THE RECENT NO-FAULT ACT AMENDMENTS DO NOT PREVENT INSURERS FROM OBTAINING INDEPENDENT MEDICAL EVALUATIONS FOR TRIAL PURPOSES PERFORMED BY "NON-MATCHING" MEDICAL EXPERTS

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I. INTRODUCTION

In *Muci v. State Farm*, the Michigan Supreme Court held that Michigan Court Rule (MCR or "Rule") 2.311 does not enable a court to refuse or render conditional the statutory right that the Legislature has granted to a no-fault insurer in Michigan's No-Fault Automobile Insurance Act to mandate that the insured submit to an independent medical evaluation (IME).[1] Rather, sections 3151 and 3159 of the No-Fault Act alone govern, and "[Rule] 2.311 is not applicable to such examinations."[2]

The Michigan Legislature recently amended section 3151 as part of its comprehensive overhaul of the No-Fault Act.[3] In its current form, section 3151 now mandates that any IME performed pursuant to section 3151 must be conducted by a physician whose qualifications match the qualifications of the insured's treating physician:

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1. Muci v. State Farm Mut. Auto. Ins. Co., 478 Mich. 178, 732 N.W.2d 88 (2007); *see also* MICH. COMP. LAWS §§ 500.3151–500.3159 (2019).

2. *Muci*, 478 Mich. at 191, 732 N.W.2d at 96.

3. *See* 2019 Mich. Pub. Acts 21, 22.

> (1) If the mental or physical condition of [the insured] is material to a claim that has been or may be made for past or future [Personal Injury Protection (PIP)] benefits, at the request of [the] insurer the [insured] shall submit to mental or physical examination by physicians . . .
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> (2) A physician who conducts a mental or physical examination under this section must be licensed as a physician in this state or another state and meet the following criteria, as applicable:
>
> > (a) If care is being provided to the [insured] by a specialist, the examining physician must specialize in the same specialty as the physician providing the care, and if the physician providing the care is board certified in the specialty, the examining physician must be board certified in that specialty.
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> > (b) During the year immediately preceding the examination, the examining physician must have devoted a majority of his or her professional time to either or both of the following:
> >
> > (i) The active clinical practice of medicine and, if subdivision (a) applies, the active clinical practice relevant to the specialty.
> >
> > (ii) The instruction of students . . . and, if subdivision (a) applies, the instruction of students is in the specialty.[4]

This amendment, coupled with *Muci*'s statement that "[Rule] 2.311 is not applicable to such examinations"[5] may cause some to believe that a no-fault insurer who is defending against a lawsuit brought by the insured cannot move pursuant to Rule 2.311 for court permission to obtain, for trial purposes, an IME performed by a physician whose qualifications do not precisely match the qualifications of the insured's treating physician.

Thus, some may conclude that if a chiropractor treats the insured and a no-fault insurer refuses to pay PIP benefits for such treatment based upon an IME performed by a chiropractor under section 3151 and, if the insured files a lawsuit, the no-fault insurer cannot request, pursuant to Rule 2.311, that the court permit the no-fault insurer to obtain an

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4. *Id.*
5. *Muci*, 478 Mich. at 191, 732 N.W.2d at 96.

additional IME performed by a neurosurgeon for use in defending against the lawsuit at trial. Likely, they would believe this because the neurosurgeon's qualifications do not match the treating chiropractor's qualifications, even though the neurosurgeon may in fact be more qualified than the treating chiropractor to formulate and explain expert medical opinions, such as whether the insured has a herniated disc and, if so, whether the motor vehicle accident caused it, to a jury.

But the proponents of such an argument misconstrue the holding of *Muci* and misunderstand the impact of the recent amendments to section 3151. The Michigan Supreme Court in *Muci* simply recognized that it did not have the constitutional authority to promulgate a court rule enabling a trial court to deny a litigant a statutorily created substantive right, such as the right of a no-fault insurer to obtain an IME for claim-handling purposes by a physician meeting the requirements of section 3151.[6] Our Supreme Court *did not* hold that section 3151 and section 3159 operate to deny a no-fault insurer the ability to seek court permission—pursuant to Rule 2.311—to obtain during discovery and present at trial evidence such as an additional IME by a physician possessing qualifications enabling the physician to render an opinion relevant to the litigated issues.[7] And nothing in the language of the newly amended section 3151 indicates a legislative intent to deny a no-fault insurer the ability to utilize Rule 2.311 to obtain an additional IME for trial purposes.[8]

II. THE MICHIGAN SUPREME COURT'S DECISION IN *MUCI*

Alina Muci filed a lawsuit against State Farm, claiming that State Farm had wrongfully denied her PIP benefits.[9] State Farm had not obtained an IME before the lawsuit was initiated.[10] Thus, after Muci filed suit, State Farm demanded that she submit to an IME—pursuant to sections 3151 and 3159.[11]

At the time *Muci* was decided, section 3151 did not contain qualification matching requirements.[12] Rather, it simply provided that a no-fault insurer could mandate that an insured submit to an IME if her

6. *Id.* at 193, 732 N.W.2d at 97.
7. *Id.* at 194, 732 N.W.2d at 97.
8. *See* 2019 Mich. Pub. Acts 21, 22.
9. *Muci*, 478 Mich. at 182, 732 N.W.2d at 90.
10. *Id.*
11. *Id.*, 732 N.W.2d at 90–91.
12. *See* MICH. COMP. LAWS § 500.3151 (1956), *amended by* MICH. COMP. LAWS § 500.3151 (2019).

mental or physical condition was material to the claim for PIP benefits and was at issue:

> When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person *shall* submit to mental or physical examination by physicians.[13]

Moreover, section 3159, which has not been amended since the Michigan Supreme Court decided *Muci*, provides that the insured cannot refuse the no-fault insurer's request without demonstrating to a court "good cause," illustrating why the IME should not occur or should only occur subject to conditions:

> In a dispute regarding an insurer's right to discovery of facts about [the insured]'s earnings or about [the insured's] history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.[14]

Muci refused to submit to State Farm's requested IME unless it was performed subject to several conditions.[15] She claimed that because she had filed a lawsuit, section 3151 and section 3159 no longer controlled the matter of her IME attendance.[16] Rather, Muci argued that filing the lawsuit had rendered State Farm's ability to obtain an IME subject to the sole control of Rule 2.311, which provides, in pertinent part:

> **(A) Order for Examination.** When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending *may* order the party to submit to a physical

13. MICH. COMP. LAWS § 500.3151(1) (2019) (emphasis added).
14. MICH. COMP. LAWS § 500.3159 (1956).
15. *Muci*, 478 Mich. at 182, 732 N.W.2d at 90.
16. *Id.*, 732 N.W.2d at 91.

> or mental . . . examination by a physician (or other appropriate professional) . . . . The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made and may provide that the attorney for the person to be examined may be present at the examination.[17]

Thus, although section 3151 and section 3159 mandate that an insured (such as Muci) submit to an unconditional IME upon the request of a no-fault insurer (such as State Farm) unless the insured can show "good cause" for the IME to be refused or conditions imposed thereon, Rule 2.311 provides that the insurer has to move the court for permission to obtain an unconditional IME and show "good cause" for such a request.[18]

The Michigan Supreme Court held that Rule 2.311 irreconcilably conflicts with sections 3151 and 3159 in such a situation, stating:

> It is simply incorrect to argue that what can be done under § 3151 of the no-fault act is no different from what is required under [Rule] 2.311; after all, [Rule 2.311] requires pending litigation and the insurer to show good cause, and allows court-imposed conditions as a predicate to the examination while § 3151 does not have these requirements. Indeed, under § 3151 an insured must submit to a medical examination. In contrast, under [Rule] 2.311, whether an insured must submit to a medical examination is left to the trial court to decide. Therefore, the court rule and [§ 3151] conflict because that which is required under § 3151 is merely discretionary under [Rule] 2.311.[19]

In a footnote to the decision, the Court continued:

> We further note that the court rule conflicts with § 3159. While [Rule] 2.311 requires the party seeking the medical examination to demonstrate good cause, § 3159 requires the party seeking to

17. MICH. CT. R. 2.311.
18. *Id.*
19. *Muci*, 478 Mich. at 190–91, 732 N.W.2d at 95.

> impose conditions on a discovery order such as an order for a medical examination to show good cause.[20]

Having determined that Rule 2.311 conflicts with section 3151 and section 3159 when a trial court is asked to refuse or render conditional a no-fault insurer's statutory right to obtain an IME, the Michigan Supreme Court sought to resolve the issue of whether the court rule or the statutes control in such an instance.[21]

In doing so, the Court looked for guidance from its prior decision in *McDougall v. Schanz*.[22] In that case, the court considered whether Michigan Rule of Evidence (MRE) 702 or MCL section 600.2169 of Michigan's Revised Judicature Act of 1961[23] controlled when determining what qualifications a physician must have to present expert testimony in a medical malpractice case regarding the standard of practice or care that a defendant-physician should have followed.[24]

In that regard, section 2169 provides qualification-matching requirements for medical malpractice experts similar to those that the Legislature recently inserted into the No-Fault Act for physicians who perform IMEs under section 3151. In relevant part, section 2169 provides:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> > (a) If the [defendant-physician] is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the [defendant-physician]. However, if the [defendant physician] is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
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> > (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

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20. *Id.* at 191 n.8, 732 N.W.2d at 95.
21. *Id.* at 190, 732 N.W.2d at 95–96.
22. McDougall v. Schanz, 461 Mich. 15, 597 N.W.2d 148 (1999).
23. MICH. COMP. LAWS §§ 600.101–600.9947 (1961).
24. *McDougall*, 461 Mich. at 19, 597 N.W.2d at 150.

> (i) The active clinical practice of the same health profession in which the [defendant-physician] is licensed and, if th[e defendant-physician] is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in . . . the same health profession in which the [defendant-physician] is licensed and, if th[e defendant-physician] is a specialist, . . . in the same specialty.[25]

In *McDougall*, the Michigan Supreme Court held that because section 2169 "contains strict practice [and] teaching requirements" as a prerequisite to proffering expert testimony at a medical malpractice trial, it necessarily conflicts with the less stringent requirements for the introduction of expert testimony contained in MRE 702,[26] which provides in relevant part:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise . . . .[27]

The Michigan Supreme Court in *McDougall* determined that an inherent conflict existed between section 2169 and MRE 702 and recognized that its authority to promulgate court rules was constitutionally limited to dictating "matters of [court] practice and procedure,"[28] whereas the legislature has sole authority to "establish, abrogate, or modify the substantive law."[29] Thus, the court acknowledged in *McDougall* that "'[i]f a particular court rule contravenes a legislatively declared principle of public policy [in a

25. MICH. COMP. LAWS § 600.2169 (1993).
26. *McDougall,* 461 Mich. at 28, 597 N.W.2d at 155.
27. MICH. R. EVID. 702.
28. *McDougall*, 461 Mich. at 27, 597 N.W.2d at 154.
29. *Id.* at 32, 597 N.W.2d at 157. Article VI, Section 5 of the Michigan Constitution provides that "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." MICH. CONST. art. VI, § 5 (1963).

statute], having as its basis something other than court administration . . . the [court] rule should yield.'"[30]

The court determined that section 2169 "reflects wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists," thus rendering it substantive in nature and controlling over MRE 702.[31] In other words, the court recognized that section 2169's qualification requirements represent a legislative determination that a defendant-physician should not be held liable for medical malpractice based on the plaintiff's expert's assertion that the defendant-physician should have exercised a certain level of care in a specific situation, unless the proffered expert possesses the same experience and knowledge with regard to such situations as the defendant-physician, and thus, has a credible basis to render an opinion regarding what the defendant-physician should have done in that situation.[32]

Relying on its earlier holding in *McDougall*, the Michigan Supreme Court in *Muci* similarly held that section 3151 and section 3159 represent a legislative determination that a no-fault insurer has a right to require an insured to submit to an IME, in order to assess whether the insured was in fact injured in the motor vehicle accident[33] and, if so, whether the medical treatment the insured is seeking payment of PIP benefits for is reasonably necessary for the insured's care, recovery, or rehabilitation.[34] Thus, in light of the inherent conflict between the statutes and the court rule, the Michigan Supreme Court held that the statutes control when determining whether a no-fault insurer has the right to demand that the insured submit to an unconditional IME:

> [T]he provisions [of section 3151 and section 3159] concerning medical examinations, because they do not concern court

30. *McDougall*, 461 Mich. at 30–31, 597 N.W.2d at 156 (quoting Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 635 (1957)).

31. *Id.* at 35, 597 N.W.2d at 158.

32. *See id.*

33. *See* Muci v. State Farm Mut. Auto. Ins. Co., 478 Mich. 178, 190, 732 N.W.2d 88, 96 (2007). Mich. Comp. Laws (MCL) section 500.3105(1) provides that a no-fault "insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of [the no-fault act]." MICH. COMP. LAWS § 500.3105(1) (1956).

34. *See Muci*, 478 Mich. at 187, 732 N.W.2d at 93. MCL section 500.3107(1)(a) of the no-fault act provides that, in addition to other PIP benefits, a no-fault insurer is liable to pay for "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MICH. COMP. LAWS § 500.3107(1)(a) (2019).

> administration, are substantive, not procedural, and are supreme over the court rule, just as the general court rule concerning experts' qualifications must, pursuant to *McDougall, supra* at 30–31, yield to statutory requirements concerning expert witnesses' qualifications.
>
> Thus, we conclude that the no-fault act comprehensively addresses the matter of claimant examinations. Accordingly, [Rule] 2.311 is not applicable to such examinations.[35]

In other words, the court held that the insured's filing of a lawsuit does not strip away the substantive policy considerations that caused the Legislature to enact section 3151 and section 3159 and enable courts to utilize Rule 2.311 to contravene those substantive policy considerations under the auspices of "practice and procedure."[36]

III. THE MISINTERPRETATION OF *MUCI*

There are those who might read *Muci*'s statement that "[Rule] 2.311 is not applicable to such examinations" out of context and misinterpret *Muci* as the Michigan Supreme Court holding that Rule 2.311 can *never* apply in no-fault cases.[37] Therefore, they may believe that a no-fault insurer is limited to obtaining IMEs solely pursuant to section 3151. Accordingly, now that section 3151 has been amended to provide that a physician performing an IME pursuant to section 3151 must possess the same qualifications as the insured's treating physician, some may believe that a no-fault insurer can *never* obtain an IME by a physician whose qualifications do not match the insured's treating physicians.

But such a belief is misplaced. Our state supreme court in *Muci* considered only whether a no-fault insurer's statutory right to obtain an IME pursuant to section 3151 and section 3159 can be judicially stripped away or limited pursuant to Rule 2.311 simply because the insured has sued the no-fault insurer.[38] That is, the court merely determined that it did not have the constitutional authority to promulgate a court rule dictating that a no-fault insurer has to seek trial court permission to obtain an IME and show good cause why the IME should be performed

35. *Muci*, 478 Mich. at 191, 732 N.W.2d at 96.

36. *Id.*

37. *See, e.g.*, Watson v. State Farm Mut. Auto. Ins. Co., No 09-12573, 2010 WL 2287148, at *5 (E.D. Mich. June 4, 2010).

38. *Muci*, 478 Mich. at 190–91, 732 N.W.2d at 95–96.

with no conditions imposed thereon in direct contravention of the legislature's substantive determination that the insured must submit to an unconditional IME unless the insured shows good cause why the IME should not be permitted or shows good cause why the IME should only be permitted subject to conditions.[39]

Importantly, our supreme court *did not* consider or rule on the inverse issue—whether a no-fault insurer defending against the insured's lawsuit may make trial court motion pursuant to Rule 2.311 for permission to obtain an IME *in addition to* any IME that the no-fault insurer is statutorily entitled by section 3151 and section 3159 to obtain.[40] The no-fault insurer may do so.[41]

A. Section 3151 and Section 3159 Do Not Limit an Insurer's Ability to Request an IME Pursuant to Rule 2.311

As an initial matter, it must be kept in mind that the recently amended section 3151 only provides that "*the [insured] shall submit* to a mental or physical examination by physicians . . . [i]f the mental or physical condition of [the insured] is material to a claim" for PIP benefits.[42] Accordingly, section 3151 merely dictates the circumstances under which the insured is required to undergo an IME requested by the insurer.[43] Stated differently, section 3151 only limits the circumstances under which a no-fault insurer can *mandate* that the insured submit to an IME.[44] It *does not* explicitly or even implicitly preclude the insurer from obtaining an IME in some other, non-insurer mandated way, such as obtaining court permission pursuant to Rule 2.311.[45]

Similarly, section 3151 merely provides that "[a] physician who conducts a mental or physical examination *under this section* must" possess qualifications matching the insured's treating physician's qualifications.[46] Thus, the Legislature had not sought to dictate in section 3151 what qualifications an IME physician must possess when an IME is obtained in some way other than under section 3151, such as pursuant to court permission under Rule 2.311 for the purposes of trial.[47]

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39. *Id.*
40. *See id.*
41. *See id.*
42. MICH. COMP. LAWS § 500.3151 (2019) (emphasis added).
43. *See id.*
44. *See id.*
45. *See id.*
46. *Id.* (emphasis added).
47. *See id.*

Therefore, the text of section 3151 reveals no legislative intent that it serve as the only means by which an insurer could obtain an IME.[48] Nor does anything in the text of section 3151 reveal any legislative intent that an IME physician necessarily possess qualifications identical to the insured's treating physician when the IME is performed pursuant to Rule 2.311 for the purposes of litigation.[49]

B. Rule 2.311 Does Not Conflict with Section 500.3151 and Section 3159 When a No-Fault Insurer Requests an IME for the Purposes of Litigation

As discussed above, the Legislature's imposition of qualification-matching upon physicians performing IMEs pursuant to section 3151 is similar to the qualification-matching requirements that the Legislature previously imposed for experts in medical malpractice cases in section 2169.[50] It is significant to note that this is where the similarities between section 3151 and section 2169 end. Indeed, the text of the two statutes makes clear that what the Legislature intended in section 2169 is *very different* from what the Legislature intended when it amended section 3151.[51]

Specifically, section 2169 provides that the proffered expert "*shall not give expert testimony . . . unless*" the proffered expert possesses qualifications matching those of the defendant-physician.[52] Thus, as the Michigan Supreme Court noted in *McDougall*, the Legislature sought to "provide[] strict requirements for the admission of expert testimony in medical malpractice cases brought against specialists" when it enacted section 2169.[53] Significantly, *nothing* in the language of section 3151 indicates that the Legislature similarly sought to provide "strict requirements" for what experts a no-fault insurer can present at trial in defense of a lawsuit brought by an insured party.[54]

Had the Legislature intended to prohibit a no-fault insurer from calling an IME physician whose qualifications do not specifically match those of the insured's treating physician—such as a neurosurgeon, whose qualifications *exceed* those of a treating chiropractor in many respects—as an expert witness at trial, the Legislature obviously could have done so, as it did in section 2169 with regard to claims of medical

48. MICH. COMP. LAWS § 500.3151 (2019).
49. *See id.*
50. *See id.*; *see also* MICH. COMP. LAWS § 600.2169 (2019).
51. *See* MICH. COMP. LAWS § 500.3151 (2019); *see also* MICH. COMP. LAWS § 600.2169.
52. MICH. COMP. LAWS § 600.2169 (emphasis added).
53. McDougall v. Schanz, 461 Mich. 15, 18, 597 N.W.2d 148, 150 (1999).
54. *Id.*; *see also* MICH. COMP. LAWS § 600.3151.

malpractice.[55] Thus, the necessary inference is that the Legislature *did not* intend to impose such limitation on no-fault insurers when it amended section 3151.[56]

Instead, based on these textual indications, it is more reasonable to assume that the Legislature's intent in amending section 3151 was simply to indicate that a no-fault insurer's suspension of PIP benefits based upon an IME mandated by the insurer under section 3151 and performed by a physician possessing the qualifications required by that statute is presumptively "reasonable," thus insulating the no-fault insurer from court-ordered sanctions for the suspension.[57]

Indeed, *nothing* about the language of section 3151 reflects a legislative intent to deny an insurer that has suspended PIP benefits pursuant to an IME performed under section 3151 by a physician possessing the statutory qualifications, the ability to present another physician at trial to proffer evidence in support of the proposition that the denial was reasonable.[58]

Nor does anything about the language of section 3151 reflect a substantive policy decision by the Legislature to vest an insured party with a right *not* to have the insurer present such evidence.[59] Again, this is

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55. *Compare* MICH. COMP. LAWS § 600.3151, *with* MICH. COMP. LAWS § 600.2169.

56. To construe section 3151 as implicitly imposing an expert testimony requirement akin to section 2169 would violate the sacrosanct tenet of statutory interpretation that "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *See* Farrington v. Total Petrol., Inc., 442 Mich. 201, 210, 501 N.W.2d 76, 80 (1993); Robinson v. City of Lansing, 486 Mich. 1, 25, 782 N.W.2d 171, 185–86 (2010) (Young, J., concurring); People v. Monaco, 474 Mich. 48, 57–58, 710 N.W.2d 46, 51 (2006); Paselli v. Utley, 286 Mich. 638, 643, 282 N.W.2d 849, 851 (1938) ("This court cannot write into the statutes provisions that the legislature has not seen fit to enact."); City of Detroit v. Redford Twp., 253 Mich. 453, 456, 235 N.W. 217, 218 (1931) ("Courts cannot attach provisions not found therein to an act of the Legislature because they have been incorporated in other similar acts."); People v. Underwood, 278 Mich. App. 334, 338, 750 N.W.2d 612, 614 (2008) ("The omission of a provision in one statute that is included in another statute should be construed as intentional, . . . and provisions not included in a statute by the Legislature should not be included by the courts . . . ." (internal citation omitted)).

57. MCL section 500.3148(1) provides, in pertinent part:

> [A]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits that are overdue. The attorney's fee is a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

MICH. COMP. LAWS § 500.3148(1) (2019).

58. MICH. COMP. LAWS § 600.3151 (2019).

59. Indeed, to read such a policy decision into section 3151 would not only impermissibly place into the statute omitted language that the Legislature included in

made clear by comparing the language that the Legislature used in section 3151 to the language that it used in section 2169.[60]

The Legislature specifically stated in section 2169 that an expert "shall not give expert testimony on the appropriate standard of practice or care" unless the expert has the same qualifications "as the party against whom . . . the testimony is offered."[61] This statement unambiguously vests the defendant-physician with the right *not* to have an expert (who does not possess the statutorily-mandated qualifications) testify against him.[62] The Legislature used no similar language in section 3151.[63] This, of course, is because when it amended section 3151, the Legislature's intention was *not* to handicap no-fault insurers at trial in defending against lawsuits for PIP benefits, but simply to quasi-immunize no-fault insurers from the possibility of court-imposed sanctions in instances where no-fault insurers deny PIP benefits based on IMEs.[64]

Thus, while section 3151 and section 3159 are unquestionably "substantive," they *do not* specifically address the matter of what IMEs can be obtained by a no-fault insurer for the purposes of litigation.[65] Nor do they specifically address what qualifications a physician performing an IME for the purposes of litigation must possess.[66] Rather, section 3151 and section 3159 are simply "silent" on these matters. Accordingly, Rule 2.311 and MRE 702 control these issues because "court rules control matters on which the no-fault act is silent."[67] Rule 2.311 or MRE 702, when applied to a no-fault insurer requesting an IME for the purposes of litigation, do not exceed the realm of "practice and procedure" and impermissibly invade upon the "substantive" nature of section 3151 and section 3159.[68]

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section 2169, but it would also contravene the cost-containment aspect of the no-fault act that our Legislature intended. Admire v. Auto-Owners Ins. Co., 494 Mich. 10, 29, 831 N.W.2d 849, 858 (2013) (citing Griffith v. State Farm Mut. Auto. Ins. Co., 472 Mich. 521, 539, 697 N.W.2d 895, 905 (2005)); Celina Mut. Ins. Co. v. Lake States Ins. Co., 452 Mich. 84, 89, 549 N.W.2d 834, 836 (1996); O'Donnell v. State Farm Mut. Auto. Ins. Co., 404 Mich. 524, 547, 273 N.W.2d 829, 837 (1979).

60. *Compare* MICH. COMP. LAWS § 600.3151, *with* MICH. COMP. LAWS § 600.2169 (1993).

61. MICH. COMP. LAWS § 600.2169.

62. *See id.*

63. *Compare* MICH. COMP. LAWS § 600.3151, *with* MICH. COMP. LAWS § 600.2169.

64. *See* MICH. COMP. LAWS § 600.2169.

65. Muci v. State Farm Mut. Auto. Ins. Co., 478 Mich. 178, 190, 732 N.W.2d 88, 96 (2007).

66. *Id.*

67. *Id.*

68. *See* McDougall v. Schanz, 461 Mich. 15, 29, 597 N.W.2d 148, 155 (1999).

Indeed, a trial court's decision to grant a no-fault insurer's request that an insured undergo an IME for use at trial, pursuant to Rule 2.311 and MRE 702, would not be "'contraven[ing] a legislatively declared principle of public policy . . . having as its basis something other than court administration.'"[69] Rather, the trial judge's discretionary grant of a no-fault insurer's request, pursuant to Rule 2.311 and MRE 702, would involve only "considerations [regarding] judicial dispatch of litigation,"[70] such as whether the requested IME physician possesses "specialized knowledge [that] will assist the trier of fact to understand the evidence or determine a fact in issue"[71] and whether the qualifications possessed by the requested IME expert will render his testimony more than a mere "waste of time, or [the] needless presentation of cumulative evidence."[72]

Therefore, because Rule 2.311 and MRE 702 do not inherently conflict with section 3151 and section 3159 where a no-fault insurer requests trial court permission to obtain an IME for the purposes of defending against a lawsuit, Rule 2.311 and MRE 702 are not rendered inapplicable in such a situation.[73] Instead, Rule 2.311 and MRE 702 remain applicable to such a situation because "the court rules control matters on which the no-fault act is silent."[74]

C. Rule 2.311 and MRE 702 Should be Read in Pari Materia with Section 3151 and Section 3159

Because, as explained above, Rule 2.311 and MRE 702 do not inherently conflict with section 3151 and section 3159, the court rules must be construed and applied so as to avoid creating tension with the statutes.[75] That is, the statutes and court rules "must be read together to produce a harmonious whole."[76]

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69. *Id.* at 31, 597 N.W.2d at 156 (citing Joiner & Miller, *supra* note 30, at 635).

70. *Id.* at 30, 597 N.W.2d at 156.

71. MICH. R. EVID. 702.

72. MICH. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

73. *McDougall*, 461 Mich. at 24, 597 N.W.2d at 153.

74. Muci v. State Farm Mut. Auto. Ins. Co., 478 Mich. 178, 190, 732 N.W.2d 88, 96 (2007).

75. *McDougall*, 461 Mich. at 24, 597 N.W.2d at 153.

76. Fradco, Inc. v. Dep't of Treasury, 495 Mich. 104, 115, 845 N.W.2d 81, 86 (2014). This is known as the doctrine of *in pari materia*, which recognizes that "'laws dealing with the same subject . . . should if possible be interpreted harmoniously.'" S.B.C. Health Midwest, Inc. v. City of Kentwood, 500 Mich. 65, 73, 894 N.W.2d 535, 539 n.26 (2017)

That being said, we know from the Michigan Supreme Court's decision in *Muci* that a court cannot utilize Rule 2.311 to refuse or render conditional a no-fault insurer's right to require that the insured submit to an IME under section 3151 and section 3159, even though the insured has filed a lawsuit against the insured.[77]

Similarly, we know from the Michigan Supreme Court's holding in *McDougall* that a court cannot utilize MRE 702 to prohibit a no-fault insurer from introducing the trial testimony of a physician who has performed an IME at the insurer's request under section 3151 and possesses the qualifications the statute mandates.[78] Rather, section 3151 reflects a "declared principle of public policy, having as its basis something other than court administration," that an IME physician possessing the qualifications mandated by section 3151 is qualified to formulate a medical opinion concerning the mental or physical condition of the insured.[79]

Moreover, we also know from the Michigan Supreme Court's decision in *Muci* that a no-fault insurer cannot utilize Rule 2.311 to obtain an IME *before trial* by an IME physician who does not possess the qualifications section 3151 requires.[80] Indeed, as aptly noted in *Muci*, Rule 2.311 "requires pending litigation."[81] Thus, the *only* way that a no-fault insurer can obtain an IME before litigation commences is under section 3151.[82] And any physician who performs a "mental or physical examination" (i.e., an IME, as opposed to a record or film review) "under th[at] section *must*" possess the qualifications mandated therein.[83]

Finally, we know that when a no-fault insurer requests an IME pursuant to Rule 2.311 for the purposes of trial, section 3151 and section 3159 *do not* apply to vest the insurer with any presumptive right to an unconditional IME.[84] Rather, "the court rules [alone] control" whether the insurer can obtain the IME and whether conditions can be imposed thereon.[85] In that regard, Rule 2.311 mandates that the no-fault insurer move the court for permission to obtain the IME.[86] Then, before the court

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(quoting ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252 (2012)).

77. *Muci*, 478 Mich. at 189–91, 732 N.W.2d at 95–96.
78. *McDougall*, 461 Mich. at 30, 597 N.W.2d at 156.
79. *Id.* at 30–31, 597 N.W.2d at 156 (internal quotation marks omitted).
80. *See Muci*, 478 Mich. at 190, 732 N.W.2d at 95.
81. *Id.*
82. *Id.*
83. MICH. COMP. LAWS § 500.3151 (2019) (emphasis added).
84. *See Muci*, 478 Mich. at 190, 732 N.W.2d at 95.
85. *Id.*
86. MICH. CT. R. 2.311.

can properly exercise its discretion to allow the IME, the no-fault insurer *must* establish "good cause" for why it should be allowed to obtain the IME and why conditions should not be imposed thereon.[87]

The "good cause" requirement, as the Michigan Supreme Court explained in *Muci*, compels the no-fault insurer to produce "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements."[88] Thus, the no-fault insurer will have to do more than make "stereotyped and conclusory" statements to the court that it needs the IME because the insured has put her physical or mental condition at issue by filing a lawsuit.[89] This, of course, will be particularly true in cases where—unlike in *Muci*—the no-fault insurer has already obtained an IME, performed by a physician whose qualifications match the insured's treating physician pursuant to section 3151, before trial.

Accordingly, the no-fault insurer will need to make a "particular and specific demonstration of fact"[90] to the court that the requested IME will not simply result in a "waste of time, or [the] needless presentation of cumulative evidence"[91] at trial, but instead will enable the insurer to obtain and present to the jury "specialized knowledge [that] will assist the trier of fact to understand the evidence or determine a fact in issue."[92] As just one example, this could be accomplished by appending an affidavit from the physician who performed the IME under section 3151 to the motion, stating that in that physician's medical opinion the physician whom the insurer seeks to have perform the IME under Rule 2.311 is more qualified to formulate and provide a medical opinion to the jury regarding the specific issues in the case than a physician possessing only the qualifications of himself and the insured's treating physician.

By interpreting and applying the court rules in the above manner, a harmony is reached between the court rules and the statutes that respects both the legislature's prerogative to statutorily implement substantive policy choices with regard to no-fault insurance and the Michigan Supreme Court's prerogative to regulate courtroom practice and procedure.

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87. *Muci*, 478 Mich. at 190, 732 N.W.2d at 95.

88. *Id.* at 192, 732 N.W.2d at 96 (internal citations omitted) (internal quotation marks omitted).

89. *Id.*

90. *Id.*

91. MICH. R. EVID. 403.

92. MICH. R. EVID. 702.

IV. CONCLUSION

Those who believe that the Michigan Supreme Court's decision in *Muci* and the Legislature's recent amendments to section 3151 preclude a no-fault insurer, defending against a lawsuit brought by the insured, from receiving court permission pursuant to Rule 2.311 to obtain an IME by a physician who possesses qualifications other than those mandated by section 3151 are simply incorrect. Nothing in the language of section 3151 or the Michigan Supreme Court's decision in *Muci* supports such an assertion.

Accordingly, if their insured serves a lawsuit, no-fault insurers should not hesitate to request such approval pursuant to Rule 2.311, where an additional IME may better equip the no-fault insurer to defend against the insured's lawsuit. Doing so will enable no-fault insurers to fulfill the legislative intent that PIP benefits not be paid to persons who did not suffer injuries arising out of a motor vehicle accident, or for treatment which is not reasonably necessary for the insured's care, recovery, or rehabilitation. Indeed, for no-fault insurers not to utilize Rule 2.311 to obtain additional IMEs where appropriate would be anathema to the long-recognized legislative intent of containing the cost of no-fault insurance—an intent that was not only acknowledged by the Michigan Supreme Court in *Muci*,[93] but is *clearly* reflected in the Legislature's recent comprehensive amendments to the no-fault act.[94]

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93. *Muci*, 478 Mich. at 188, 732 N.W.2d at 94 ("[A]n important goal of the no-fault scheme" was "economy in the handling of claims to reduce transaction costs"); *see also* Jarrad v. Integon Nat'l Ins. Co., 472 Mich. 207, 218, 696 N.W.2d 621, 627 (2005) (recognizing "the Legislature's overarching commitment in the no-fault act, and its later amendments, to facilitating reasonable economies in the payments of benefits, thus causing the costs of th[e] mandatory auto insurance to be more affordable"); Admire v. Auto-Owners Ins. Co., 494 Mich. 10, 29, 831 N.W.2d 849, 858 (2013) (citing Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co., 472 Mich. 521, 539, 697 N.W.2d 895, 905 (2005)); Celina Mut. Auto. Ins. Co. v. Lake States Ins. Co., 452 Mich. 84, 89, 549 N.W.2d 834, 836 (1996); O'Donnell v. State Farm Mut. Auto. Ins. Co., 404 Mich. 524, 547, 273 N.W.2d 829, 837 (1979).

94. For example, the Legislature enacted MCL section 500.2111f, which requires no-fault insurers to reduce the premiums charged for PIP coverage by a minimum per-vehicle amount; amended MCL section 500.3157 to implement a fee schedule in order to limit what PIP benefits can be sought for medical bills; enacted MCL sections 500.3181–500.3189 to create a "managed care option"; enacted MCL section 500.3107c and MCL section 500.3107d to provide motorists with several less expensive alternatives to the previously mandated unlimited "allowable expense" PIP coverage; and significantly revised MCL section 500.3109a with regard to coordination of PIP coverage with other health and accident coverage.