STATE OF MICHIGAN

IN THE COURT OF APPEALS

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ELLEN M. ANDARY, a legally incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., PHILIP KRUEGER, a legally incapacitated adult, by and through his Guardian, RONALD KRUEGER, & MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan corporation,

Plaintiffs - Appellants,

Court of Appeals No. 356487

Ingham County Circuit Court
Case No. 19-738-CZ

v

USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan corporation,

Defendants - Appellees.

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# PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANTS-APPELLEES' BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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## I. THE RECENT SUPREME COURT OPINION IN *BUHL V. CITY OF OAK PARK* DISPOSITIVELY CONFIRMS THAT THE 2019 AMENDMENTS TO THE NO-FAULT ACT SHOULD NOT BE RETROACTIVELY APPLIED.

In plaintiffs' Brief on Appeal, plaintiffs cited the case of *Buhl v City of Oak Park,* 505 Mich 1023; 941 NW2d 58 (2020). At the time plaintiffs filed their brief, the *Buhl* case was being reviewed by the Michigan Supreme Court. On June 9, 2021, the Supreme Court issued its opinion in that case, which plaintiffs urge should be interpreted by this Court as dispositively resolving the retroactivity issue pending in the case at bar. *See Buhl v City of Oak Park*, __ Mich __; __ NW2d __ (2021) (Docket No. 340359).

*Buhl* involved a statutory amendment to the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, that added a provision to that statute granting municipalities the right to assert the open and obvious danger doctrine as a defense in premises liability cases. That amendment was enacted after the plaintiff in *Buhl* was injured in a fall on an uneven and cracked public sidewalk. Accordingly, the central issue in *Buhl* was whether the statutory amendment could be retroactively applied to plaintiff's claim, thus essentially barring any recovery for plaintiff. The Court of Appeals held that this amendment should be applied retroactively, noting the previous common law existence of the open and obvious defense and the legislature's implied intent that it be available to governmental defendants.

The Supreme Court reversed the Court of Appeals' decision in *Buhl* and held that the statute at issue ***could not be applied retroactively***. In doing so, the Court reaffirmed the long recognized presumption embraced in Michigan common law that "Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Id.* at ___; slip op at 5, quoting *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012). In elaborating on this presumption, the Court cited *Lynch v Flex Technologies, Inc*, 463 Mich 587; 624 NW2d 180 (2001) which stated, "the Legislature has shown on several occasions that it knows

how to make clear its intention that a statute apply retroactively." *Id.* The Court further made clear that in order to determine if a statute should be given retroactive application the courts must implement "the primary and overriding rule . . . that legislative intent governs. All other rules of construction and operation are subservient to this principle." *Id.* at ___; slip op at 4, (quoting *Lynch*, 463 Mich at 584; 624 NW2d 180). The *Buhl* Court then went on to hold that the implementation of this overriding rule requires that courts apply the specific factors previously articulated by the Supreme Court in *LaFontaine Saline, Inc v Chrysler Group, LLC,* 496 Mich 26; 852 NW2d 78 (2014). Quoting from the *Lafontaine* case, the Court set forth the specific framework for conducting such an analysis in the following passage:

> First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.
>
> *Id.* at ___; slip op at 4, quoting *LaFontaine,* 496 Mich at 38-39; 852 NW2d 78.

In applying the *LaFontaine* factors in *Buhl*, the court made the following observations:

(1) Regarding the first *LaFontaine* factor, the Court held "In this case, nothing in the plain language of the statute suggests that MCL 691.1402a(5) was intended to apply retroactively. To the contrary, the amendment was given immediate effect without further elaboration." *Id.* at ___; slip op at 5.

(2) Regarding the second *LaFontaine* factor, the statutory amendment in question did "not pertain to a specific antecedent event," and therefore retroactivity was not implicated. *Id.*

(3) Regarding the third *LaFontaine* factor, the Court concluded that it militated against retroactive application because the amendment in question would "take[ ] away or impair[ ] vested rights

acquired under existing laws, or create[ ] a new obligation and impose[ ] a new duty, or attach[ ] a new disability with respect to transactions or considerations already past." *Id.*, quoting *In re Certified Questions*, 416 Mich 456, 571; 331 NW2d 456 (1982).

(4) Regarding the fourth *LaFontaine* factor, the Court concluded that it did not favor retroactive application because the amendment in question was not merely "remedial or procedural," which would favor retroactive application. In that regard, a newly enacted statute should not be applied retroactively if it would relieve a party of a substantive duty. In finding that this factor favored only prospective application of the amendment in question, the Court stated: "Where a statute 'imposes a new substantive duty and provides a new substantive right that did not previously exist ... it cannot be viewed as procedural, and the presumption against retroactivity applies.'" *Id.* at ___; slip op at 6, quoting *Kia Motors America, Inc v. Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733, 740 (CA 6, 2013).

The enormous significance of the Supreme Court's decision in *Buhl* to the case at bar is obvious. The *Buhl* Court's application of the *LaFontaine* factors clearly and unequivocally establishes that the provisions of PA 21 at issue in the instant case cannot be retroactively applied. Application of these factors compels that conclusion, as is demonstrated by the discussion below.

Regarding the first *Buhl/LaFontaine* factor, PA 21 contains no specific language that clearly expresses the intent that it should be applied to people who purchased no-fault insurance contracts and who were injured many years before its enactment. The provisions regarding family provided attendant care and non-Medicare fee schedules that were adopted by PA 21 were specific amendments to the No-Fault Act, which is a self-contained, omnibus statutory scheme controlled by Chapter 31 of the Insurance Code, MCL 500.3101 *et seq*. PA 21 did not contain any language whatsoever that amended Chapter 31 to specifically state that the attendant care and fee schedule

provisions contained in §§3157(7) and (10) should be retroactively applied. In fact, after the passage of PA 21, the provisions of the No-Fault Act codified in Chapter 31 remained completely silent as to any legislative intent to apply these new provisions to persons injured prior to the 2019 amendments.

As is evident from the Supreme Court's discussion in *Buhl*, there must be a specific indication of legislative intent to apply amendments retroactively. Silence never constitutes proof of that intent. In an effort to avoid this conclusion, Defendants point to changes that PA 21 made to Chapter 21 of the Insurance Code (MCL 500.2101 *et seq*). Those amended provisions are not in the No-Fault Act. That fact is of great significance, given that Article 4 Section 25 of the Michigan Constitution prevents one act from being amended by another "*by reference*" and without reenactment and publication "*at length*." Moreover, the amendatory language referenced by defendants in Chapter 21 does not specifically state a legislative intent to apply the fee schedule and family provided attendant care provisions set forth in §§3157(7) and (10) retroactively to persons injured before 2019. Therefore, this amendatory language, even if it were deemed to apply to the issues in the instant case, would be insufficient to constitute an adequate expression of specific legislative intent justifying retroactive application.

Finally, with regard to this first *Buhl/LaFontaine* factor, it is very important to remind the Court of the historic amicus brief filed by bipartisan House Representatives Julie Brixie (D) and Andrea Schroeder (R), wherein those amici persuasively contend that there was no legislative intent to retroactively apply the two amendatory provisions at issue in this case. In support of their

position, Representatives Brixie and Schroeder have attached to their brief, as ***Exhibit A***, a *Memorandum of Support* signed by 73 current and former legislators who voted on PA 21.[1]

In regard to the second *Buhl/LaFontaine* factor, PA 21 contains no specific reference to any antecedent event and consequently, this is further support for the conclusion that the fee schedule and attendant care provisions of §§3157(7) and (10) should not be applied to persons injured antecedently before June 2019.

In regard to the third *Buhl/LaFontaine* factor, PA 21 would clearly take away vested contractual rights acquired by injured victims through insurance policies they purchased long before the amendments were passed. As is further discussed in Plaintiffs-Appellees' Brief on Appeal, decades of Michigan appellate case law interpreting the No-Fault Act clearly and unequivocally required insurance companies to pay victims insured under their insurance contracts no-fault PIP allowable expense benefits without regard to any government fee schedule or the identity of attendant care providers. The right to receive reimbursement for such expenses was clearly embodied in the no-fault insurance contracts purchased by the plaintiffs in this case. Moreover, the premiums paid by plaintiffs for the policies they purchased were based upon those previously existing contractual rights which PA 21 has taken away. If this is permitted by the Court, those insurers will have received, and been given the right to retain, insurance premiums for risks and obligations for which they will no longer have any liability. Such a clear and unjustified windfall should not be countenanced by this Court.

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[1] This *Memorandum of Support* states in pertinent part:

> We do not believe the Legislature intended for MCL 500.3157(7) and (10) to be applied retroactively. Many of us voted on this legislation understanding that MCL 500.3157(7) and (10) would only be applied prospectively. Moreover, because there does not appear to be any specific language in this legislation which clearly states a legislative intent to apply these provisions retroactively to previously injured victims, we believe these provisions are presumed to have only prospective application.

In regard to the fourth *Buhl/LaFontaine* factor, PA 21 cannot fairly be viewed as procedural or remedial, given the fact that it totally relieves the defendant insurance companies of clear substantive duties they owed to the plaintiffs under the insurance contracts those defendants previously sold to the plaintiffs years ago.

Moreover, Justice Viviano's concurring opinion in *Buhl* provides ***even further support*** for the conclusion that the provisions of PA 21 at issue here cannot properly be applied retroactively. In that regard, Justice Viviano succinctly states the test for determining if a statute should be considered to apply retroactively, as follows: "A retroactive statute, therefore, is one that regulates conduct that occurred before the statute became effective." *Id.* at __; slip op at 9 (VIVIANO, J., concurring). Under this very simple retroactivity test, it is abundantly clear that the provisions of PA 21 cannot be retroactively applied because they simply do not regulate ***any conduct*** that occurred prior to the passage of that amendatory act.

In a poorly reasoned argument that PA 21 should be given retroactive application, defendants point to a proposed amendatory provision that was offered, but not ultimately included, in the final version of this Act. This proposed provision stated, "Subsections (2) to (12) [of MCL 500.3157] apply to treatment or training rendered to an injured person who suffers an accidental bodily injury from a motor vehicle accident that occurs after the effective date of the amendatory act that added this subsection." In reality, the fact that this proposed language was not adopted is actually further support for the conclusion that the new legislation, as drafted, was never intended to be retroactive because there was no language in the bill draft that clearly expressed such an intent. Therefore, nothing needed to be added to that legislation to give it prospective application, given the black letter law presumption that all statutes are presumed to have prospective application only unless there is a clear, specific, and unequivocal statement of legislative intent to

apply the statute retroactively. Because there was no such specific statement of retroactive intent, the proposed amendatory language was completely unnecessary, and thus properly excluded.

Finally, in an effort to avoid the obvious impact of the *Buhl* decision, defendants advance a straw man argument that the PA 21 reforms are not being retroactively applied to plaintiffs because they only regulate treatment and services rendered after the effective date of the new law. This argument is without any merit for obvious reasons: even though PA 21 only limits reimbursement for services rendered after the effective date, it applies those limitations to plaintiffs who purchased no-fault insurance policies years ago that did not contain those limitations. Those previously purchased policies required payment of the benefits that PA 21 now takes away from these patients. This is the classic characteristic of a retroactive statute.

In conclusion, it is clear that all of the *Buhl/LaFontaine* factors overwhelmingly establish that the attendant care and fee schedule provisions of the 2019 statutory amendments should not be applied retroactively to plaintiffs.

## II. THE DEFENDANTS' ARGUMENTS URGING THE RETROACTIVE APPLICATION OF PA 21 BASED UPON (A) PAST AMENDMENTS TO THE WORKERS COMPENSATION LAW; (B) LEGAL PRINCIPLES REGARDING THE ACCRUAL OF RIGHTS; AND (C) THE IDENTITY OF THE NAMED INSURED, ARE WITHOUT MERIT, AS THESE ARGUMENTS ARE FUNDAMENTALLY FLAWED AS APPLIED TO THE INSURANCE BENEFITS AT ISSUE IN THE CASE AT BAR.

The defendants primarily rely on two principles urging retroactive application. These are addressed below.

### A. DEFENDANTS' MISPLACED RELIANCE ON ROMEIN AND PRIOR WORKERS COMPENSATION STATUTORY AMENDMENTS

*Romein v General Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990) is a case which held that amendments to the Workers' Compensation Disability Act did not violate the Contracts Clause. As has been previously discussed, *Romein* and other cases dealing with the Workers'

Compensation Disability Act are not applicable to the case at bar. The fundamental difference between workers' compensation and auto no-fault PIP benefits is that patients receiving workers' compensation benefits ***do not purchase the insurance policies*** that are paying the benefits. The patient's employer purchases these policies. On the contrary, plaintiffs in the instant case purchased their own auto no-fault insurance policies. Thus, it is the personal, privately purchased contractual rights of plaintiffs that are being violated in this case.

### B. DEFENDANTS' MISAPPLICATION OF THE LAW REGARDING ACCRUAL OF CLAIMS

Defendants argue that retroactive application of PA 21 is permissible because it does not impair any rights or claims of plaintiffs that ***accrued*** prior to its passage. In support of this argument, Defendants cite MCL 500.3110(4), which states: "Personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred." The defendants' attempts to utilize this provision are misplaced for the simple reason that in *Buhl*, the Supreme Court focused on whether a statute impaired or affected ***vested rights***. In this regard, the Court stated: "a statute or amendment may not be applied retroactively if doing so would 'take[ ] away or impair[ ] vested rights acquired under existing laws.'" *Buhl*, __ Mich at __; slip op. at 5. It just so happens that in *Buhl*, the plaintiff's rights dealt with a ***tort claim***, which both vested and accrued on the date of the injury. However, the case at bar deals with ***contract rights***, which vested when the contract was entered into and an injury covered by its terms occurred. This has long been a black letter principle in Michigan appellate law regarding insurance policies, and in particular, those policies issued under the Michigan Auto No-Fault Insurance Act. In this regard, see *Medar v League Gen Ins Co*, 152 Mich App 734, 742; 394 NW2d 90 (1986) ("Rights created under an insurance policy become fixed as of the date of the accident."); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450

NW2d 6 (1989) ("Rights created under an insurance policy become fixed as of the date of the accident."); and *Clevenger v Allstate Ins Co*, 443 Mich 646, 656; 505 NW2d 553 (1993) ("The rights and obligations of the parties vested at the time of the accident.").

In this particular case, plaintiffs' contractual rights vested on the date plaintiffs were injured, which is long before PA 21 went into effect. Although claims for the payment of specific PIP benefits accrue when expenses are incurred by the patient, the patient's legal right to receive payment for those expenses ***vested when the contract was executed and the injury occurred*** and thus become payable in accordance with the contractual benefits available at that time.

Defendants also point to the projected $3.2 million in consumer savings due to insurers reduced liability for payment for attendant care and other medical treatment as a reason why PA 21 should be applied retroactively. Defendants claim that these savings cannot be passed on to consumers if the amendments are not retroactively applied. However, as was more fully discussed in CPAN's amicus curiae brief filed in this case, there is not any proof that these savings will actually occur. *See Brief of Amicus Curiae CPAN in Support of Plaintiffs-Appellants' Appeal*, pp. 25 – 26.

Moreover, defendants conveniently fail to mention the massive savings that they themselves gain by retroactively applying these amendments to patients whose contractual rights to no-fault PIP benefits vested years ago. Plaintiffs purchased their polices and paid premiums based upon the statutory obligation of the defendants to reimburse plaintiffs for all "allowable expenses," which were defined in §3107(1)(a) as follows: "Allowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." As previously stated, when plaintiffs purchased their no-fault insurance contracts, allowable expenses payable under §3107(1)(a) were

defined by numerous appellate court decisions as not being limited by any governmental fee schedules or identity of caregivers. It is beyond dispute that plaintiffs themselves do not benefit from any savings under PA 21 because they have already paid their premiums to secure lifetime no-fault PIP coverage without the limitations set forth in PA 21. Allowing defendants to retroactively change the benefits that plaintiffs are entitled to receive, and for which they paid a premium to secure, results in a huge windfall to the insurers at the expense of plaintiffs.

### C. DEFENDANTS' MISAPPLICATION OF THE LAW REGARDING NAMED INSUREDS

Finally, defendants' argument that Ms. Andary and Mr. Krueger did not have a contract with their respective insurers because they were not the "named insured" under their polices is absurd. Ms. Andary and Mr. Krueger are entitled to no-fault PIP benefits pursuant to MCL 500.3114(1) as resident relatives of the named insured. Under §3114(1), a resident relative shares the same status as a named insured. Defendants collected premiums to secure no-fault PIP coverage for all of plaintiffs' resident relatives. Therefore, defendants owed a contractual obligation to Ellen Andary and Philip Krueger which is exactly the same as if they had been formally identified as "named insureds."

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Dated: August 13, 2021

**STATE OF MICHIGAN**
MI Court of Appeals

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