

**STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT COURT FOR INGHAM COUNTY**

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, and MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan Corporation,

Plaintiffs,

v

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

Defendants.

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AMICUS CURIAE BRIEF OF BRAIN INJURY ASSOCIATION OF MICHIGAN

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STATEMENT OF AMICUS CURIAE INTEREST

The Brain Injury Association of Michigan (“BIAMI”) is a non-profit organization that serves as the conduit between approximately 200,000 brain injury survivors living in Michigan and the nation’s largest network of brain injury providers. BIAMI has over 1,000 members, over 500 of whom are brain injury survivors. 18,000 auto accident survivors living with a TBI are currently receiving no-fault benefits in Michigan, and approximately 1,600 of those are receiving 24-hour lifetime care. According to the Michigan Public Health Institute, motor vehicle is the second leading cause of traumatic brain injuries in the state (the first is falls).

At its core, BIAMI is a patient advocacy organization that strives to establish, protect and preserve the laws, policies and systems that comprise Michigan’s brain injury care. BIAMI also seeks to help provide immediate and equal access to these services for all brain injury survivors and their families. BIAMI works tirelessly on a grassroots level through its 20 chapters and support groups across the state, which meet monthly to provide support and community involvement opportunities for brain injury survivors and family members. BIAMI also offers training to family members so that they can learn how to provide appropriate care to their loved ones who are brain injury survivors.

BIAMI fully embraces the legal arguments presented in Plaintiffs’ Brief. BIAMI presents this amicus brief to shed light on how the retroactive application of MCL 500.3157(10) will gravely impact brain-injured auto accident survivors and the family members who have committed themselves to their loved ones’ care.

ARGUMENT

I. Retroactive application of the new act hurts many brain-injured auto accident survivors whose families provide attendant care under the No- Fault Act.

Under the No-Fault Act of 1973, MCL 500.3107, first party insurance provides for

reasonably necessary care for an injured person's care, recovery, and rehabilitation, which includes attendant care. Many brain injury accident survivors require 24-hour per day attendant care. These brain-injured auto accident survivors live at home with their parents, spouses, siblings, or some combination of family members. Often, family members have given up their careers so that they can take care of their loved ones. These brain injury survivors have been able to obtain superior care because the no-fault system protected them, and enabled family members to devote 24/7 care.

The new law caps reimbursement for family-provided attendant care at 56 hours per week (8 hours per day). MCL 500.3157(10). This limitation is made without regard to the extent of the brain-injured auto accident survivor's injuries or whether a doctor has prescribed more than 56 hours per week of attendant care. The bottom line is for that those families currently caring for critically injured auto accident survivors, the family will be required to bring strangers into their home to provide commercial in-home care for up to 112 hours every single week. The statute makes no exceptions for brain-injured auto accident survivors who require 24-hour care. The statute makes no exceptions for families who have been successfully—and economically—providing that care to the patient for years. The statute makes no exception for family members who have given up careers, including careers in the medical field, to provide attendant care to their family members. The statute provides no exceptions whatsoever.

The retroactive application of MCL 500.3157(10) violates of due process. As the Michigan Supreme Court noted in *Shavers v Attorney General*, 402 Mich 554 (1978):

The existence of interests or benefits entitled to due process protection depends on the extent to which government activity has fostered citizen dependency and reliance on the activity. We are reminded: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Limiting the number of hours for family-provided care has no basis in quality of care and is overly broad in protecting insurers from fraud. The new act is arbitrary and has no rational basis.

This amicus brief will show how taking away that immensely successful and cost-effective care will be detrimental to the health and safety of these brain injury survivors. Accordingly, BIAMI advocates that this Court should not permit the retroactive application of MCL 500.3157(10), and instead allow those brain injury survivors who are receiving benefits from a no-fault auto insurance policy purchased before July 1, 2021 to continue to receive the reasonably necessary attendant care benefits they purchased with their insurance policies, and as existed at the time of the auto accident that caused their brain injuries.

A. In many cases, family-provided attendant care is better than commercial in-home care by strangers, as brain injured auto accident victims have achieved greater improvements than expected.

For those brain injury survivors who can live at home, their family members provide hygiene care, such as helping use the toilet (or changing diaper), bathing and grooming, and assisting with dressing and undressing. Family members also assist the brain injury survivors with eating (for those survivors who are not intubated), moving them from a bed to a wheelchair, assisting with walking, meal preparation, and transportation. Many family members also provide necessary medical care, such as administering medication (including injections), changing bandages and dressing wounds, and assisting with the use of medical equipment. Family members provide socialization and reintegration, which is extremely important for the recovery of brain injury survivors. In addition to all of these necessary day-to-day activities in the life of a brain injury survivor, for those survivors who require 24/7 care, the family members are there to supervise and monitor their loved ones and are “on-call” all day and night to help the brain injury survivor from suffering further injury.

Many brain injury survivors live with multiple family members, such as their parents, siblings, and nieces and nephews. These family members re-arrange their lives to provide the full-time attendant care required by their loved one. Having a brain-injured family member literally

becomes a family affair, particularly when the patient cannot be left unattended. For brain injury survivors, the day-to-day care under the new legislation is completely different than it has been under the No-Fault Act. Retroactively applying the attendant care limitations of MCL 500.3157(10) will be injurious to the health of the brain-injured auto accident survivor. Patient care is higher quality care when it is rendered by properly trained, instructed, and supervised family members rather than a revolving door of aides/nurses sent from an agency.

Moreover, the family members who have sacrificed to care for the brain injury survivors will be subjected to an invasion of their privacy in their home by the new act. Because the act only permits 56 hours per week of family-provided care, the remaining 112 hours per week of care will have to be provided by strangers. There is not one person who will be able to provide the commercial care. In fact, there will most often be an endless stream of strangers traipsing through their homes at all hours of the day and night in order to provide the required 24-hour care to the brain injury survivor. These strangers will often be “aides” with less training than the typical family member who have devoted themselves to the full-time care of their loved ones. This Amicus Brief will share the experiences of just a few of the brain injury survivors (and their family members) that BIAMI serves.¹

The Howell Family. At age 15, Sam Howell won the International Science Fair in biochemistry finding a cause of a disease from which his sister suffered. At age 18, Sam went to work at Harvard Medical labs to continue his research. A few months later, in February 2005, while Sam was home on break from Harvard, he sustained a traumatic brain injury in an auto accident. Sam’s parents devoted themselves completely to his care. Sam’s mother Maureen was a trauma nurse manager and neuro-nurse educator who taught other nurses how to treat brain injury

¹ Much of the factual recitation in this Amicus Brief derives from phone interviews conducted by Attorney Liisa Speaker on April 17, 2020 with Linda St. Amant, the mother of David St. Amant, and James and Maureen Howell, the parents of Sam Howell.

patients and James Howell was an attorney and Republican legislator representing Saginaw in the Michigan House (1999-2004). Jim worked for 2 years after the accident but had to quit his job as Maureen was unable to care for Sam without assistance. Later, Jim was the Chairman of BIAMI (2012-2014).

Sam was in a coma for 3 months. He remained in the ICU and his mother stayed by his side. Sam went into arrest and the on-call nurse did not know what to do, so Sam's mother stepped in and saved Sam's life. The doctor recommended a rehabilitation facility, and again, Sam's mother stayed by his side and provided Sam the majority of his care. Sam came home after 8 months of hospitalization. Sam's condition was still acute. He had to be turned every 2 hours, he required a feeding tube for 2 years, he could not speak for 2 years, and was in a wheelchair for 7 years. Sam had pituitary and pulmonary system failures, required every other day labs drawn by Maureen, and he used IVs, catheters, and tube feedings. Sam's spleen was removed and he is a right risk for infections. His parents worked very hard for Sam to achieve improvements. Jim slept on a mattress in Sam's room for 2 years so that Maureen could have a good night's sleep, particularly since she spent her waking hours caring for Sam's needs.

Sam has greatly improved. Sam attended college, both remotely and in-person (with his mother in the college hallway and a cognitive therapist in the classroom next to Sam). Sam obtained a B.S. degree in human health. Sam can feed himself. He walks without assistance inside the home, but otherwise requires stand-by assistance due to balance issues. When Sam is under stress or ill, he requires pills or injections of steroids to prevent adrenal crises. Although Sam has suffered 5 seizures due to adrenal failure, his mother has learned to assess his condition, so she can often prevent a medical crisis from occurring. Maureen has also trained her husband to give intramuscular injections in the event of a seizure. Sam has never been readmitted to the hospital in 14 years. He has also never been left alone since 2005.

Sam is blind in his right eye and has balance issues. He is also a choking hazard. He has trouble using appropriate judgment, particularly when it comes to his safety. His brain does not recognize his left arm, so he needs cueing or assistance doing simple tasks. He has difficulty with visually scanning his environment, which means he is a tripping hazard because he does not notice objects on the floor. Sam is unable to use divided attention; he cannot read and cognitively learn at the same time. In class, he cannot listen and take notes. No doubt, Sam is a success story of the no-fault system, but he still requires 24/7 care.

Sam would be far worse off without in-home family-provided attendant care. Receiving commercial care is a tricky business. There would be a revolving door of aides. They would not know the patient. There are many reports of home healthcare workers stealing from the patient or the family. For a brain injury survivor like Sam who requires care 24/7, the family members would have to spend all their time monitoring the commercial care providers.

As witnessed in these examples, properly administered family-provided attendant care has many benefits to the brain injury survivor, including substantial therapeutic value which cannot be replicated either in an institutional setting or by commercial attendant care providers.

The St. Amant Family. David St. Amant suffered a traumatic brain injury in an auto accident in 2003. He was 16 years old. David was in a coma for 3 months and spent more than 5 months in a hospital after the accident. David suffered a “full brain injury.” When he was released from the hospital, he could not walk for over one year. David’s speech was unintelligible. David had to be retaught absolutely everything. A full brain injury survivor has to retrain his brain on how to move limbs, chew food, communicate, and see. Even today, David has to “mindfully swallow” which means swallowing is not a reflex but requires careful thinking to tell his muscles to swallow food. He is a fall hazard and a choking hazard.

Once David returned home, David’s parents took care of him full-time. Linda St. Amant

was a dental hygienist, and Steve St. Amant was a prominent attorney in Ingham and Clinton Counties. For a time after David's accident, his mother continued to work as a dental hygienist, which required commercial care to come into their home for 8-9 hours per day for 4 days per week. The commercial care provided a false sense of security, especially when it came to David's outbursts, which occur regularly but are difficult to predict, especially for a stranger. When David would have outbursts, the commercial care provider would not know how to handle David and often their solution was to recommend medication to sedate David. In contrast, David's mother has learned how to anticipate and minimize outbursts, and when they do occur, she and other family members know how to manage David without medication.

In 2010, his parents attempted institutional care by placing David with the Hope Network, a very well-respected brain injury treatment center. David stayed at Hope Network for 4 months. Their idea was to move David to Hope Network so he would have more opportunities to interact. It did not work. David was extremely confused by the different caretakers in his room and being in a strange place—particularly one that he did not know before the auto accident. His parents brought him home because he fared better at home with fewer outbursts.

When David's father passed away 8 years ago, Linda needed help. She had already stopped working as a dental hygienist and devoted herself to the full-time care of her son. But she could not provide 24/7 care alone. David's sister and brother-in-law (and their young daughter) decided to move from Arizona into the family home to help Linda with David's full-time care and so that an adult could always be home with David.

David's doctors told his mother that, when he was released from the hospital, he would have all his noticeable improvement in the first year following the accident. The doctors were totally wrong. The continued therapy that David receives and the family-provided 24/7 attendant care is only available because of the No-Fault Act, and has resulted in David continuing to improve

even 17 years post-accident. David's family members organize his schedule to maximize the therapies and socialization available to him.

Today, David is doing well. He is articulate, has a sense of humor, enjoys music, ambulates with assistance of AxioBionics, a device that stimulates his muscle to replace the fact that his brain does not communicate with his leg (he is still a fall hazard), feeds himself (with supervision as he is a choking hazard). Reading is still a challenge because David's brain has difficulty doing two things at once—so he can read the words or he can comprehend the words, but his brain cannot do both at the same time. Instead, he can listen to a family member read to him so he can comprehend the words as he is listening. David enjoys spending time with his extended family—the family who live with him and visits from his brother and his 4 children.

Having strangers in the home to care for David—which is what is required under the new legislation—would be very difficult for David. His mother believes from past experience that David would suffer more outbursts. Not to mention that a revolving door of different commercial aides means that David's mother, sister, brother-in-law, and niece, would all be exposed to various strangers every day.

The Park Family. Robert Park shares how his family's life has changed after his sister Letrice suffered a brain injury in an auto accident.² Letrice's auto accident occurred in 2006. Robert was 20 years old and returned home to provide full-time care to his sister. Shortly after the accident, Letrice was told she had a 10% chance of survival. The No-Fault Act enabled Robert to make his sister's care his full-time job. Due to her severe brain injury, when commercial care came into the home, Letrice had an adverse reaction. "She has great difficulty working with those she didn't know before the accident and often has seizures, outbursts and severe breakdowns when

² Factual recitations from Robert Park, whose sister is another brain injury survivor, come from his 12/04/19 letter to the Governor. (Attached at Exhibit A.)

working with others. I have spent my time as her caregiver researching and creating programs for her recovery and rehabilitating her myself. The new law will take away my ability to care for her full time.”

There is no rational basis for the new act’s limitations on family-provided attendant care. In the vast experience of BIAMI, there is no question that family-provided attendant care is better than commercial care, but also that brain injury survivors fare worse, deteriorate, and lose progress when their attendant care is provided by strangers. The current Covid-19 pandemic highlights how the new act will actively harm brain-injured auto accident survivors and their families. If the new act were in effect today, it would force brain injury survivors and their family to interact with strangers on an intimate basis every day, exposing the vulnerable brain injury survivors and their family members to the coronavirus.

B. Family-provided care is cheaper than commercial in-home care, particularly when many of the auto accident victims require 24-hour daily care.

There is no rational basis for MCL 500.3157(10) because family-provided attendant care is more economical than in-home commercial care for those patients who require 24/7 care. The new act is irrational because its stated goal is to reduce the cost of insurance rates, but yet retroactively applying its terms to brain injury survivors will be more expensive under the new act, as compared to the family-provided care under the No-Fault Act. Moreover, the quality of the commercial care provided by strangers, often who have less training than the family members, will most certainly be a lower quality care (but more expensive).

Once her husband became ill, Linda St. Amant negotiated a contract with David’s insurance carrier. She receives \$5,500 per month for David’s care. This includes the 24/7 attendant care by her and other family members, David’s living expenses, and David’s therapies. This rate has not been increased in over 8 years. Even by attributing the entire monthly allotment to 24/7

attendant care of a single family member, that is less than \$8/hour—far less than what commercial care would cost the insurance company.

No-fault insurance also pays for the 24/7 attendant care provided by the Howell family, including 4 hours daily of RN care (by Maureen) but at far lower rate than a commercial RN. In fact, the rate paid is even less than a commercial LPN or aide. And certainly, the cost of family-provided attendant care for Sam is far less than Sam living in a nursing home or rehab facility.

Jim Howell noted that there are many ways for insurance companies to control and minimize the risk of abuse of the no-fault system. The insurance company can assign a case manager to come into the home to verify that the brain injury survivor is receiving the appropriate care from family members. And of course, the level of family-provided attendant care is dictated by a doctor's recommendation based on the needs of the brain injury survivor. The current no-fault system adequately protects the insurance companies, while allowing brain injury survivors to receive the most beneficial care possible – from their family members.

CONCLUSION AND REQUEST FOR RELIEF

Retroactive application of MCL 500.3157(10) will actively harm brain injury survivors who receive family-provided attendant care, while costing the insurance industry and taxpayers more money. BIAMI respectfully requests this Court hold that MCL 500.3157(10) only applies prospectively to brain injury survivors injured in an auto accident after July 1, 2021.

Respectfully submitted,

Dated: April 27, 2020

/s/ Liisa R. Speaker
Liisa R. Speaker (P65728)
SPEAKER LAW FIRM, PLLC

Exhibit A: 12/04/2019 Letter

mlevandowski@cpan.us

From: donotreply@votervoice.net
Sent: Wednesday, December 04, 2019 5:11 AM
To: Martha Levendowski
Subject: Protect the right to recover. Fix the new auto insurance law.

Martha Levendowski:

User Robert Park has sent message to following recipients:

- * Governor Gretchen Whitmer
- * Senator Adam Hollier
- * Representative Joe Tate

The content of the message is as follows:

[The message(s) you sent had each recipient's salutation here]:

Below is some information that I have written about my personal story as a family caregiver and how my sisters life and future are in jeopardy. We are not alone there are thousands of recovering persons and family members that care for them whose lives will be destroyed if the law goes through as is. The good news is that the final details haven't been written and there's still time to change people's minds and bring to their attention what the new auto no fault law really means to both drivers and accident victims. Thank you for your time and please let me know if you'd like more information? I'd love the opportunity to talk to you more about it. I have a passion for helping people who are differently abled have a good quality of life and this new bill strips auto accident victims of their "right to recover" something that was promised to them under the old law.

It was 2006 on "Good Friday" my sister was in an auto accident and sustained many injuries to her body and her mind. She broke her femur, ulna and tibia and shattered her sacrum. In addition to this she sustained a severe traumatic brain injury. She was given a 10% chance to live and despite that small chance of survival she came through and lived. For me and my family it was the best "Good Friday" of our lives because God allowed her to live and allowed us to keep her. I slept in the hospital's ICU wing for a month and a half until she recovered enough to go home. I never left the hospital and lived in the waiting room during that time. I didn't know at the time just how hard her recovery would be for her or for my family. I was caught in a difficult situation and had to choose between living my life as a twenty year old or caring for my sister full time. I made the decision to care for her full time because it was the right thing to do and because she deserved it. Under the old law I have been able to be her full time care provider and in that time myself and her medical team have taken her from a 10% chance to live to make it to her recently celebrated 36th birthday. Had the law been the one that was just passed I would not have had the opportunity to take care of my sister full time and I would have had to bring on outside people. However because of her severe traumatic brain injury she has great difficulty working with those she didn't know before the accident and often has seizures, outbursts and severe breakdowns when working with others. I have spent my time as her caregiver researching and creating programs for her recovery and rehabilitating her myself. The new law will take away my ability to care for her full time. This is something that was promised to her under the unlimited lifetime benefits part of the previous no fault law. The main thing that we are fighting for is to show people that this new law will take away care from people like my sister and it will not save them any money, which is how the law was passed in the first place. I believe that when we work together we all win. By allowing people who are differently abled as a result of an auto accident to properly recover we can help make our whole society better. Under the new law I will have to stop taking care of my sister full time and bring on strangers to care for her. Not only will this not work for us but it will also cost much more money as agencies can charge two to three what a family caregiver can

charge. I have more details that I'd like to share with you but I wanted to give you a condensed version to give you and idea of what the situation is and how our lives have been improved by the old law and how they will be drastically changed by the new law.

For years, Michigan's no-fault system offered unparalleled medical care and rehabilitation for auto accident victims. Now, under the law passed earlier this year, many motorists will be woefully underinsured and won't be able to afford needed rehabilitation or therapy. I and many other survivors will have nowhere to turn without the help of specialized rehabilitation centers that have changed the lives of so many.

The new law will likely raise taxes in Michigan, as more accident victims are forced to declare bankruptcy and end up on Medicaid. Further, Medicaid nursing homes do not have the space nor specialized care available to support traumatically injured patients. The 56-hour attendant care limit is devastating to people who need round-the-clock care.

We're counting on you to make the right choice for your constituents. I urge you to look at the law, look at its shortcomings, and work together before it fully takes effect to ensure it protects drivers, accident victims and all consumers.

Thank you for your service to Michigan.

Sincerely,

Robert Park

[User's postal address was included here]

**STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT COURT FOR INGHAM COUNTY**

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, and MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan Corporation,
Plaintiffs,

Case No. 19-738-CZ

Hon. Wanda M. Stokes

v

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

I hereby certify that, on April 27, 2020, pursuant to this Court's Public Notice, I electronically filed the foregoing Amicus Curiae Brief of Brain Injury Association of Michigan

with the Clerk of the Court by email to CircuitCourtRecords@ingham.org, and served a copy on the following counsel of record by email:

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Dated: April 27, 2020

Respectfully submitted,

/s Adam S. Denton
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