

STATE OF MICHIGAN

MI Court of Appeals

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Case Title: ELLEN M ANDARY V USAA CASUALTY INSURANCE COMPANY	Case Number: 356487
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Motion - Regular	brixie motion COA revised final 05272021
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/s/ Marla Linderman

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Linderman Law PLLC

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

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,

Court of Appeals Case No. 356487

Ingham County Circuit Court
Case No. 2019-000738-CZ

Plaintiffs-Appellants,

v

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

Defendants-Appellees.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE
ON BEHALF OF REP. JULIE BRIXIE AND REP. ANDREA SCHROEDER**

REP. JULIE BRIXIE AND REP. ANDREA SCHROEDER move for permission to file the attached brief amici curiae in support of Plaintiffs/Appellants' position on appeal in this case. In support of their motion, Representative Brixie and Representative Schroeder state the following:

1. The legal issues presented in this case are significant and include whether the trial court erred by holding that 2019 PA 21 applied retroactively to individuals that purchased no-fault coverage and were injured in motor vehicle accidents before the No-Fault Act was recently amended.

2. Rep. Brixie and Rep. Schroeder both served in the Michigan House of Representatives when 2019 PA 21 was passed. Consequently, as duly elected representatives in the State of Michigan, they have a clear interest in seeing that it is applied as the Legislature intended.

3. As stated in the memorandum attached to the proposed brief amici curiae as Exhibit A, many legislators share their concern that this legislation will be applied retroactively even though it did not state that it had retroactive application and that was not what the Legislature intended.

4. Applying 2019 PA 21 retroactively would not only negate vested contract rights, it would violate the Contracts Clause of the Michigan Constitution. See Const 1963, Art 1, § 10.

WHEREFORE, Rep. Brixie and Rep. Schroeder respectfully request that this Honorable Court grant leave for them to file a brief amici curiae in this legally significant case and accept for consideration, the attached brief amici curiae that is being filed in conjunction with this motion.

Dated: May 27, 2021

Respectfully submitted,

/s/ Marla A. Linderman

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**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

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,

v

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

Defendants-Appellees.

**REP. JULIE BRIXIE AND REP. ANDREA SCHROEDER'S BRIEF
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS**

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INTRODUCTION

The overriding legal question in this case is whether recent changes made to the No-Fault Act in 2019 will be applied retroactively to individuals injured in motor vehicle accidents long before the law was amended. Effective July 1, 2021, reimbursement for family-provided attendant care services and post-acute rehabilitation will be reduced to levels that jeopardize the care that has long been provided for persons injured in motor vehicle accidents in Michigan under the No-Fault Act. Unless the trial court's decision to apply the amended law retroactively is reversed, businesses will shut down or stop providing care for auto accident victims and serious harm will result to injured persons. This Court can provide stability, certainty, and clarity on the critical question of whether legislation can be applied retroactively to individuals injured before the No-Fault Act was amended.

STATEMENT OF INTEREST OF AMICI CURIAE REP. JULIE BRIXIE AND REP. ANDREA SCHROEDER¹

Representative Julie Brixie (D-Meridian Township) is currently serving her second term in the Michigan House of Representatives. She represents the 69th District. Plaintiffs/Appellants, Ellen and Michael Andary, reside in the 69th district. Representative Andrea Schroeder (R-Clarkston) also is serving her second term in the Michigan House of Representatives. She represent the 43rd District. Both Rep. Schroeder and Rep. Brixie were present and participated in the voting when the Michigan House of Representatives approved the legislation that subsequently became 2019 PA 21. That legislation included significant changes to reimbursement for family-provided attendant care services and post-acute rehabilitation services that are now being challenged on appeal in this pending case.

¹The undersigned counsel states under MCR 7.312(H)(3) that no party or counsel for a party authored this brief, in whole or in part, and also, no party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief by amici curiae.

As noted in Plaintiffs/Appellants' briefing on appeal in this case, the underlying legislation, now 2019 PA 21, did not state that it would be applied retroactively. Yet, the trial court in this case nonetheless concluded that 2019 PA 21 applied retroactively to individuals who were injured in motor vehicle accidents before the law was changed. As a result, auto accident victims like Ellen Andary and Philip Krueger now face devastating, and potentially life-threatening, consequences due to cuts in reimbursement for family-provided attendant care services and post-acute rehabilitation. Businesses that care for persons seriously injured in motor vehicle accidents in Michigan similarly face an existential threat if the cuts in reimbursement for existing patients are applied retroactively.

As duly elected representatives in the State of Michigan, Rep. Brixie and Rep. Schroeder have a significant interest in seeing that legislation is applied as intended by the Legislature when passed. Here, the trial court's decision to apply this legislation retroactively to individuals previously injured in motor vehicle accidents has negated the Legislature's intent in amending the No-Fault Act. It also raises serious constitutional questions for this Court as the amended law violates the Contracts Clause in Michigan, see Const 1963, Art 1, § 10, by denying catastrophically injured persons like Andary and Krueger the PIP benefits that their PIP insurers agreed to provide for them when PIP coverage was secured and premiums were paid long before the No-Fault Act was amended in 2019.

This case will likely determine whether 2019 PA 21 will be applied retroactively or not. It will also have a broader effect on other laws passed that do not specify how they will be applied. For those reasons, and the ones stated previously, Rep. Brixie and Rep. Schroeder, in conjunction with all other legislators who support filing this brief amici curiae request that this Honorable Court reverse the trial court's decision to apply the recent changes made to the No-Fault Act retroactively. See the memorandum of support signed by additional legislators which is attached as Exhibit A.

CONCURRING STATEMENT AS TO QUESTIONS PRESENTED

Amici Curiae accept and concur with the Statement of Questions Presented provided in Plaintiffs/Appellants' Brief on Appeal, including the question concerning retroactive application of 2019 PA 21 to individuals injured in motor vehicle accidents before the No-Fault Act was amended.

CONCURRING STATEMENT AS TO FACTS AND PROCEEDINGS

Amici Curiae accept and concur with the Statement of Material Proceedings and Facts provided in Plaintiff/Appellants' Brief on Appeal.

STANDARD OF REVIEW

Whether a statutory amendment applies retroactively is a question of statutory interpretation subject to de novo review. *Johnson v Pastoriza*, 491 Mich 417, 428-429, 818 NW2d 279 (2012).

ARGUMENT

I. The Legislature did not intend to apply the changes to the No-Fault Act retroactively to individuals injured in motor vehicle accidents before the No-Fault Act was amended.

"In determining whether a statute applies retroactively or prospectively, the intent of the Legislature governs." *Johnson*, 491 Mich at 429, citing *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). Moreover, because of the potential for unfairness that exists whenever a statute is applied retroactively, and not prospectively, "[s]tatutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Johnson*, supra, 491 Mich at 429, citing *Brewer v A D Transp Express, Inc*, 486 Mich 50, 55-56, 782 NW2d 475 (2010). Accordingly, "[t]he Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155-156, 725 NW2d 56 (2006).

Here, there was no “clear, direct, and unequivocal” expression by the Michigan Legislature of its intent for 2019 PA 21 to apply retroactively. As with much legislation, 2019 PA 21 merely said that it would be immediately effective when the Governor signed it, as she did on June 11, 2019. There was no direction regarding whether the amendments made to it should be applied prospectively or retroactively. Consequently, the trial court clearly erred by applying it retroactively. Had the Legislature intended for the amendments made to the No-Fault Act in 2019 to apply retroactively, it could have easily said so. For example, recent laws passed to address the COVID-19 pandemic did so. See generally, MCL 691.1477, which states that “[t]he liability protection provided by this act applies retroactively, and applies on or after March 29, 2020 and before July 14, 2020.”

To determine whether a law has retroactive effect, this Court “keep[s] four principles in mind.” *LaFontaine Saline, Inc v Chrysler Grp, LLC*, 496 Mich 26, 38, 852 NW2d78 (2014):

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.

Here, as in the *LaFontaine* case, the factors clearly weigh against applying the recent changes to the No-Fault Act retroactively. In particular, as noted previously, there is no specific language found in 2019 PA 21 that provides for retroactive application. Furthermore, there are clearly “vested rights acquired under existing laws”, i.e., the No-Fault Act before it was amended, that will be impaired. As such, the trial court erred when it held that the changes to the No-Fault Act applied retroactively.

Simply put, many legislators voted on this legislation with the understanding that the changes to reimbursement for family-provided attendant care services under MCL 500.3157(10) and the 55% fee schedules for post-acute rehabilitation services not covered by Medicare under 500.3157(7) would not be applied retroactively to individuals who purchased coverage (and were injured in a motor vehicle accident) before the No-Fault Act was amended. In fact, DIFS evidently continues to public state that 2019 PA 21 does not apply retroactively and that it was never intended to do so. Yet, PIP insurers in Michigan have made it abundantly clear that reimbursement will be reduced based on those newly added provisions under MCL 500.3157 in less than 60 days, i.e., July 1, 2021.

II. Applying the recent changes made to the No-Fault Act retroactively is not consistent with Michigan law and it violates the Contracts Clause of the Michigan Constitution.

As stated in Plaintiffs-Appellants' Brief on Appeal, the law in Michigan is clear that legislation must not be applied retroactively if doing so will impair existing contract rights. In *LaFontaine*, supra, 496 Mich at 44, this Court made that point when it refused to apply retroactively an amendment to an existing law which expanded geographically the relevant market area for dealerships to a nine-mile radius, because it would "impinge on the manufacturer's right" under a previously negotiated "dealer agreement" that limited the relevant market area to a six-mile radius.

Here, retroactive application of 2019 PA 21 likewise impairs the contract rights of individuals that purchased coverage, paid premiums, and were injured in motor vehicle accidents before the law was amended to limit reimbursement for family provided attendant care services and post-acute rehabilitation services not covered by the Medicare program. It further impairs the rights of providers of post-acute rehabilitation services who contractually agreed to provide services for those same individuals with an understanding that reasonable and customary rates would be paid.

Furthermore, retroactive application of 2019 PA 21 also would violate the Contracts Clause of the Michigan Constitution. See Const 1963, Art 1, § 10. In *AFT Mich v State of Michigan*, 501 Mich 939, 904 NW2d 417 (2017), this Court held that the Contracts Clause was violated because the Legislature retroactively imposed a salary reduction on public school employees that negated contractual agreements previously negotiated between the public schools and their employees. The same analysis applies under these circumstances because 2019 PA 21, if applied retroactively, will similarly reduce reimbursement from what the parties previously agreed when contracts were signed.

CONCLUSION

Applying retroactively the changes made to reimbursement under the No-Fault Act in 2019, specifically, the cap on family-provided attendant care and the 55% fee schedules for services not covered by the Medicare program would be fundamentally unfair to individuals who purchased coverage and were injured in motor vehicle accidents before the No-Fault Act was amended. It would also be unfair to businesses that contracted with those individuals based on the understanding that the services provided would be reimbursed at rates customarily charged as the parties agreed. Doing so would not only undermine the Legislature's intent in amending the No-Fault Act, it would violate the Contracts Clause of the Michigan Constitution, because contract rights had clearly vested.

Dated: May 27, 2021

Respectfully submitted,

/s/ Marla A. Linderman
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EXHIBIT A

Memorandum of Support dated May 27, 2021

To: To the Michigan Court of Appeals

From: Members of the Michigan Legislature

Date: May 27, 2021

Re: *Ellen M. Andary, Philip Krueger, & Eisenhower Center, v. USAA Casualty Insurance Company and Citizens Insurance Company of America*

We, the undersigned lawmakers, sign this memo to express our strongly held belief that the attendant care limitations and the 55% fee schedule provisions of the recently enacted auto no-fault insurance reforms (Public Act 21 of 2019: MCL 500.3157(7) and (10)) should not be retroactively applied to accident victims who purchased insurance policies and sustained bodily injury prior to the enactment of this legislation.

As you know, this retroactivity question is presently pending in the Michigan Court of Appeals in the above-referenced legal case (Andary litigation).

Our colleagues, State Representatives Julie Brixie and Andrea Schroeder, are in the process of filing an amici curiae brief asking the Michigan Court of Appeals to rule that these specific provisions of the new no-fault law should not be given retroactive application. We support our colleagues' efforts to seek amici curiae status in this important case and agree with their position regarding the retroactivity issue. We support their efforts for the following reasons:

1. 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.
2. We believe retroactive application of these provisions would be a violation of plaintiffs' legal rights, including but not limited to, the Contracts Clause of the Michigan Constitution (e.g., Const 1963, art 1, § 10) and case law preserving the sanctity of private contracts.
3. We believe that retroactive application of these specific provisions of the new no-fault law would be fundamentally unfair to survivors of catastrophic auto accidents, such as Ms. Andary and Mr. Krueger (i.e., the plaintiffs in this case). That is true for the thousands of other residents across our state who will lose valuable insurance benefits they have under automobile insurance policies they purchased and entered into many years ago, thereby materially altering their contracts of insurance.

Information that appears on the website of the Michigan Catastrophic Claims Association (MCCA), [which can be accessed by clicking here](#), reflects that there are over 18,000 patients who were injured years ago whose care is funded by the MCCA. Nearly every one of these residents and their families would be severely impacted by retroactive application of these reforms.

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Many of those catastrophically injured patients have, for years, been receiving attendant care rendered by family members and friends for many hours every day. If the 56 hour weekly attendant care limitations set forth in MCL 500.3157(10) are retroactively applied to those patients, their critically important daily care will be significantly disrupted.

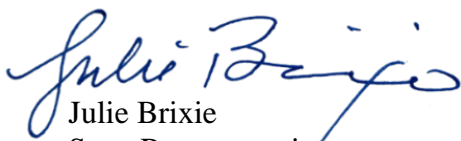
Moreover, the retroactive application of the fee schedule provisions set forth in MCL 500.3157(7) will cause a number of medical provider businesses to either close their doors or otherwise discontinue services to those patients who sustained severe injuries many years ago. Therefore, such application will likely have a significant impact on an important part of Michigan's healthcare economy and seriously impact access to necessary care.

A number of those medical businesses render commercially provided in-home attendant care to auto accident victims who do not have family members who can render such care. Therefore, the closure of such businesses, coupled with the limitations on family provided attendant care, could create a dangerous shortage of critical in-home attendant care services for the patients who are most in need.

In writing this memo we wish to emphasize the urgency of the current situation. The provisions dealing with attendant care and the 55% fee schedule will be put into effect by insurance companies on July 1, 2021. If those provisions are retroactively applied to victims injured before enactment of these provisions, a chaotic situation could rapidly develop. Many medical provider businesses are likely to close, catastrophically injured persons will suffer a significant disruption in their daily care, hundreds of jobs (or more) are likely to be lost, and our courts could be flooded with lawsuits seeking relief from the harsh consequences of retroactively applying these benefit reductions to Michigan citizens.

Therefore, we strongly urge the Michigan Appellate Courts to review these issues, pursuant to the amicus brief filed on behalf of the plaintiffs in the Andary litigation, as they are of great importance to the citizens of the State of Michigan.

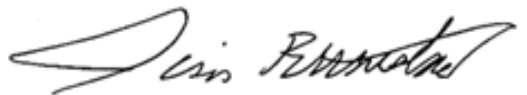
Sincerely,



Julie Brixie
State Representative
69th District



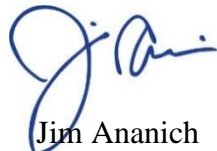
Andrea Schroeder
State Representative
43rd District



Jim Runestad
State Senator
15th District




Winnie Brinks
State Senator
29th District



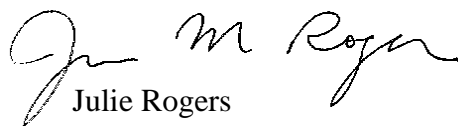
Jim Ananich
Senate Democratic Leader
27th District



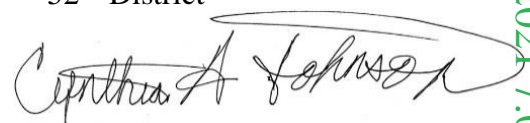
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Tenisha Yancey

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