause of action; rather, it is an equitable remedy.” *Id.* at \*32-33.

On June 9, 2014, Plaintiffs filed a motion for reconsideration, which the Court of Appeals denied on July 22, 2014. Plaintiffs now seek leave to appeal.

### **STANDARD OF REVIEW**

Each of the underlying issues raised by this appeal is subject to de novo review. A circuit court’s grant or denial of a motion for summary disposition is reviewed de novo. *Rory v Cont’l Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Constitutional issues are also reviewed de novo, *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003)), as are issues involving statutory construction, *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008), and other

questions of law. *Bradley v Bd of Education of the Saranac County Schools*, 455 Mich 285, 293; 565 NW2d 650 (1997).

### ARGUMENT

**I. The MCCA is a Public Body Subject to FOIA and MCL 500.134 Cannot Reasonably Be Read as Wholly Exempting the MCCA From the Reach of FOIA.**

**A. The MCCA is a Public Body and is Therefore Subject to FOIA.**

The Court of Appeals assumed, but did not decide, that MCCA is a public body subject to FOIA. That premise is prefatory to the statutory issues raised on appeal. The underlying purpose of FOIA is to provide public access to the records and information of public bodies in order to advance the policy that all persons “*are entitled to full and complete information ... so that they may fully participate in the democratic process.*” MCL 15.231(2)(emphasis added).

MCL 15.232(d) identifies various entities which constitute a “public body” and further broadly defines a “public body” to include:

*[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority.*

MCL 15.232(d)(iv) (emphasis added). Either definition is sufficient to constitute a public body; MCCA satisfies both.

The Michigan Legislature created MCCA by amending the No-Fault Act to add Section 3104, which states in part “An unincorporated, nonprofit association to be known as the catastrophic claims association, hereinafter referred to as the association, *is created.*” MCL 500.3104(1) (emphasis added). The statutory duties and obligations of MCCA are set forth in the statute. Therefore, pursuant to MCL 15.232(d)(iv), MCCA is a public body as an entity “*created by state or local authority.*”

MCCA is also “*primarily funded by or through state or local authority.*” In *Breighner v Mich High School Athletic Ass’n, Inc*, 471 Mich 217; 683 NW2d 639 (2004), this Court

considered whether the Michigan High School Athletic Association (MHSAA) qualified as a “public body” under the FOIA standard. Giving distinct meanings to the terms “by” and “through,” this Court explained that the “terminology suggests that even *indirect* public funding might satisfy the requirements of § 232(d)(iv)[.]” *Id.* at 226 (emphasis in original). This Court quoted the Court of Appeals’ decision in *Breighner* to clarify that the term “by” denoted a situation where an entity was directly funded by a government authority while the term “through” denoted a situation where a government authority directed or mandated the funding of the entity but did not actually provide that funding. *Id.* (citing *Breighner v Mich High School Athletic Ass’n, Inc*, 255 Mich App 567, 579-80; 662 NW2d 413 (2003)). Because the MHSAA was financially supported through sporting event ticket sales, it was not primarily funded “by or through” governmental authority. *Breighner*, 471 Mich at 227.

Unlike the MHSAA, MCCA does receive funding *through* governmental authority. In order to sell insurance in Michigan, MCL 500.3104 *requires* insurers to be members of the MCCA and to pay premiums to MCCA. MCL 500.3104(7)(d) states in pertinent part:

(7) The association shall do all of the following on behalf of the members of the association: . . .

(d) In a manner provided for in the plan of operation, ***calculate and charge to members of the association a total premium sufficient to cover the expected losses and expenses of the association that the association will likely incur during the period for which the premium is applicable . . . Each member shall be charged an amount equal to that member’s total written car years of insurance providing the security required by section 3101(1) or 3103(1), or both, written in this state during the period to which the premium applies, multiplied by the average premium per car. The average premium per car shall be the total premium calculated divided by the total written car years of insurance providing the security required by section 3101(1) or 3103(1) written in this state of all members during the period to which the premium applies . . .***

*Id.* (emphasis added).<sup>5</sup> MCCA member/insurers pass 100% of these charges to their policyholders in the form of a line item assessment on each policyholder's premium. As MCCA explains on its website:

Companies writing personal auto or motorcycle insurance pay a per vehicle amount to the MCCA and that cost (assessment) is generally passed on to the policyholders.

See <http://www.michigancatastrophic.com/>.<sup>6</sup> Pursuant to the compulsory insurance provisions of the No-Fault Act, *Michigan citizens must pay these premiums upon penalty of criminal prosecution.* Operation of a motor vehicle without the required Michigan No-Fault insurance is a crime and subjects the violator to fines and imprisonment for up to one year. MCL 500.3102(2). Consequently, because the Michigan Legislature, a "state authority," has mandated the funding of MCCA through the enactment of MCL 500.3104, the "by or through" definition of MCL 15.232(d)(iv) is also satisfied.

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<sup>5</sup> To determine the "*total premium sufficient to cover the expected losses and expenses of the association that the association will likely incur during the period for which the premium is applicable,*" referred to in MCL 500.3104, the MCCA uses various actuarial assumptions and projections. Only persons with access to these assumptions and projections can determine precisely how MCCA's assessments are calculated and whether they are fair and reasonable. In this action, MCCA is fighting to keep these actuarial assumptions and projections secret and hidden from the auto policyholders who ultimately pay them.

<sup>6</sup> MCCA has disingenuously claimed that it is "entirely funded" by private insurers. Paragraphs 11, 12, and 13 of BIAMI's Complaint make well pleaded allegations that 100% of the cost of care and MCCA's administrative costs and 100% of the per vehicle premium set by MCCA are "passed through" to Michigan auto policy holders. *Those allegations have never been denied and must be accepted as true by this Court.* The MCCA assessment has increased from about \$125 per vehicle in 2009 to \$186 presently. See <http://www.michigancatastrophic.com/>. MCCA sets the per vehicle charge essentially without oversight by the Michigan Insurance Commissioner, in part because MCCA does not file the rate setting information with the Insurance Commissioner, as is required of all Michigan insurance companies pursuant to MCL 500.2406, and without providing any notice to policyholders of what rate affecting factors and criteria have been employed.

**B. MCL 500.134, in Conjunction With MCL 15.243(1)(d), Cannot Reasonably Be Read to Wholly Exempt the MCCA From FOIA.**

FOIA is a prodisclosure statute and its exemptions are to be narrowly construed. *See Swickard v Wayne Cnty Med Exam'r*, 438 Mich 536, 544; 475 NW2d 304 (1991) (citing *State Emp Ass'n v Dep't of Mgmt & Budget*, 428 Mich 104; 404 NW2d 606 (1987)); *see also Coblenz v City of Novi*, 475 Mich 558, 574; 719 NW2d 73 (2006). When claiming an exemption to disclosure, a defendant bears the burden of demonstrating that the requested information falls within the exemption. *Swickard*, 438 Mich at 544 (citing MCL 15.240(1)); *see also Evening News Ass'n v City of Troy*, 417 Mich 481, 503; 339 NW2d 421 (1983). Further, every word in a statute is to be given full effect according to its plain meaning. *See Joseph v ACIA*, 491 Mich 200, 215; 815 NW2d 412 (2012); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 98; 523 NW2d 310 (1994); *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). A court may not read words into a statute that the Legislature did not see fit to add. Nor may plainly expressed words be disregarded. Rather,

[e]ffect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory.

*Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013) (footnotes omitted).

Because MCCA is a public body subject to FOIA, it must demonstrate that the records identified in CPAN's FOIA request are exempt from disclosure. Given the strong presumption in favor of disclosure, this is a heavy burden which MCCA has never attempted to satisfy. Rather than analyze whether a FOIA exemption protects from disclosure the particular records Plaintiffs request, the Court of Appeals has concluded that MCL 500.134 and MCL 15.243 exempt MCCA itself from FOIA.

The statutes do not support this "wholesale exemption" of MCCA or any of the other "associations" and "facilities" embraced by MCL 500.134, including the Michigan worker's compensation placement facility, the Michigan basic property insurance association, the Michigan automobile insurance placement facility, the Michigan life and health insurance guaranty association, the property and casualty guaranty association, and the assigned claims facility. All are governed by the same statutory provision at issue in this appeal and, as goes MCCA, so they go too. MCL 500.134 provides in part:

(4) A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws.

\* \* \*

(6) As used in this section, "association or facility" means an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to, the following:

(a) The Michigan worker's compensation placement facility created under chapter 23.

(b) The Michigan basic property insurance association created under section 29.

(c) The catastrophic claims association created under chapter 31.

(d) The Michigan automobile insurance placement facility created under chapter 33.

(e) The Michigan life and health insurance guaranty association created under chapter 77.

(f) The property and casualty guaranty association created under chapter 79.

(g) The assigned claims facility created under section 3171.

Section 13 of FOIA, MCL 15.243, does not support the finding that MCL 500.134 wholly exempts these public bodies from FOIA. Section 13 describes the categories of documents

exempt from FOIA, including at subsection (1)(d) “*records or information specifically described and exempted from disclosure by statute,*” but it does not contemplate or permit a statutory exemption *of the public body itself*. In other words, the subject of the statutory exemption must be “*specifically described records and information,*” not “a public body.”

MCL 15.243(1)(d) states in pertinent part:

(1) *A public body* may exempt from disclosure *as a public record* under this act any of the following: . . . (d) *Records or information specifically described and exempted from disclosure by statute.*

(Emphasis added).

A nonsensical and non-grammatically expressed meaning would have to be given to MCL 15.243(1)(d) if it is to be deemed to have authorized the broad exemption the Court of Appeals found in MCL 500.134. This Court would have to interpret MCL 15.243(1)(d) as if it said:

(1) *A public body* may exempt from disclosure *as a public record* under this act any of the following: . . . (d) *A public body* specifically described and exempted from disclosure by statute.

This meaning would not only require this Court to read “*public body*” into subsection (d), it would likewise require this Court to read “*records or information specifically described*” out of subsection (d). Further, subsection (d) would not follow grammatically or sensibly from subsection (1). *A public body* cannot exempt from disclosure *as a public record . . . a public body*. A public body is not a public record, and cannot exempt itself from disclosure.

Likewise, in concluding that MCL 500.134 exempted from FOIA *all* of the MCCA’s records, the Court of Appeals disregarded the *actual* language of MCL 500.134. MCL 500.134(4) does not state that “*records,*” “*all records,*” or “*any record*” shall be exempted; MCL 500.134(4) refers to “*a record*” and MCL 15.243(1)(d) refers to “specifically described” records. “*Records*” or “*any record*” are not the same as “*a public record*” or “specifically described”

records. Further, MCL 500.134(4) does not say that a record shall be exempted from disclosure pursuant to *Section 13(1)(d) of FOIA*; it says that a record shall be exempted “*pursuant to section 13* of the freedom of information act ...,” which embraces more than the statutory exemption found at MCL 15.243(1)(d).<sup>7</sup> Yet the Court of Appeals interpreted the exemption as if these language discrepancies did not exist, stating:

Plaintiffs make much of the fact that MCL 500.134(4) refers to "a record," while MCL 15.243(1)(d) applies to "records or information specifically described and exempted from disclosure by statute." *We find this minimally differing language of no interpretive consequence.* The statute fully exempts any and all of MCCA's records from FOIA. It accomplishes this goal by employing the indefinite article "a" to identify which records are exempt from FOIA. The *Legislature's use of the indefinite article "a" in MCL 500.134(4) clearly indicates its intent to exempt all of MCCA's records in general.*

\* \* \*

Plaintiffs contend that § 13(1)(d) permits a statutory exemption for the production of specified records but it does not permit "a statutory exemption of the public body itself." Therefore, according to plaintiffs, MCL 500.134 cannot wholly exempt MCCA's records from FOIA. Plaintiffs' argument lacks merit. The plain language of MCL 500.134(4) and (6) meets the requirements of § 13(1)(d) in that read together, these subsections specifically exempt all records of MCCA. Nothing in § 13 of FOIA precludes the Legislature from exempting all records of a particular entity from FOIA and we will not read such a restriction into § 13. See *Paschke v Retool Industries*, 445 Mich 502, 511; 519 NW2d 441 (1994) ("Where the statutory language is clear, the courts should neither add nor detract from its provisions.").

*Coalition*, 2014 Mich App LEXIS 916 at \*11-13.

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<sup>7</sup> Section 13 exemptions include, among others, information of a personal nature (MCL 15.243(1)(a)); records of law enforcement investigations (MCL 15.243(1)(b)); records that could prejudice the security of custodial or penal institutions (MCL 15.243(1)(c)); trade secrets, commercial or financial information (MCL 15.243(1)(f)); privileged information (MCL 15.243(1)(g) and (h)); certain bids (MCL 15.243(1)(i)); property appraisals (MCL 15.243(1)(j)); testing information (MCL 15.243(1)(k)); and medical, counseling or psychological information (MCL 15.243(1)(l)). The Legislature's reference to the totality of FOIA exemptions in Section 13, rather than just the single exemption described in Section (1)(d), must be given meaning.

Contrary to the Court of Appeals' dismissive view of the actual words used in these statutes, this Court has given articles their plain and ordinary meaning, refusing to imply a "plural" or "indefinite" construction when a singular or definite construction has been expressed. *See e.g., Robinson v City of Detroit*, 462 Mich 439, 461 n 18; 613 NW2d 307 (2000) (refusing to imply a plural meaning to the term "the proximate cause" used in tort reform statutes). *See also, Kelly v Thompson-McNully Co*, 2004 Mich App LEXIS 2016 at \*11 (July 27, 2004) ("The indefinite article 'a' signals that the class is singular"); *Branch County v MERC Int'l Union*, 260 Mich App 189, 200; 677 NW2d 333 (2003) (refusing to read a plural sense into former MCL 53.91 where the statute expressly indicated that the county register of deeds could appoint "a" deputy to serve, rather than multiple deputies). Chief Justice Young has expressly referenced the importance of particular words in his writing, *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 Okla City UL Rev 263, 282, stating:

My Traditionalist colleagues and I have had many occasions in recent years to reintroduce the tenets of textualism. For instance, we have held that the statutory phrase "the proximate cause" truly refers to "the," rather than "a" proximate cause.

*Id.*, citing *Robinson, supra*, and *Paige v City of Sterling Heights*, 476 Mich 495; 720 NW2d 219 (2006). Justice Young continued:

Textualists focus on a statute's expressed intent, not some supposed, unstated "purpose" of the lawgivers, by construing the words of a statute using their plain meaning and by applying standard grammar conventions to the language. A textualist looks to the statute itself for clues about meaning, to look at its structure, to examine related passages of the same statute or statutes that may be in *pari materia* ...

33 Okla City UL Rev at 280-281.

For unexplained reasons, the Court of Appeals impermissibly disregarded these principles of statutory construction. But if the Legislature had wanted to exempt MCCA from FOIA, it could have plainly expressed that intent by stating that "an association is exempt from

FOIA.” If a wholesale exemption of all or MCCA’s records had been the Legislature’s goal, that too could have been easily expressed by stating, “All records of an association or facility are exempt from FOIA.” The Court of Appeals is not permitted to give the statute a meaning the Legislature chose not to express.

Further, as explained, MCL 15.243(1)(d) only allows an exemption for *records or information specifically described and exempted from disclosure by statute*. In conformity with MCL 15.243(1)(d), other statutes that purport to be FOIA exemptions *specifically describe the exempt categories of records and information*, not the holders of those records.<sup>8</sup> In enacting MCL 500.134, the Legislature is deemed to have known what MCL 15.243(1)(d) required of a statutory FOIA exemption and to have legislated consistently with that mandate. “It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.” *Walen v Dep’t of Corrections*, 443

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<sup>8</sup> See e.g. MCL 333.5613 (exempting trade secrets and privileged information obtained regarding occupational diseases); MCL 333.5621 (exempting reports on occupational diseases submitted to the department); MCL 333.16238 (exempting patient names obtained in a public health investigation); MCL 124.12 (exempting fund and liability reserve information of municipalities for satisfaction of specific claims); MCL 445.85 (exempting all or more than 4 digits of social security numbers); MCL 28.730 (exempting sex offender registrations and reports); MCL 257.307 (exempting donor registry records); MCL 18.355a (exempting information identifying victims of sexual abuse); MCL 28.292(8) (exempting organ donor information); MCL 29.5p (exempting information regarding hazardous chemicals in the workplace); MCL 52.202(4) (exempting records obtained during a medical examiner’s investigation); MCL 125.1954 (exempting proprietary information in a proposal to the Michigan Strategic Fund); MCL 125.2088c(8) (exempting records used by an investment fiduciary related to investments of the Michigan Strategic Fund); MCL 168.759a(11) (exempting e-mail addresses by an absent uniformed or overseas voter); MCL 205.747(7) (exempting certain mediation information); MCL 780.830 (exempting victims’ address and telephone numbers maintained by courts or sheriffs). See also, 12/26/12 Op. at 11 where the Trial Court noted that when the Legislature exempts records from FOIA, it “makes very clear through the language of the statute which records are specifically exempt and the conditions under which such records shall not be disclosed,” citing as examples MCL 380.1230h (exempting certain records under the Revised School Code) and MCL 333.16238 (exempting information obtained in an investigation or compliance conference under the Public Health Code).

Mich 240, 248; 505 NW2d 519 (1993); *see People v Feezel*, 486 Mich 184, 211; 783 NW2d 67 (2010) (same). In fact, a Lexis search of the Michigan Compiled Laws revealed no other statute which attempted a wholesale exemption of a public body's records from FOIA. Thus, although MCL 500.134(4) is a statute, it does not "specifically describe" records and information exempt from disclosure and thus is not an exemption contemplated by the strictures of MCL 15.243(1)(d).

**II. If MCL 500.134, In Conjunction With MCL 15.243(1)(d), Is Read to Exempt the MCCA From FOIA In Whole or In Part, Then It is Unconstitutional Because it Violates Article IV, §25 and Article IV, §24 of the Michigan Constitution.**

**A. The Provisions of MCL 500.134 and MCL 15.243(1)(d), if Applied to Wholly or Partially Exempt the MCCA Records From FOIA, Would Violate the Re-Enactment/Re-Publication Requirement of Article IV, §25 of the Michigan Constitution.**

An important issue raised in the Court of Appeals was whether the Legislature violated Article IV, §25 of the Michigan Constitution by failing to amend and republish FOIA to include within FOIA the MCCA exemption embedded in MCL 500.134 of the Michigan Insurance Code. The Court of Appeals concluded that *the Legislature drafted* Section 13(1)(d) of FOIA, MCL 15.243(1)(d), "*in a manner to allow future statutory exemptions without the need to revise or amend FOIA,*" and thus held that the new FOIA exemption contained in MCL 500.134 did not amend or revise FOIA but rather worked "pursuant to" FOIA. *Coalition*, 2014 Mich App LEXIS 916 at \*15 (emphasis added).

The Court of Appeals' circular analysis overlooks the untoward premise of the Court's conclusion: that the Legislature may statutorily exempt itself from an express constitutional limitation upon its law-making power by enacting a provision such as MCL 15.243(1)(d), that, according to the Court of Appeals' interpretation, would allow FOIA to be amended through the enactment of an entirely different statute. In other words, the Court of Appeals opines that §25

can be disregarded if, by virtue of another statutory provision, the Legislature has given itself permission to embed amendments, revisions and modifications of a statute in any other code section of the Michigan Compiled Laws. Under those circumstances, the Court of Appeals opines, the new insertions are not amendments and therefore, §25 will not apply.

The Court of Appeals offers no support for the novel proposition that the Legislature may give itself permission to violate the Constitution. To Plaintiffs' knowledge, no Michigan Court has ever so held. Rather, Courts have consistently concluded that the Legislature is *bound* by the Constitution. See *AFT Michigan v Public School Employees Retirement Sys*, 297 Mich App 597, 627; 825 NW2d 595 (2012) (noting that in exercising its authority to adopt legislation, "the Legislature remains constrained by the state and federal Constitutions and the rights they guarantee"); *Council 23 Am Fed'n of State, Cnty and Mun Emp, AFL-CIO v Civil Serv Comm'n*, 32 Mich App 243, 248; 188 NW2d 206 (1971) ("[t]he legislature's power to legislate is unlimited, *except as expressly limited by the Constitution*") (emphasis added); *Alan v Wayne County*, 388 Mich 210, 282-283; 200 NW2d 628 (1972) (the Legislature cannot avoid its constitutional duties even if compliance is difficult).

To the extent MCL 15.243(1)(d) can be interpreted as allowing the Legislature to disregard §25, it is itself a breach of the constitutional limitation on the Legislature's lawmaking authority. §25 would be rendered a nullity if the very public body embraced by its prohibition could statutorily immunize itself from compliance. If MCL 15.243(1)(d) has that effect, as the Court of Appeals concluded, it is unconstitutional.

Article IV, §25 provides that if the Legislature desires to revise, alter, or amend an existing law, the Legislature must reenact and republish the subject law with all of the new changes. §25 states:

No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

The policy underlying §25 is to prevent the Legislature from enacting statutes that are deceptive or misleading, a concept that was fully explored in the landmark case of *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972). In the early case of *Mok v Detroit Bldg & Sav Ass'n No 4*, 30 Mich 511 (1875), the Michigan Supreme Court analyzed the effect and operation of §25 (the same constitutional provision then as it exists today). There, the Michigan Supreme Court examined the relationship between an 1855 statute, which governed the formation of corporations for building and leasing houses and an 1869 statute, which provided that corporations for building and savings associations can be incorporated pursuant to the 1855 statute. *Id.* at 521. The Court concluded that the 1869 statute specifically sought to modify and reference the 1855 statute, but the Legislature did not properly amend the 1855 statute first in accordance with §25. *Id.* at 522-523. In so finding, Justice Cooley noted that amending a law by reference without fully reenacting the original law to include those amendments was calculated to mislead and deceive the public:

Alterations made in the statutes by mere reference, and amendments by the striking out or insertion of words, without reproducing the statute in its amended form, were well calculated to deceive and mislead, not only the legislature as to the effect of the law proposed, but also the people as to the law they were to obey ... [T]he section requires nothing in legislation that is not perfectly simple and easily followed, and nothing that a due regard to clearness, certainty and simplicity in the law would not favor.

*Id.* at 516-517 (emphasis added).

Despite *Mok*'s clear conclusion as to the proper constitutional method of amendment, this Court deviated from *Mok* and used a far more relaxed standard in *Burton v Koch*, 184 Mich 250; 151 NW 48 (1915). There, this Court analyzed the relationship between 1881 Mich Pub Acts 164, which governs the operation of school districts, and two newly passed statutes which

amended the existing law: 1913 Mich Pub Acts 146, which established uniform qualifications for voters in certain school districts, and 1913 Mich Pub Acts 251, which provided that in districts in large cities, the board of education would be elected by the electors of the entire district qualified to vote for school inspectors. This Court considered whether 1913 Mich Pub Acts 251 and 1913 Mich Pub Acts 146 properly amended 1881 Mich Pub Acts 164, even though they did not reenact and republish the initial law. This Court held that although the new laws did have the effect of amending the old law, they did not violate §25. *Id.* at 255.

With these competing views on the requirements of §25, the Legislature had no clear directive as to how an amendment must be enacted. But this Court resolved the dispute in *Alan v Wayne County, supra*. In *Alan*, this Court analyzed the disparate holdings in *Mok* and *Burton*, concluding that *Mok* set forth the proper method for amendments: ***in order to amend an existing statute, the Legislature must actually reenact and republish the existing statute to include the desired changes.*** This Court noted that, in contrast, the *Burton* case allowed the Legislature to amend an existing statute without republishing it. Overruling *Burton*, this Court adopted the rule of *Mok*, stating that the Legislature could not avoid its Constitutional duties and requirements, even where compliance might be difficult. *Alan*, 388 Mich at 281, 282-283.<sup>9</sup>

In this case, when enacting MCL 500.134 to exempt specified MCCA records from FOIA, the Legislature was obligated to amend and republish FOIA to include the exemption

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<sup>9</sup> The Court of Appeals closely examined the effect of §25 and relied heavily on *Alan* in *Nalbandian v Progressive Mich Ins Co*, 267 Mich App 7; 703 NW2d 474 (2005). In that case, the Court found unconstitutional an attempted amendment to the point system of the Michigan Insurance Code, which allows insurers to allocate points for speed limit violations when considering whether and at what rate to insure an individual. *Id.* at 9.

within FOIA itself.<sup>10</sup> Instead, the Legislature buried MCL 500.134 in an obscure nook and cranny of the Insurance Code. This omission cannot be excused by pretending that MCL 500.134 did not amend FOIA because the Legislature allowed itself to place future amendments in other statutes. The gravamen of §25 is antithetical to that very notion. Statutory amendments must be published within the statute itself. The aberrational analysis adopted by the Court of Appeals – which allows the Legislature to evade its constitutional duty – borders on constitutional anarchy.

**B. The Provisions of MCL 500.134 and MCL 15.243(1)(d), if Applied to Wholly or Partially Exempt the MCCA's Records from FOIA, Would Violate the Fair Notice of Intent Requirement of Article IV, §24 of the Michigan Constitution.**

Article IV, §24 prohibits any law from embracing more than one object. It also provides that the object embraced by the law must be expressed in the title of that law. Finally, the provision prohibits the Legislature from altering or amending a bill in such a way that the original purpose of the law would be changed. Article IV, §24 provides:

No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

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<sup>10</sup> The Legislature knew how to do this. It properly amended FOIA in 2006 to exempt protected health information from disclosure by public bodies. *See, e.g.*, 2006 PA 482. In the Senate Floor Analysis of the bill, it was specifically stated that “[t]he bill would amend the Freedom of Information Act to allow a public body to exempt from disclosure protected health information, as defined in 45 CFR 160.103” Senate Floor Analysis, SB 468, April 21, 2006 (Exhibit 13). In order to accomplish this amendment, the Michigan Legislature reenacted FOIA with added language in subsection 13(1)(l), MCL 15.243(1)(l). That added language specifically exempts:

*Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including protected health information, as defined in 45 CFR 160.103.*

SB 468, As Passed House, November 30, 2006 (Exhibit 14) (emphasis added).

In *People v Kevorkian*, 447 Mich 436; 527 NW2d 714 (1994), this Court identified three possible violations of the title-object clause – (1) a law could be found to have multiple objects; (2) the body of a law could embrace an object not found in the title of the law; and (3) an amendment could change the purpose of the law. *Id.* at 453. In summarily dismissing the §24 challenge, the Court of Appeals erroneously relied upon a phrase in the title of 1988 PA 349, codified as MCL 500.134, which states that the law provides for the “rights, powers, and immunities” of certain associations, and then opined that the FOIA exemption is embraced within that description. The Court erred. If the text of MCL 500.134 (which is part of the Insurance Code of 1956, a code which does not include FOIA), is to be interpreted as the Court of Appeals held, it clearly and specifically purports to address and alter FOIA, but nowhere in the lengthy, extensive and detailed title of the law is there any clue that the law deals with FOIA, FOIA exemptions, or exempting MCCA from FOIA.

Here, MCL 500.134 falls under the Insurance Code, the general purpose of which is to broadly and generally regulate the insurance and surety business of Michigan. Analyzing the phrase “*rights, powers, and immunities*” in that context, the term “immunities” might logically relate to a myriad of factors in the insurance and surety contexts but does not reasonably or logically embrace an exemption from FOIA, a statute which governs the public’s right to access information and is not in any way a part of the insurance code. This conclusion is compelled because titles cannot be written so broadly that they fail to create a reasonably discernible linkage between the words of the title and the subject of the act. Such mischief would occur if the Court accepted the assertion that the overly broad phrase “*rights, powers, and immunities*” should be interpreted to warn the reader that the body of the act was making fundamental changes to FOIA.

This Court commented on the purpose and effect of § 24 in *People v Carey*, 382 Mich 285; 170 NW2d 145 (1969). There, this Court examined article 5, section 13 of the Motor Carrier Act and determined that it was constitutional under § 24.<sup>11</sup> Stating that the main purpose of § 24 was to prevent the Legislature from passing laws unless they were fully understood, this Court also explained that § 24 worked to prohibit diverse subjects from being dealt with in a single bill. The goal was to ensure that the public could understand the substance of the law from its title. This Court stated:

The main purpose of [Const art 4, §24], was to prevent the legislature from passing laws not fully understood and to avoid bringing into one bill subjects diverse in their nature and having no necessary connection. It is intended that the legislature, in passing law, should be fairly notified of its design and that the legislature and public might understand from the title that only provisions germane to the expressed object would be enacted.

*Id.* at 296 (citing *MacLean v State Bd of Control*, 294 Mich 45; 292 NW 662 (1940)).

In *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), this Court articulated the standards that the title of a law must meet in order to comply with § 24. There, this Court stated that the title of a law is not required to be a full, detailed index. However, it must provide clear guidance for the law that it contains. Justice Black stated this principle slightly differently in his concurrence to *Alan*. Justice Black stated that the body of the act must not be inconsistent with the title, and quoted *Vernor v Sec'y of State*, 179 Mich 157, 160; 146 NW 338 (1914), to frame three essential prerequisites: does the title fairly indicate the act's purpose, does it fairly index the act, and does it fairly inform the legislators and the public of the act's purposes. *Alan*, 388 Mich at 372. The text of MCL 500.134 and its relationship to the title do not satisfy these requisite standards. The title does not embrace a FOIA exemption. It

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<sup>11</sup> At the time, the 1908 Michigan Constitution was in effect and Article 5, Section 21 was the location of the present day Article IV, Section 24 found in the 1963 Michigan Constitution.

expresses a general purpose, among other specifics, “to revise, consolidate, and classify the laws relating to the insurance and surety business.” 1988 PA 349. Contrary to *Alan* and *Pohutski*, the title gives no inkling of the FOIA exemption and thus violates §24.<sup>12</sup>

**III. If Plaintiffs Are Not Permitted to Access the Ratemaking Data They Seek, They Will Have Been Denied the Constitutional Right to Due Process Afforded to Michigan Auto No-Fault Consumers, As Recognized By This Supreme Court in *Shavers v Attorney General*.**

*Shavers* is a landmark case in the jurisprudence of the No-Fault Act. In *Shavers*, this Court held that under the compulsory No-Fault insurance system, due process was violated by a ratemaking process which did not provide individuals the information they needed to assure that their automobile insurance rates are fair and equitable. The Court of Appeals was dismissive of *Shavers*, holding that it was “inapplicable in the present case” because: (1) a detailed regulatory scheme governs MCCA and the premiums it charges to its members; (2) the Essential Insurance Act corrected the No-Fault Act’s constitutional deficiencies; and (3) *Shavers* does not entitle policyholders to information regarding *every* component of their auto insurance premiums. Not one of these reasons is valid.

**A. Under the *Shavers* Decision, Michigan Auto Insurance Ratepayers Have a Due Process Right to Know How Their No-Fault Premiums Are Calculated and This Right Has Not Been Negated By the Subsequent Passage of the Michigan Essential Insurance Act.**

In *Shavers*, this Court held that because of the compulsory nature of Michigan’s No-Fault insurance program, the constitutional guarantees of due process and equal protection mandate

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<sup>12</sup> This § 24 violation is evidenced by the fact that there was confusion about what the Legislature was passing with the MCL 500.134 amendment. The actual statutory provision indicates that it purports to amend FOIA. See MCL 500.134(4). However, the legislative intent section of 1988 PA 349, codified as MCL 500.134, indicates that the provision was enacted in response to the Court of Appeals decision in *League General* and thus intended to exempt MCCA from the Administrative Procedure Act (APA), not FOIA.

that auto insurance ratemaking information be available to policyholders to ensure that their rates are fair and equitable. This case implicates the very same due process concerns articulated by this Court in *Shavers*. Here, not only is MCCA's ratemaking information not available before the compulsory insurance assessments become effective, which was the cause for concern in *Shavers*, MCCA's ratemaking information is not available at all.<sup>13</sup>

After the No-Fault Act became law, the constitutionality of the Act was challenged in the landmark *Shavers* case. While upholding the constitutionality of the Act's compulsory insurance provisions, this Court nonetheless concluded that the Act as originally drafted was an unconstitutional deprivation of due process because the law did not include sufficient safeguards to ensure that the required insurance would be available at "fair and equitable rates." This Court stated that the assurance of such rates was paramount to ensuring that the due process rights of Michigan citizens were protected. This Court explained:

In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates. ***Consequently due process protections under the Michigan and United States Constitutions are operative.***

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<sup>13</sup> In lower court briefing, MCCA cited a *single, unpublished federal district court opinion* for the proposition that "[s]ubsequent decisions have made clear that the interest articulated in *Shavers* does not extend to all circumstances involving the No-Fault Act." See MCCA COA Br. at 19-20, citing *Advocacy Organization for Patients and Providers v Auto Club Ins Assoc*, Case No 5:96-cv-177, 1997 US Dist LEXIS 12186 (ED Mich, June 20, 1997) (emphasis added). As MCCA has acknowledged, the due process claims were dismissed in *AOPP* because "the issue before the court 'does not implicate issues which are similar to an individual's ability to get no-fault insurance, and consequently to drive [under *Shavers*].'" MCCA COA Br. at 20. Contrary to *AOPP*, the issue here implicates those very concerns. If MCCA is permitted to shield from public view the information it uses to calculate premiums under MCL 500.3104, policyholders will not have the information they need to assure the availability of insurance at fair and equitable rates. If insurance is not available at fair and equitable rates, a portion of Michigan's driving public will not be able to afford the compulsory auto insurance premiums and as a result, will be prohibited from operating a motor vehicle in this State. The MCCA assessment is a significant component of the premium computation. This issue is directly embraced by *Shavers*.

*Shavers*, 402 Mich at 599 (emphasis added).

This Court recognized that the due process rights of Michigan citizens require that they have knowledge as to how their insurance rates are determined. This Court specified that the system of rate regulation as originally conceived in the Act denied due process to a motorist who attacks the validity of a rate because it only allows public inspection of a rate after it becomes effective. Such constrained inspection was insufficient because “*individuals must have the knowledge necessary to protect themselves against erroneous or discriminatory underwriting and rate-making decisions.*” *Id.* at 606 (emphasis added) (citation omitted). This Court explained:

[D]ue process, at a minimum, requires that rates are not, in fact, ‘excessive, inadequate or unfairly discriminatory’ *and, further, that persons affected have notice as to how their rates are determined and an adequate remedy regarding that determination. . . . [T]he present system of rate regulation denies due process to the motorist attacking the validity of a rate.* Filings and supporting information submitted by insurers are open to public inspection only after the filing becomes effective. This certainly is questionable due process.

*Id.* at 601-602 (emphasis added).

This Court gave the Legislature 18 months to correct these deficiencies. The Legislature responded by enacting the Essential Insurance Act (1979 PA 145 and 1979 PA 147), which adopted certain ratemaking protections for Michigan insurance consumers. As a result of that legislation, the *Shavers* litigation died a quiet death in 1982. *See Shavers v Attorney General*, 412 Mich 1105; 315 NW2d 130 (1982) (*Shavers II*). However, this Court has never held that the Essential Insurance Act negated the constitutional concerns raised in *Shavers*. Rather, in *Shavers II*, this Court made clear that its decision did not prohibit future attacks on the constitutionality of the No-Fault law on the grounds stated in the Court’s original opinion. Specifically, this Court stated:

Because there has been no further claim that this act, as recently amended, is unconstitutional, we decline to so hold. However, *this order should not be construed as foreclosing future attacks on the constitutionality of the act based upon the concerns expressed in our opinion.*

*Id.* (emphasis added). *Shavers* continues to be a very relevant present day constitutional doctrine, as evidenced by this Court's reference to *Shavers* in *Griffith v State Farm Mut Auto Ins Co*, 472 Mich. 521, 539, n 15; 697 NW2d 895 (2005).

**B. Plaintiffs' Constitutional Right to Access Information Relevant to Auto Insurance Premiums, Clearly Recognized in *Shavers*, Has Not Been Preempted, Nor Is It Adequately Protected By Any of the Regulations Contained in MCL 500.3104.**

The Court of Appeals is absolutely wrong in stating that MCCA's power to establish premium assessments is regulated by MCL 500.3104. Nothing in that statute or MCCA's concomitant Plan of Operation imposes any oversight or restriction upon the power MCCA wields to determine the assessments policyholders must pay. In fact, nothing in the record suggests that the "regulatory scheme" the Court refers to or MCCA's Plan of Operation protects the ratepayers or ensures that the rates they pay are fair and equitable. To the contrary, MCCA is not required to file the ratemaking information insurance companies must file, and refuses to disclose the actuarial assumptions and calculations that MCCA uses to project its exposure and the sufficiency of its reserve.

The secrecy of this information makes Michigan an anomaly among all other states, as the National Association of Insurance Commissioners (NAIC) has recognized. See Excerpt of NAIC Report on Profitability by Line by State in 2011 (NAIC Report), attached to the Amicus Brief of Amici Curiae MSMS, MOA, MAC and MOS in the Court of Appeals. It explains: "The profit reported for Michigan auto liability is not meaningful because of data reporting anomalies arising from the data related to the Michigan Catastrophic Claims Association."

Further, irrespective of whether policyholders are entitled to information regarding *every*

component of their insurance premiums, they are at a minimum entitled to the information necessary to determine whether their premiums are fair and equitable. On the present record, the Court of Appeals could not have possibly known whether the information available to Plaintiffs was sufficient. There is undisputed evidence to the contrary. Industry expert Jay Angoff has opined that MCCA does not disclose the actuarial assumptions and projections it uses to determine rates. *See* Angoff Affidavit, Exhibit 12. MCCA does not dispute that it keeps this information secret to avoid having to defend it.

Indeed, this information *is not even available to MCCA's members*. *See* Affidavit of Gloria Freeland, filed as Exhibit D to the MCCA's Brief on Appeal in *Demery v ACIA*, Court of Appeals Case No. 310731 and referenced in the Court's *Demery* opinion (of which this Court may take judicial notice). MCCA admits that these actuarial assumptions and projections are used to set the assessments *that are passed on to auto policyholders*. *See* MCCA's *Demery* Brief at 1, 3 (noting that MCCA's "actuarial model" is used to "project the number of persons who will sustain catastrophic injuries in motor vehicle accidents in the next year and the amount of money needed in today's dollars to pay those claims in the future" and that "[w]hen the MCCA indemnifies a member in accordance with section 3104, the costs are passed along to the MCCA's members at large, and ultimately on to the Michigan rate paying public in the form of an assessment" and that "MCCA premiums are reflected in the rates charged to Michigan policyholders by the MCCA's members."). But this information is not available to auto policyholders or MCCA members.

MCCA does not publish its ratemaking information on its website. Financial data exists, but it does not contain the actuarial assumptions and projections required to understand how the per-vehicle assessment was determined or the reasonableness of that assessment. The principal

document insurers typically file regarding their financial condition is the Annual Statement. The Annual Statement contains information regarding a company's assets, liabilities, income, cash flow, and investments. MCCA files an Annual Statement with the Department of Insurance and Financial Services each year. *But in addition to financial data, insurers file ratemaking data in a document known as a rate filing whenever they increase or decrease their rates. In a rate filing, the company estimates the amount it is likely to pay out for claims covered by its policies, and thus the amount of premium it must collect to pay for those claims.* The ratemaking process consists of several steps, and the actuary must make assumptions, projections, calculations, and selections at each of those steps. Whether a company should increase or decrease its rates, and how large any increase or decrease should be, depends on the assumptions, projections, calculations and selections the actuary makes. One set of those components may justify a large increase in rates, whereas another may justify a large decrease. The data contained in insurance company rate filings is extremely important to both the regulator and the public. Accordingly, *many states, including Michigan, now routinely post those rate filings (with the ratemaking data and analysis) on their websites.*

*Significantly, MCCA does not submit rate filings to the state regulators. It discloses no ratemaking data or analysis whatsoever, either on its website or anywhere else.* Thus, when MCCA announces the annual per-vehicle assessment that will be charged against policyholders in a given policy year, it discloses none of the ratemaking data or analysis that would have to be disclosed if it were a regular auto insurer. The assessment amount depends upon what MCCA projects to be its ultimate liabilities in a given year. To make that projection, MCCA must estimate (1) the number of people who will be catastrophically injured in that year, how long they will live, how much their medical costs will ultimately be and when they will incur those

costs, and (2) the amount MCCA will earn on its \$14 billion reserve over the period it will be paying out on those claims. Various calculations and assumptions go into that projection. Policyholders cannot test the reasonableness of the projection (and concomitantly, the per-vehicle assessment) without this information, which is detailed in Plaintiffs' Requests. Angoff Affidavit (Exhibit 12).

For example, the Requests seek documents setting forth the calculation of the *present value* of disbursements expected to be made in the ultimate settlement of the claims reported. In its Financial Statements and Supplemental Schedules ("Financials") at 8, available on MCCA's website under the heading Financial Reports, MCCA acknowledges that it "actuarially computes the provision for unpaid losses and loss adjustment expense using the present value of disbursements expected to be made in the ultimate settlement of the claims reported." *MCCA does not, however, disclose this actuarial computation or that of the present value of the payments it expects to make.*

Similarly, MCCA uses actuarial tables to reflect the probabilities of each claimant surviving to incur the costs MCCA projects. In its Financials, MCCA acknowledges that it adjusts its estimated payouts "based upon actuarial tables that incorporate actual emerged Association mortality and closure experience to reflect the probabilities of each claimant surviving to incur such costs." This means that MCCA considers the claimant's likely lifespan in estimating the amount it will ultimately pay for each claimant. In its Financials, MCCA acknowledges that its estimates of lifespan are based on actuarial tables derived from previous MCCA experience, but *it doesn't disclose its previous experience or the tables.*

MCCA's actuaries would have created a loss development analysis in connection with unpaid losses and loss adjustment expenses. That is, in order to project the amount it will

ultimately pay out for claims arising in the policy year, MCCA must first determine the amounts it has been paying, and the timing of its payments, for similar claims in previous years. It then assumes that this same payment pattern will apply with respect to claims arising in the policy year, based on estimates of the amount it will ultimately pay out for those claims, before accounting for inflation. This process is called loss development. *Nowhere on its website has MCCA disclosed its past payment patterns, the assumptions it has made regarding the extent and timing of payments it projects it will make in the future for claims arising in prior years, or the assumptions and calculations it has used to determine the payment pattern it assumes with respect to claims arising during the policy year.*

After it develops its estimated ultimate losses for the policy year, the MCCA must then project them into the future – because it is estimating the ultimate liabilities for claims incurred in the policy year, not in prior years – based on the extent to which it believes that increases in medical costs and other factors will cause those payments to increase in the future. That analysis is called a trend analysis. Insurance company rate filings typically show separate trends for frequency – the number of claims each year – and severity – the average claim amount each year. The actuary calculates the trend for the policy year based on frequency and severity in previous years. However, the number of previous years' data the actuary looks at, the specific years he looks at, and the amount of weight he gives to different periods of years are all matters within the actuary's discretion. *Nowhere on its website does MCCA disclose any of that data.*

This is all highly critical information that MCCA refuses to disclose. It is not on MCCA's website or otherwise available. Without this information, Plaintiffs cannot determine whether the compulsory per-vehicle assessment is fair. Moreover, Plaintiffs do not have the option of refusing to pay the MCCA line item per-vehicle assessment on their premium bill. They must

pay the entire premium or risk going to jail. This is the very context of *Shavers* and precisely why this Court invoked the due process right recognized in *Shavers*.

On the record that exists here, the Court of Appeals could not have fairly concluded that MCCA provides sufficient information to satisfy the due process concerns recognized in *Shavers*. It had no record whatsoever upon which to base such a conclusion. Nor are the concerns ameliorated by the general provisions of MCL 500.3104. MCL 500.3104 does not regulate, nor compel disclosure of, any of the information necessary to determine the reasonable of MCCA's per-vehicle assessments. MCCA tacitly admits this. The record reflects that MCCA's confessed goal is to avoid accountability in the selection of its actuarial assumptions and projections. At a Trial Court hearing, MCCA expressed that the harm it was seeking to avoid by withholding its records was having to become *accountable for – and having to defend – the actuarial assumptions underlying the compulsory assessment:*

THE COURT: Now, your worst-case scenario is that their experts look at it and say: Well, we think the wrong factors were used and there should be some different factors . . . And it doesn't interfere with your ability to operate. And it doesn't, in fact, interfere with your ability to have a new assessment . . .

\* \* \*

[MCCA'S COUNSEL]: Your Honor, what it means is, instead of doing the things that we are charged with doing under the statute, *it means that we have to devote all of our attention to whether or not the actuarial reserves that were set in each and every one of what are dozens and dozens of assumptions are correct or not correct, . . .*

\* \* \*

[MCCA'S COUNSEL]: But the issue isn't the argument about whether it exists or not, or whether we can give it to them or not, the issue is what happens to the information after it's released, and the fact that *we will then have to spend all of our time defending the information that is contained in those assumptions, have to be defending each and every aspect of very complicated actuarial findings....*

February 28, 2013 Tr. (Exhibit 15) at 44-47 (emphasis added).

The Court's rationale for dismantling *Shavers*, belied by MCCA's own admissions regarding the unavailability of the underlying ratemaking information, does not bear up. Due process survives *Shavers II*. It has not been negated by the Essential Insurance Act and it is operative here.

**IV. If Plaintiffs Are Not Permitted to Access MCCA's Ratemaking Data, They Will Have Been Denied Their Long Recognized Common Law Right to Access Information, Which Right Has Not Been Preempted By the Passage of FOIA.**

**A. The Plaintiffs Have a Long Recognized Common Law Right to Access the Ratemaking Information They Seek in This Case.**

The Court of Appeals brushed aside Plaintiffs' common law argument with an irrelevant discussion about mandamus and the *non sequitor* that Plaintiffs are not shareholders of MCCA, erroneously implying that at common law only a shareholder may access corporate records. For example, the Court of Appeals inexplicably attributed to Plaintiffs the following: (1) The Court of Appeals stated, apparently relying on statements made by Defendant, that "Plaintiffs' argument that a 'special interest' vests an individual with the right to inspect private records under *Nowack* is also devoid of legal merit." *Coalition*, 2014 Mich App LEXIS 916 at \*28-29. Plaintiffs never made such a claim. (2) The Court of Appeals attributed to Plaintiffs the following: "Plaintiffs also argue that the *Nowack* Court's reference to stockholders right to inspect the 'books and records of his corporation' shows that individuals have a common law right to inspect private records." Plaintiffs made no such argument. *Id.* at \*30. (3) Finally, the Court of Appeals states: "Accordingly, plaintiffs [sic] argument that *Nowack* stands for the proposition that the common law right of inspection extends to private records is devoid of merit ...." *Id.* at \*31. Plaintiffs have never asserted that *Nowack* stood for such a proposition. ***Plaintiffs did cite six other common law cases which absolutely stand for that proposition; but not one of them was worthy of mention by the Court of Appeals.***

Plaintiffs cited to *Nowack* for one reason and one reason only - its detailed discussion of the nature of the interest required at common law to enable one to secure access to records.

*Nowack*, at page 205, describes the requisite interest:

At common law, every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive and judicial records, provided he has an interest therein which is such that would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.

Plaintiffs' straightforward claim is simply this. At common law, persons are permitted to inspect records – public or private – if they can show an “interest” distinct from that of the general public. See, *Woodworth v Old Second National Bank*, 154 Mich 459; 117 NW 893 (1908); *In re Buchanan*, 152 Mich App 706, 713-714; 394 NW2d 78 (1986); and *Booth Newspapers, Inc v Muskegon Probate Judge*, 15 Mich App 203; 166 NW2d 546 (1968). Where Plaintiffs can establish an “interest” in records, the common law allows access to those records, regardless of whether the custodian is “public” or “private”.

The nature of this “interest” has not been definitively established by the courts, but includes an array of circumstances and will be recognized so long as the interest is legitimate and specifically impacts the claimant. The Michigan Supreme Court addressed such an interest-based claim to private records in *Woodworth v Old Second National Bank, supra*. There the petitioner sought to gain access to corporate records for use in federal litigation. The circuit court ruled against him because he was not a shareholder of the corporation from which the records were sought. According to the record before the circuit court, “One share of stock stood upon the stock book in the relator’s name, but the same was never delivered to him nor removed from the books.” *Id.* at 464. It was also noted that petitioner never paid value for the stock in the Maltby Cedar Company. But this Court did not hesitate in finding that petitioner had a sufficient “interest” to give him the right under the circumstances to inspect the corporate books.

The point that the relator was not a stockholder in the Maltby Cedar Company, and therefore, not entitled to any inspection of its records, is not well taken. The Maltby Cedar Company was a mere instrumentality of the bank itself in which all of the stock holders of the bank had a least an equitable interest . . .

*Id.* at 468. *Booth Newspapers, Inc v Muskegon Probate Judge*, 15 Mich App 203; 166 NW2d 546 (1968), a pre-FOIA case, found that a newspaper's interest in disseminating news was sufficient to access the will of a recently deceased person. *Id.* at 209. *In re Buchanan*, 152 Mich App 706, 713-714; 394 NW2d 78 (1986), held that a city council member had a sufficient special interest in investigating alleged mismanagement of city programs to justify access to court records.

In the Trial Court, BIAMI based its common law claim upon two special and private interests: First, the special private economic interest of Michigan auto policyholders, who pay the rates set by MCCA; and second, the special private economic and personal interest of catastrophically injured victims to be assured that the adequacy and continuity of their care will not be jeopardized by MCCA's mismanagement or deficient rate-setting practices. Like the plaintiffs in *Woodworth, Booth and Buchanan*, Plaintiffs here have a unique and special interest in MCCA's records not shared by the general public because insurance companies pass 100% of MCCA assessments through to Plaintiffs and other Michigan auto policyholders. Unlike the general public, auto owners are required to purchase mandatory No-Fault insurance upon penalty of criminal prosecution. This means that the policyholders, not general taxpayers or anyone else, ultimately pay the entire cost of the care and treatment of catastrophically injured victims in excess of the statutory amounts prescribed by § 3104, as well as MCCA's cost of administration.

This is borne out by past experience. In 1998, the MCCA had accumulated excess premium funds. This Court may take judicial notice of Insurance Bulletin 98-01 (Exhibit 16), wherein the Department of Insurance and Financial Services (DFIS) announced a refund of \$1.2

billion effective March 18, 1998. In the bulletin, DFIS directed that MCCA's excess funds must be paid to the policy holders as *"the ultimate payers of the MCCA premium by way of a pass-through of the charge by member companies . . . ."* (emphasis added). On these facts, which are not disputed, Plaintiffs possess the requisite "special interest."<sup>14</sup>

Plaintiffs' special interests, in part, are also grounded on *Shavers* recognition that "Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis." *Shavers*, 402 Mich at 600. As *Shavers* explained, automobile insurance rates may not be "excessive, inadequate or unfairly discriminatory" and persons affected by Michigan's No-Fault system must have *"notice as to how their rates are determined and an adequate remedy regarding that determination."* *Id.* at 601 (emphasis added.) As long as MCCA carries on its rate-setting practices in secret, Plaintiffs and other auto policyholders have no way to determine if they are paying excessive, discriminatory or unreasonable rates. Because they have a special private interest, Plaintiffs have a common law right to MCCA's records.

Moreover, catastrophically injured patients and their families also have a special interest in obtaining the requested records. Many depend upon MCCA for their survival. Their quality of life could greatly diminish if MCCA became financially unsound or ceased to exist. These patients have a special interest in the integrity of the fund. Of course, any assessment of MCCA's financial health must be based on relevant and accurate data. Erroneous assumptions

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<sup>14</sup> While Michigan motor vehicle owners as a group constitute a substantial portion of Michigan's population, they do not constitute all Michigan citizens. Therefore, that group has an interest that is distinct from the public interest in general. MCCA directly affects the rates paid by Michigan motorists, therefore those motorists have a special interest in ensuring those rates are fair and reasonable so that their legislatively mandated insurance premiums do not unreasonably deprive them of their property.

could affect MCCA's claim procedures, thereby adversely affecting catastrophically injured patients. For example, if MCCA thought it was going broke, it could implement measures that would severely limit payments and the way it handles catastrophic claims such that the quality of care and health of catastrophically injured patients and their families could suffer.<sup>15</sup>

**B. The Court of Appeals' Decision Disregards Centuries of Common Law.**

Michigan's common law right of access to public and private information pre-dates Michigan statehood. That common law right evolved from the English common law and was incorporated into the Michigan Constitution, now Const. 1963, Art III, sec 7. As former Michigan Supreme Court Chief Justice Clifford Taylor noted, the English common law was adopted as part of Michigan jurisprudence through the Northwest Ordinances:

These ancient references concerning the status of the common law before Michigan's statehood are significant because in our earliest Constitution, by way of the ordinances of 1787 for the government of the Northwest Territory, **we adopted what was in essence the English common law in existence on that date.**

*Phillips v Mirac, Inc*, 470 Mich 415, 426 n 10; 685 NW2d 174 (2004) (emphasis added.) . Chief Justice Taylor there cited *In re Sanderson*, 289 Mich 165; 286 NW 198 (1939), which also makes the point:

The common law, including the English statutes of general application, made the law of the Northwest Territory by the Ordinance of 1787, continued to be the law of Michigan during the territorial period.

The English common law was adopted in the "Schedule", section 1, of the very first Michigan Constitution of 1835, and readopted in section 1 of the "Schedule" of the Michigan Constitution of 1850. The common law savings clause has been readopted in every Michigan constitution

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<sup>15</sup> Belying its assertion that it does not deal with catastrophically injured patients, MCCA released a bulletin requiring all insurers to submit all claims and settlements to MCCA for approval before making payment decisions. See MCCA Oct. 2009 Claim Bulletin (Exhibit 17).

since. This common law is as much a part of Michigan law today as if it had been recently enacted by the Michigan legislature. Thus, it is entirely proper to look to 18th century and earlier English common law for guidance regarding the right of access to public and private records.

This right of access to private records was recognized in many early English cases, including *Mayor of Lynn v Denton*, 1 Term Rep 689; 99 Eng Rep 1322 (1787), where a stranger with a claim of interest in the material sought was granted access by the British court. *See also*, *Corp of Barnstable v Lathey*, 3 Term Rep 303; 100 Eng Rep 588 (1789), involving access to corporate records by a non-shareholder. If a party had a legitimate interest in the subject matter contained in the books of a corporation, even if that party was a “stranger”, i.e., not a shareholder, that party was entitled to inspect those records. To the same effect is *Mayor of the City of London and Swinland*, Term Pasch 4, Geo II; 94 Eng Rep 306 (1731).

An early 18th century case discusses at length the array of circumstances in which one may access the records of others, including private entities. *Dominus Rex v The Fraternity of Hostmen in Newcastle-Upon-Tyne*, 2 Strange 1223; 93 Eng. Rep. 1144 (Circa 1716-1749). One of many circumstances in which a stranger could access corporate records is where an action was brought by a corporation to enforce claims against the public. There it was said that persons challenging the claims have an “interest in the books which will intitle them . . . to inspection of the entries relating to the litigation.” Even if the challenging parties were strangers, inspection of private records was allowed where the books were the “common evidence” of transactions between them. *Id.* Such cases are *Warriner v Giles*, 2 Strange 954; 93 Eng Rep 964 (Circa 1716-1749), and *Geery v Hopkins*; 2 Ld Raym 852; 92 Eng Rep 69 (Circa 1694-1732). In *Geery*, the court observed:

[I]f the bank deal in transfer of their stock, and that cannot be done by any other means than by entry made in their books, it is very reasonable that they should be produced for the benefit of the party . . . .

*Dominus Rex, supra*, points to other circumstances in which a stranger may access private records:

[T]he Court will grant this rule, when an instrument of which it is not usual to have a counterpart, is lodged in the hands of a private person, as a general and common custodee for the parties interested in it . . . .

*Dominus Rex, supra, at 1146*. He cites several cases including *Goater v Nunnely*, 2 Strange 1130; 93 Eng Rep 1081 (Circa 1716-1749); and *Gracewood v \_\_\_\_\_*, Barnes 439; 94 Eng Rep 993 (Circa 1732-1760). Both involved access to private records, and the outcome in each case turned on whether the seeking party had an “interest” in the records sought.

Beyond pejorative characterizations of this claim, MCCA has offered nothing to the Court of Appeals or the Trial Court which would suggest that these principles are not as viable today as they were over 200 years ago. This interest-based right to access was at the heart of the holding in *Woodworth v Old Second Bank, supra*. And this interest-based right was recently confirmed and repeated by the United States Supreme Court in *McBurney v Young*, 569 US \_\_\_; 133 S Ct 1709; 185 L Ed 2d 758, 770-771 (2013), which dealt with the constitutionality of a Virginia FOIA statute:

Most founding-era English cases provided that *only those persons who had a personal interest in non-judicial records were permitted to access them*. See, e.g., *King v. Shelley*, 3 T. R. 141, 142, 100 Eng. Rep. 498, 499 (K. B. 1789) (Buller, J.) (“[O]ne man has no right to look into another’s title deeds and records, when he . . . has no interest in the deeds or rolls himself”); . . . .

. . . . *Brewer v. Watson*, 71 Ala. 299, 305 (1882) (“*The individual demanding access to, and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose.*”) (Emphasis added).

1335 Ct 1718-1719.

The foregoing cases make clear that the right can and does extend to “private” records. Whether private or public, Plaintiffs’ special interest cannot be safeguarded without reasonable access to MCCA’s records. Plaintiffs must be able to inspect the records MCCA is withholding in order to assure the protection of Plaintiffs’ important private economic and personal interests and the rights recognized in *Shavers*.

**C. The Michigan FOIA Does Not Preempt the Plaintiffs’ Common Law Right to Access Information.**

The plain language and purpose of FOIA, a statute expressly enacted to provide greater access to the records and information of public bodies, cannot be reconciled with the Court of Appeals’ conclusion that FOIA preempts and restricts the common law right to information. In ruling that FOIA preempts Plaintiffs’ common law right to inspect MCCA’s records, the Court of Appeals has turned the plain language and purpose of FOIA on its head. Whether a statute preempts the common law “is a question of legislative intent” and “[t]he first step in ascertaining legislative intent is to look at the words of the statute itself.” *Wold Architects v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006).<sup>16</sup> The Legislature “‘should speak in no uncertain terms’ when it exercises its authority to modify the common law.” *Velez v Tuma*, 492 Mich 1, 11-12; 821 NW2d 432 (2012) (internal citations omitted).

Here, per the plain language of FOIA, the common law remains intact. Section 13(3) states:

*This Act does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.*

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<sup>16</sup> In finding that the Michigan Arbitration Act did not preempt common law arbitration, this Court observed that the Legislature “is presumed to know of the existence of the common law when it acts” and “[w]hen wording the MAA, the Legislature could easily have stated an intent to abrogate common-law arbitration.” *Wold Architects*, 474 Mich at 234. The same is true of FOIA.

MCL 15.243(3) (emphasis added). The plain meaning of these words is that FOIA cannot preempt any law that would otherwise require information to be disclosed to (1) the public or (2) a party in a contested APA case. This meaning is consistent with the frequently-repeated understanding that the Legislature intended FOIA to be “purely a disclosure statute,” *Tobin v Michigan Civil Service Comm*, 416 Mich 661, 668; 331 NW2d 184 (1982), and that “FOIA did not create any right to prevent disclosure.” *Health Central v Comm’r of Ins*, 152 Mich App 336, 341; 393 NW2d 625 (1986). Nor would it, given that the purpose of FOIA is to foster “disclosure of public records in order to ensure the accountability of public officials.” *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). FOIA itself expresses:

It is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

MCL 15.231(2).

To achieve greater transparency and accountability, FOIA stream-lined the process by which Michigan citizens could obtain access to public records and significantly lightened their burden. As Justice Levin explained in *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 584; 475 NW2d 304 (1991):

A person seeking disclosure pre-FOIA had the burden of establishing that he could maintain an action in mandamus, as in *Nowack*, or for superintending control, as in *Booth Newspapers*. Under the FOIA, the public body has the burden of justifying nondisclosure.

Nothing in FOIA intimates, let alone makes clear, that if access was foreclosed under FOIA, it was likewise foreclosed under the common law.

Quite the contrary, our appellate jurists have repeatedly recognized that the common law right of access continues to exist alongside FOIA. In *Swickard*, Justice Levin explained “Swickard made an FOIA request. A different question might be presented if he had filed a separate pre-FOIA count in his complaint.” *Id.* at 584. In *Walen v Michigan Dep’t of Corrections*, 443 Mich 240; 505 NW2d 519 (1993), Justice Riley (concurring in part, dissenting in part) noted that “even if the FOIA did not permit general access to public records, our common law would almost certainly permit such access.” *Id.* at 260, n 19 (citing *Nowack*). Similarly, in *Breighner*, Justice Weaver observed that “[t]he FOIA was enacted to continue the common-law right Michigan citizens have traditionally possessed to access government documents.” 471 Mich at 234.

Given these Michigan-specific principles, there was no reason for the Court of Appeals to rest its analysis upon inapposite federal court decisions. This Court has said that it is “not bound by cases interpreting the federal [FOIA] statute because we are interpreting Michigan’s FOIA” and “[t]here are significant differences between the federal and state act which make reliance on the federal cases of limited value ...” *Mich State Emp Ass’n v Mich Dep’t of Mgt and Budget*, 428 Mich 104, 120; 404 NW2d 606 (1987). That point is well-taken. The federal court cases the Court of Appeals relies upon are not instructive.

The federal FOIA was not at issue in *Nixon v Warner Cable*, 435 US 589; 98 S Ct 1306, 55 L Ed 2d 570 (1978), and the word “preemption” appears nowhere in that opinion.<sup>17</sup> *United*

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<sup>17</sup> The question presented in *Warner Cable* was whether the District Court abused its discretion when it denied release of the Watergate tapes for broadcast and sale following their admission into evidence at the trial of President Richard Nixon’s former advisers. 435 US at 591. In reviewing that issue, the Supreme Court explained that the District Court “did not have to confront the question whether the existence of the Act is, as we hold, a decisive element in the proper exercise of discretion with respect to release of the tapes.” *Id.* at 607. Nowhere in the (Footnote continued . . .)

*States v El-Sayegh*, 131 F3d 158, 159; 327 US App DC 308 (1997), is also inapposite. *El-Sayegh* is neither a FOIA case nor a preemption case.<sup>18</sup> Unlike the other cases, *Center for Nat'l Security Studies v US Dep't of Justice*, 331 F3d 918, 936; 356 US App DC 333 (2003), is a FOIA action in which plaintiffs sought information regarding individuals detained in the course of the government's post-9/11 terrorism investigation. The imperative of countering terrorism is a frequent theme throughout the opinion. Finding that disclosure was not required by FOIA, the Court likewise concluded that disclosure could not be compelled by the First Amendment or the common law right of access to government information. With respect to the later, the Court explained that it could not "craft federal common law", an unusual exercise of federal court lawmaking, "when Congress has spoken directly to the issue at hand." *Id.* at 937. This case is inapposite and does not support a finding that Michigan's FOIA preempts the corollary common law, particularly given that Michigan's FOIA statute includes a savings provision.

### CONCLUSION

In its audited statement of June 30, 2012, MCCA acknowledges having reserves in excess of \$14 billion. Despite those massive reserves, MCCA claims a projected deficit of over \$2

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opinion does the Supreme Court hold that the Act abrogates the common law right of access. Quite the contrary, as to the common law the Supreme Court simply held "that the common-law right of access to judicial records does not authorize release of the tapes in question from the custody of the District Court." *Id.* at 608. This has nothing to do with whether the Michigan FOIA preempts the common law right of access in this state.

<sup>18</sup> The issue in *El-Sayegh* involved a request to unseal a plea agreement that contained sensitive and confidential information. 131 F3d. at 159. This Court's citation of *El-Sayegh* as holding that the media did not have a common law right to access the plea agreement "because '[t]he appropriate device ... [to obtain disclosure] is a [FOIA] request addressed to the relevant agency'" is not an accurate description of the Court's holding. The Court held that the plea agreement was not subject to the common law right of access to judicial records because the plea agreement played no role in any adjudicatory function. *Id.* at 163. At best, the statement quoted by the Court of Appeals is dicta.

billion. Without access to the critical ratemaking data underlying MCCA's projections, auto ratepayers cannot fairly determine if MCCA's per-vehicle assessment is fair and reasonable. Similarly, without this information Plaintiffs, catastrophically injured persons, and Michigan citizens have no way to determine the accuracy of the MCCA's claims regarding the financial integrity of the MCCA and the viability of the No-Fault system. If this Court carefully scrutinizes the record to date, it will find no justification in MCCA's submissions for the shroud of secrecy MCCA seeks to maintain. The only harm MCCA has articulated is that it would be time-consuming and inconvenient to explain and defend the actuarial assumptions and projections MCCA uses. This is hardly a reason to keep this information from the No-Fault ratepayers - who fund entirely MCCA and its operation. *Shavers* made clear that Michigan motorists *have a due process* right to this important ratemaking information. That constitutional right trumps all others and is reinforced by FOIA and the common law.

Contrary to this Court's express direction in *Shavers II*, the Court of Appeals has relegated *Shavers* to the trash heap. The Court of Appeals has likewise condoned a clear violation of the constitutional reenact/republish requirement on the ostensible basis that the Legislature gave itself permission to place FOIA exemptions in other statutes and as a result, the misplaced exemptions are not "amendments." Such reasoning is unprecedented. The Legislature does not trump the Constitution; rather the Constitution is a check on the legislative power. Beyond that, the Court's interpretation of the FOIA exemption violates even the most elemental rules of statutory construction, and the Court's disregard of the common law right to access dismantles centuries of common law. These egregious errors, arising in the important context of No-Fault, transparency and the public's right to know, present a compelling case for this Court's consideration. Leave to appeal should be granted.

**RELIEF REQUESTED**

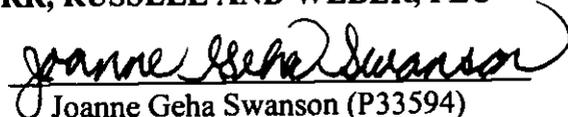
For the reasons expressed above, Plaintiffs-Appellants request that this Court grant leave to appeal and peremptorily reverse, or reverse after hearing, the erroneous decision of the Court of Appeals and affirm the Trial Court's December 26, 2012 Order.

Dated: August 29, 2014

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