STATE OF MICHIGAN
IN THE COURT OF APPEALS

COALITION PROTECTING AUTO NO-FAULT (CPAN), MARTHA E. LEVANDOWSKI, GERALD E. & MARY ELLEN CLARK, A. MICHAEL AND PAULINA M. DELLER, and M. THOMAS DELLER,

Plaintiffs-Appellees/Cross-Appellants,

v.

THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (MCCA),

Defendant-Appellant/Cross-Appellee.

and

BRAIN INJURY ASSOCIATION OF MICHIGAN (BIAMI), RICHARD K. & ILENE IKENS, DR. KENNETH & SUSAN WISSER, GREGORY A. & KAREN M. WOLFE, AND OTHER SIMILARLY SITUATED MICHIGAN AUTOMOBILE POLICY HOLDERS

Plaintiffs-Appellees/Cross-Appellants,

v.

THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (MCCA),

Defendant-Appellant/Cross-Appellee.

Court of Appeals Case No. 314310

Ingham County Circuit Court
Case Nos. 12-68-CZ, 12-659-CZ
(Consolidated)

Honorable Clinton Canady III

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS COALITION PROTECTING AUTO NO-FAULT ("CPAN") AND NAMED INDIVIDUALS

THE CROSS-APPEAL REQUESTS A RULING THAT A MICHIGAN STATUTE IS UNCONSTITUTIONAL AND INVALID

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I. The MCCA, Even If A Private Association, Is A "Public Body" Subject To FOIA Because It Satisfies The Definition Of "Public Body" In MCL 15.232(d)(iv).

Private associations are not excluded from the reach of Michigan's Freedom of Information Act ("FOIA"). To the contrary, a private association can be a "public body" within the meaning of FOIA if the private association is "created by state or local authority" **OR** is "primarily funded by or through state or local authority." MCL 15.232(d)(iv). As will be discussed below, numerous Michigan appellate court decisions recognize that private associations can be public bodies subject to FOIA. Thus, contrary to the premise the MCCA urges upon this Court, the status of the MCCA as a private association does not mean that the MCCA is not a public body within the meaning of FOIA. This Court cannot be faithful to the plain language of MCL 15.232(d)(iv) and the well-established jurisprudence of this state if it concludes otherwise.

A. Under The Plain Language of MCL 15.232(d)(iv), The MCCA Is A "Public Body" Under FOIA.

Pursuant to Section 2(d)(iv) of FOIA, a "public body" includes any "body which is created by state or local authority or which is primarily funded by or though state or local authority." MCL 15.232(d)(iv). The MCCA unequivocally satisfies this definition: it was created by an act of the Legislature and the Legislature has mandated its funding. See MCL 500.3104. These facts were acknowledged by this panel in the earlier *CPAN v MCCA* opinion, and the MCCA frankly admits them. See MCCA's Supp Br. at 11 ("The Legislature enacted MCL 500.3104 in 1978, which codified the MCCA's existence …"); MCCA's Supp Br. at 12 ("Section 3104 requires the MCCA to assess premiums on its member insurers to fund its reimbursement obligations and operating expenses" and "[t]he method for calculating the

premiums is also established by statute"). These uncontested facts establish that the MCCA is a public body within the scope of FOIA.

The MCCA's assertion that it "is not funded ***by*** state or local authority" (emphasis added) is irrelevant. That the MCCA is not *"**funded by**"* state authority does not remove it from the definition of public body. It is enough that the MCCA is **"*created by*"** state authority. But even so, it is telling that the MCCA does not deny being "***funded through"*** state authority. As explained in CPAN's Post-Remand Supplemental Brief, under *Breighner v Mich High School Athletic Ass'n*, 255 Mich App 567, 579-80; 662 NW2d 413 (2003), the term "through" denotes a situation where a government authority ***directs or mandates*** the funding of the entity but does not actually provide that funding. As the MCCA admits, MCL 500.3104 unquestionably mandates the funding of the MCCA.

B. The Definition Of "Public Body" In MCL 15.232(d)(iv) Controls.

MCCA urges this Court to ignore the plain meaning of "public body" in FOIA and to read into the statute an exception for private associations that the Legislature did not see fit to enact. MCCA relies on language in Section 1 of FOIA, entitled "Short title," which refers to "the affairs of government and the official acts of those who represent them as public officials and public employees…" MCL 15.231(1), and points to references to "***public*** bodies" in the preamble of FOIA. But these references cannot overcome the unambiguous language of MCL 15.232(d)(iv), which simply does not require that a "public body" be a governmental entity.

The Legislature certainly could have limited FOIA's "public body" definition to government and public officials if that had been its intent. The Legislature could have required that a public body's employees be public employees, that its funds be public funds, that its obligations be public obligations, and that it possess regulatory or legislative authority. But the Legislature plainly did not impose these limitations. This Court should not read requirements

into the statute that the Legislature "did not put there." See *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 423; 565 NW2d 844 (1997).[1]

If the Legislature had intended to limit the scope of FOIA to government entities, there would have been no need for it to enact the public body definitional catchall in Section 2(d)(iv). Government entities are already fully embraced by Section 2(d)(i)-(iii):

> (d) "Public body" means any of the following:
>
> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (ii) An agency, board, commission, or council in the legislative branch of the state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

MCL 15.232(d)(i)-(iii). The catchall definition of Section 2(d)(iv) should not be applied in a way that renders its terms surplusage or nugatory. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

There is no provision in FOIA which removes a private association from the statute's reach. When this Court and the Michigan Supreme Court have been asked to decide whether a private nonprofit association is a "public body" subject to FOIA, the party's status as a private association has ***never*** been the determining factor. Rather, in accordance with the language of MCL 15.232(d)(iv), our courts have asked whether the association was created by state or local

[1] The MCCA cites 1989 OAG 6563 for the offhand proposition that if private associations are embraced by MCL 15.232(d)(iv), it was "invalidly enacted" because it creates a "title-object problem in FOIA." MCCA Supp Br. at 6. This cavalier assertion does not properly raise a constitutional challenge or come anywhere close to addressing the analytical standards necessary to satisfy a title-object challenge.

authority **OR** whether it was primarily funded by or through state or local authority. Clearly, no Michigan appellate court decision has ever held or intimated that simply because an entity was a "private association" it was not a "public body" subject to FOIA.

Breighner v Mich High School Athletic Ass'n, supra, is a case in point. In *Breighner*, the Michigan Supreme Court was asked to decide whether the Michigan High School Athletic Association was a public body subject to FOIA. The MHSAA was clearly a private association. However, its status as such was not relevant. Rather, the Supreme Court focused on each of the two prongs of the public body definition in Section 2(d)(iv) to determine if the MHSAA was subject to FOIA. The Court explained that it was "constrained to apply ***the plain language of the FOIA's definitional provisions*** in determining whether the MHSAA is subject to the requirements of FOIA" (*id*. at 229, n3) and to "give meaning to the Legislature's terms." *Id*. at 229 (emphasis added). Applying the plain language of the statutory definition of public body, the Court found that the MHSAA was neither created by state or local authority nor primarily funded by or through state or local authority.

The same analysis was demonstrated in *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 269; 660 NW2d 97 (2003), where this Court declared that "the Legislature ***included certain otherwise private organizations in the definition of public body***" (emphasis added). In *Sclafani*, the defendant was a "nonstock, nonprofit corporation" that educated the public about domestic violence and provided abuse victims with shelter and other services. Plaintiff was a terminated employee who made a FOIA request for her personnel file and other documents. This Court analyzed defendant's status as a public body under the "primary funding" prong of MCL 15.232(d)(iv) and concluded that the defendant was a public body. 255 Mich App at 265. The fact that defendant was a private organization had no impact on the "public body" analysis.

The defendant in *Kubick v Child and Family Svcs of Michigan, Inc*, 171 Mich App 304, 308; 429 NW2d 881 (1988), was also a private nonprofit entity. In evaluating whether it was a public body within the meaning of FOIA, this Court explained that the "case turns on the interpretation of MCL 15.232(b)(iv); MSA 4.1801(2)(b)(iv), and how to determine if a 'body' is 'primarily funded by or through state or local authority.'" *Id*. at 307. Defendant's status as a private entity did not remove it from the reach of FOIA. The holding that defendant was not a public body rested on the funding prong of the public body definition.[2]

Numerous other cases involving FOIA claims against private entities consistently demonstrate that an entity's status as a private association does not determine if it is a public body under the two-fold catchall definition set forth in Section 2(d)(iv) of FOIA. See e.g., *Jackson v Eastern Mich Univ Foundation*, 215 Mich App 240, 244; 544 NW2d 737 (1996) (FOIA status of a private nonprofit foundation was evaluated under the MCL 15.232(d)(iv) catchall and held to be a public body subject to FOIA under the primarily funded prong); *Detroit News v Policemen and Firemen Ret Sys of City of Detroit*, 252 Mich App 59, 71; 651 NW2d 127 (2002), *lv den* 468 Mich 922; 662 NW2d 743 (2003) (analyzing the public body status of defendant under MCL 15.232(d)(iv), the court affirmed the trial court's conclusion that defendant was a public body); *Perlongo v Iron River Co-op TV Antenna Corp*, 122 Mich App 433, 332 NW2d 502 (1983) (finding that the defendant was not a public body because it was not created or funded by or through state or local authority); and S*tate Defender Union Employees v*

[2] The MCCA acknowledges as much in its description of the *Kubick* case. See MCCA's Supp Br at 10 ("This Court has found that where a private nonprofit corporation did not receive more than 50% of its funding from the government, it was not subject to FOIA," *citing Kubick*). This is an admission that a private association can be a public body if it is primarily funded by state or local authority, one of the funding prongs of Section 2(d)(iv). The MCCA's extrapolation that since it receives no funding from the government it should not be considered a public body is not helpful to the analysis because, as the MCCA admits, it was created by state authority and funded through state authority.

The Legal Aid and Defender Ass'n of Detroit, 230 Mich App 426, 430-31; 584 NW2d 359 (1998) (private, nonprofit corporation analyzed under the funding prong of the MCL 15.232(d)(iv) catchall held not to be a public body).[3] Applying this statutory definition, this Court has held on at least three occasions that private entities were public bodies as defined in MCL 15.232(d)(iv).

C. This Court Must Enforce The Plain Meaning Of MCL 15.232(d)(iv).

Contrary to the requirement of MCL 15.232(d)(iv), MCCA argues that even if this Court finds that the MCCA was created by state authority it would be "error" to subject it to FOIA (MCCA Supp. Br. at 7, n 6). The MCCA further urges that "[t]he fact the Legislature enacted MCL 500.3104, which 'created' the MCCA, is simply not enough to conclude that the MCCA is a 'public body' that is subject to FOIA." MCCA's Supp Br. at 7.

MCCA's disrespect for the law is disheartening. In no uncertain terms, the MCCA is urging this Court to disregard the law - to instead give the MCCA a special pass from the duty the Legislature has imposed. But the MCCA is not above the law and this Court is not empowered to rewrite it. If the uncontested facts establish that the MCCA was created by state authority **OR** is funded through state authority – and they indisputably do – the MCCA is a public body subject to FOIA.

Invoking absurdity, the MCCA urges this Court to read the "created by state or local authority" language out of the public body definition so as to not subject to FOIA certain private colleges which were ostensibly established by "territorial law." See MCCA Supp Br. at 7 ("For example, Kalamazoo College, a private liberal arts college, was established by a territorial law in 1833 … The same is true for Albion College and Hillsdale.") The MCCA's reliance upon laws

[3] At the time of *State Defender*, section (d)(iv) was numbered (b)(iv) but the language was the same. 230 Mich App at 428, n 1.

enacted before Michigan became a state is itself absurd and does not, in any event, permit this Court to ignore the plain meaning of the language the Legislature used to define a public body.

The MCCA also argues that absurdity results from the "created" by state authority prong because "every private corporation since 1908 has been 'created' by the Legislature." MCCA Supp Br. at 8. The Business Corporations Act, MCL 450.1101 *et seq*, which prescribes the mechanism by which corporations can be created, is not comparable to MCL 500.3104, the statute which expressly created the MCCA itself. Corporations formed under the BCA are created by their incorporators, not the Legislature.

D. The Unfounded Argument That The MCCA Cannot Be A "Public Body" Under MCL 15.232(d)(iv) Because It Is A "Person" Under MCL 15.232(c) Must Be Rejected.

The MCCA argues that FOIA distinguishes between "persons" who are entitled to make FOIA requests and "public bodies" who must respond to those requests, and because a private association is a "person" within the meaning of MCL 15.232(c), it cannot be a "public body" within the meaning of MCL 15.232(d)(iv). This argument is non-sensical. If this logic applied, a governmental entity would not be subject to FOIA either because a governmental entity is also defined as a "person" under MCL 15.232(c), which states (with emphasis added):

> "Person" means an individual, corporation, limited liability company, partnership, firm, organization, association, ***governmental entity***, or other legal entity. Person does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

Indeed, if all of the entities embraced within the definition of "person" were excluded from the definition of "public body" no one would be subject to FOIA, contrary to clear legislative intent.

The MCCA also argues that it cannot fall within the catchall definition of "public body" because the definition does not expressly include an "association" or a "person." That is of no consequence given the Legislature's purposeful decision to use a much broader term, i.e., "[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). An "association" is unquestionably a "body." *Roget's International Thesaurus* (4th ed 1977) lists "association" as the *first noun* under the word "body." *Id*. at p 619. "Person" also appears on the list as the eighth entry under the word "body." *Id*. If one turns to the word "person," body is the first entry on the list. *Id*. at 1123.[4]

II. Neither *League General* Nor The Drafter's Note in Public Act 1988, No. 349, §2, Alter The MCCA's Status As A Public Body Under FOIA.

In CPAN's Post-Remand Supplemental Brief, CPAN fully addresses the Michigan Supreme Court's decision in *League Gen Ins Co v Mich Catastrophic Claims Ass'n*, 435 Mich 338; 458 NW2d 632 (1990), and the Drafter's Note in Public Act 1988, No. 349, §2. For the reasons stated in CPAN's Supplemental Brief, neither the *League General* decision nor the Drafter's Note alter the status of MCCA as a public body within the meaning of FOIA.

The MCCA's discussion of *League General* is misleading. The MCCA's status as a public body was not before the Court in *League General*, nor did that case have anything whatsoever to do with FOIA or the application of the plain meaning of MCL 15.232(d)(iv). The Court certainly did not suggest that it was proper to ignore the plain meaning of an unambiguous statutory definition when determining whether an entity was included within such definition. Quite the contrary, in *League General*, the Court only considered and applied the statutory definition of "state agency" in the ***Administrative Procedures Act,*** MCL 24.201 et seq, when it was asked to decide whether the MCCA was subject to the requirements of that act. Clearly, that determination has no bearing on whether the MCCA is a public body under FOIA.

[4] The 4th edition of Roget's Thesaurus was published the year FOIA became effective.

III. Even If MCL 134(4) Is Interpreted To Mean That The MCCA Is Not A Public Body, The Act Was Enacted In Violation Of Art 4, §25.

Even if this Court concludes that the FOIA exemption in MCL 500.134(4) means that the MCCA is not a public body, MCL 500.134(4) violates art 4, §25 of the Michigan Constitution because the Legislature did not reenact and republish FOIA to include the FOIA amendment contained in MCL 500.134(4), as more fully explained in CPAN's Post-Remand Supp Brief.

IV. If The MCCA Is A Public Body Subject To FOIA, MCL 500.134(4), Which Purports To Exempt A Record Of The MCCA From FOIA, Was Enacted In Violation of Art 4, §25.

Art 4, §25 provides that "[n]o law shall be revised, altered or amended by reference to its title only" and that "[t]he section or sections of the act altered or amended shall be re-enacted and published at length." The MCCA argues that "no section of FOIA is revised, altered, or amended when the Legislature enacts an exemption in a separate law…" MCCA's Supp Br. at 21. This raises the question as to what "altered or amended" means. An amendment needn't expressly change the wording of a statute in order to alter its effect. According to *Merriam-Webster's Online Dictionary*, the relevant definition of *amend* is "***to alter*** especially in phraseology; especially: to alter formally by modification, deletion, or addition." (emphasis added). *Revise* means "to make a new, amended, improved, or up-to-date version of." *Alter* means "to make different without changing into something else." *See* http://www.merriam-webster.com. The wholesale exemption of the records of a public body alters the application of FOIA in a fundamental way. This is an amendment of FOIA.

Further, the Legislature may not constitutionally excuse itself from the requirements of art 4, §25 by enacting a provision which permits it to place exemptions in other statutes. See *UAW v Green*, 302 Mich App 246, 253; 839 NW2d 1 (2013) (recognizing that the legislative power is subject to the limitations and restrictions imposed by the state constitution), *aff'd on*

other grounds sub nom, 498 Mich 282, 870 NW2d 867 (2015); *AFL-CIO v Civil Serv Comm'n*, 32 Mich App 243, 248; 188 NW2d 206 (1971) ("legislature's power to legislate is unlimited, ***except as expressly limited by the Constitution***") (emphasis added).

The MCCA does not argue that MCL 500.134(4) is exempt from the strictures of art 4, §25 as an act complete in itself. It argues that the act is part of the insurance code and that the insurance code is complete in itself. The MCCA is wrong. The proper analysis is to determine whether MCL 500.134(4) is complete in itself with respect to the subject matter of the amendment it creates, which is the right of Michigan citizens to acquire information from public bodies. FOIA is the only statute that addresses that right. FOIA is the statute that is "complete in itself." But instead of placing the MCCA exemption in FOIA, the Legislature amended an obscure provision of the Insurance Code, not MCL 500.3104, which is the specific statutory provision that enacted the MCCA. Because the Legislature did not reenact and republish FOIA when it created the MCCA exemption, MCL 500.134(4) violates art 4, §25 and is constitutionally invalid.

For these reasons and the reasons set forth in CPAN's Post-Remand Supplemental Brief, MCL 500.134(4) violates art 4, §25 of the Michigan Constitution.

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