

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

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

Plaintiff,

vs. CASE NO: 12-68-CZ

THE MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION (MCCA),

Defendant.

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

Plaintiffs,

vs. CASE NO: 12-659-CZ

THE MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION (MCCA),

Defendant.

HONORABLE CLINTON CANADY, III, CIRCUIT JUDGE
LANSING, MICHIGAN -- WEDNESDAY, OCTOBER 24, 2012
MOTION FOR SUMMARY DISPOSITION

APPEARANCES:

FOR PLAINTIFF CPAN:

GEORGE T. SINAS, JD, JD
SINAS, DRAMIS, BRAKE,
BOUGHTON & MCINTYRE, PC
3380 Pine Tree Road
Lansing, MI 48911-4207

Reported by: Teresa J. Abraham, CSR (517)483-6404
Ingham County Circuit Court - cc_abraham@ingham.org

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10	None.		
11	<u>WITNESSES: DEFENDANT'S</u>		
12	None.		
13	EXHIBITS:		
14	<u>Exhibit #</u>	<u>Description</u>	<u>Received</u>
15	None.		
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1 APPEARANCES CONTINUED:
 2 OF COUNSEL FOR PLAINTIFF:
 3 NOAH D. HALL, JD
 4 ASSOCIATE PROFESSOR OF LAW
 5 WAYNE STATE UNIVERSITY LAW SCHOOL
 6 471 West Palmer Street
 7 Detroit, Michigan 48202
 8 FOR PLAINTIFF BIAMI:
 9 JAMES R. GIDDINGS, JD
 10 6000 Lounsbury Road
 11 Williamston, Michigan 48895
 12 FOR THE DEFENDANT:
 13 LORI McALLISTER, JD
 14 JOSEPH K. ERHARDT, JD
 15 DYKEMA GOSSETT PLLC
 16 2723 South State Street, Suite 400
 17 Ann Arbor, Michigan 48104
 18
 19
 20
 21
 22
 23
 24
 25

1 Lansing, Michigan
 2 October 24, 2012
 3 at about 1:33 p.m.
 4 *****
 5 THE COURT: This is in the matter of
 6 Coalition Protecting Auto No-Fault, acronym,
 7 CPAN, versus the Michigan Catastrophic Claims
 8 Association, acronym, MCCA, and the Brain Injury
 9 Association of Michigan, acronym, BIAMI, versus
 10 the Michigan Catastrophic Claims Association,
 11 MCCA. File number 12-68-CZ. Today is the 24th.
 12 May we have appearances, please?
 13 MS. McALLISTER: Your Honor, Lori
 14 McAllister and Joe Erhardt on behalf of the MCCA.
 15 MR. SINAS: May it please the Court –
 16 THE COURT: Joe who?
 17 MR. ERHARDT: Erhardt. E-R-H-A-R-D-T.
 18 THE COURT: Okay. Mr. Sinas?
 19 MR. SINAS: George Sinas, general counsel
 20 for CPAN.
 21 MR. HALL: Noah Hall appearing as of
 22 counsel for CPAN.
 23 THE COURT: Okay.
 24 MR. GIDDINGS: James R. Giddings, counsel
 25 for the Brain Injury Association of Michigan and

1 individual Defendants, Ikens, Wisser and Wolfe.
 2 THE COURT: All right. We have competing
 3 motions for summary disposition. I think the
 4 Defendant's was filed first, and in time, looking
 5 at the document, Ms. McAllister.

6 MS. McALLISTER: Good afternoon, Your
 7 Honor. We have conferred, Your Honor, just so
 8 you know, with Plaintiffs' counsel. And we've
 9 roughly allocated, in half, our time, that the
 10 Court has allotted us this afternoon. I would
 11 like to reserve a few minutes for rebuttal, if
 12 that's all right?

13 THE COURT: All right.

14 MS. McALLISTER: In getting ready for
 15 today's argument, Your Honor, I discovered that
 16 reading all of the briefs that all the parties
 17 have filed could put one in a catatonic state if
 18 you maybe weren't careful.

19 THE COURT: It did.

20 MS. McALLISTER: And so, as I thought
 21 about the argument and how might the best way to
 22 sort of hit the spots that I thought were
 23 pertinent for the Court's decision, I put
 24 together a presentation that I'm hoping will
 25 reflect properly on the Court's screen. It seems

1 CPAN's arguments that the FOIA exemption that
 2 exists is unconstitutional. They recognize that
 3 it's there in the law, that they say you should
 4 overturn it on constitutionality grounds.

5 Second, we have the Brain Injury
 6 Plaintiffs who are coming at this from a common
 7 law rights perspective, arguing theories such as
 8 the common law right to obtain public documents,
 9 trust theory, both constructive and resulting.
 10 And then CPAN, when it amended its complaint,
 11 joined the Brain Injury's common law argument,
 12 including all issues in that case.

13 So what are the rules in terms of this
 14 Court approving these issues? I think Your Honor
 15 is well familiar with the rules that have been
 16 set down in this Supreme Court in terms of
 17 statutes being interpreted as they are written,
 18 that the Constitution is – that the Court would
 19 have to go out of its way to find that a statute
 20 is unconstitutional. Statutes are presumed to be
 21 constitutional. And if there is any reading of
 22 those statutes that would render them
 23 unconstitutional, the Supreme Court has said that
 24 the Court is obligated to so hold.

25 Public policy considerations, which I

1 to be crawling toward the ceiling on the screen
 2 on the wall. I do have a hard copy of it, Your
 3 Honor, if you would like me to hand to the Court?

4 THE COURT: Yes, I would.

5 MS. McALLISTER: Okay. And, as Your Honor
 6 noted, MCCA has filed a motion for summary
 7 disposition with respect to both of the
 8 complaints that have been filed.

9 And as I again stepped back from it, I
 10 thought about the case of what it's really about,
 11 I think there are some things that we can say are
 12 an issue and that are not an issue that may help
 13 focus our inquiry this afternoon.

14 What we have in both cases is an effort by
 15 the Plaintiffs to obtain documents of an
 16 association that the Michigan Supreme Court has
 17 said is a private, non-profit association in the
 18 *League General* case. There is no question but
 19 that the legislature has provided that the MCCA
 20 records are exempt from the Freedom of
 21 Information Act or FOIA. I don't think that's
 22 disputed by anyone, nor has anyone really argued
 23 that this is an ambiguous exemption in any way.

24 So what are they attacking? I divided it
 25 roughly into three categories. First, we have

1 suspect the Court will hear a lot about today,
 2 are not a factor if the law is clear and the
 3 statute is clear and the Constitution is clear.

4 So let's back up and talk about the MCCA
 5 for a few minutes, if we may, Your Honor. As I
 6 noted earlier, the MCCA is a private association.
 7 And we have all insurance companies that are
 8 selling no-fault insurance in Michigan are
 9 required to be members of the MCCA. We have a
 10 Supreme Court decision –

11 THE COURT: Let me just ask –

12 MS. McALLISTER: Yes, Your Honor.

13 THE COURT: So, as a result of that, then
 14 every citizen who has insurance also is paying
 15 something set by the MCCA, right, a rate set by
 16 the MCCA?

17 MS. McALLISTER: Not directly, Your Honor.
 18 What happens is only the charges that the MCCA
 19 does comes in the form of an assessment. It then
 20 charges the insurance companies that are members.
 21 Only those insurance companies pay premiums to
 22 the MCCA in the form of this assessment. The
 23 insurance carriers have a right under the statute
 24 to consider the assessment and to pass it along
 25 in the form of their overall rates that they

1 charge you and I for our premium payments. You
 2 and I never pay directly anything to the MCCA.
 3 And if we stiff our insurance company for a bill,
 4 for example –
 5 THE COURT: Let me, so I can –
 6 MS. McALLISTER: Yeah.
 7 THE COURT: The MCCA has members and they
 8 assess the members?
 9 MS. McALLISTER: Correct, which are the
 10 insurers.
 11 THE COURT: It ultimately comes as a cost
 12 that the member insurance companies are entitled
 13 to pass along to the individual ratepayers of the
 14 state?
 15 MS. McALLISTER: They consider it as an
 16 expense in their rate-making procedure, that's
 17 correct.
 18 THE COURT: Passed along, right? So I
 19 guess what I'm more interested in here is the
 20 fact that if MCCA establishes whatever the
 21 assessment is to the members, knowing that the
 22 members are going to pass that on to the general
 23 public, why wouldn't the general public be able
 24 to find out or have information about how that
 25 rate, that assessment, I won't call it a rate, is

1 would seem to me since it's a mechanism to pass
 2 an assessment onto individual insurers, which is
 3 all of us, that at some point maybe the person
 4 who is paying would have a right to have some
 5 information.
 6 MS. McALLISTER: Well, Your Honor, the
 7 only way they get the kind of right that you're
 8 describing is if it is granted by law. And if
 9 they were to be deemed a public body or state
 10 agency, which under League General they are not,
 11 then the only way they could get the information,
 12 a citizen could get that information, is if the
 13 legislature authorized it under the Freedom of
 14 Information Act.
 15 There is no dispute in this case that the
 16 legislature made the decision that the MCCA
 17 records are, in fact, exempt from the Freedom of
 18 Information Act. So while the Freedom of
 19 Information Act might apply if we were a public
 20 body, and if this were a situation where the
 21 records were deemed to be public records, which
 22 is, as Your Honor knows we dispute. Even if that
 23 were the case under FOIA, the legislature has the
 24 right and has exercised that right to exempt
 25 certain records from FOIA. And it clearly has

1 set? It seems to me to be the essence of the
 2 Freedom of Information Act that if a ratepayer is
 3 paying this amount, which appears to be at least
 4 \$150 a year, then at some point wouldn't the
 5 ratepayer be able to ascertain just how that was
 6 set, whether or not the amount assessed to them
 7 was really needed?
 8 I mean, it seems that one of the questions
 9 raised by the other side is we don't really know.
 10 So here, even though there is this statutory
 11 exemption, but the result is the citizen, who
 12 ultimately is paying an assessment for this
 13 determination made by the MCCA, has no mechanism
 14 to ascertain whether it's high, whether it's low,
 15 whether it's valid or not. So that's really what
 16 I'm interested in. I have read all the briefs,
 17 so –
 18 MS. McALLISTER: All right, Your Honor.
 19 I'll try and focus.
 20 THE COURT: But I'm more concerned with
 21 why would a citizen be compelled to remain in the
 22 dark and have no, I guess, mechanism in which to
 23 ascertain whether or not it's fair or not.
 24 Whether this is, you know, they charge you too
 25 much. Are their reserves too high, too low. It

1 done so here.
 2 THE COURT: But doesn't that leave the
 3 ratepayer sort of like just having to accept
 4 whatever MCCA says is the rate that needs to be
 5 paid? I mean, that's the difficulty I have. I'm
 6 just telling you up front, that's the difficulty
 7 I have. That is, as a citizen I'm compelled by
 8 statute, if I own a vehicle, to have insurance.
 9 And then as a citizen, the insurers are, I'm not
 10 going to say compelled, but it's not unreasonable
 11 that they would then pass along whatever
 12 assessment they might receive from MCCA to cover
 13 these catastrophic claims and brain injuries to
 14 the individual rate holder. I don't have any
 15 difficulty with that.
 16 But as a ratepayer, as an insured, as an
 17 automobile owner, if I say: Well, how do I
 18 really know if this amount is accurate, is it
 19 fair, is it high, is it low, what are the
 20 reserves? Maybe I could pay \$25 a car less if
 21 the reserves were at a lower level, or if they
 22 are a higher level. But how could I decide or
 23 even make a determination if in fact I can never
 24 find out any information. I'm always held in the
 25 dark if I'm a ratepayer.

1 MS. McALLISTER: But, Your Honor, let's
2 think about that argument, okay? First of all,
3 you're only paying to your insurance company.
4 Yet, you're ordered by the law to have insurance
5 through an insurance company. But, yet, as a
6 citizen, that does not give you the right to go
7 to your insurance company and ask them to see the
8 actuarial model that supports all of the rates
9 that they file. All it does is give you the
10 right to go to OFIR, the Office of Financial
11 Insurance Regulation, and say: I want to see
12 what rates they are charging me. Carriers don't
13 file that kind of actuarial data with OFIR in any
14 circumstances. So how can you have a right from
15 one step removed from your insurance company when
16 you don't even have the right to get that from
17 your insurance company?

18 Another example that might apply, Your
19 Honor, is many companies, especially the smaller
20 ones, now get reinsurance that applies between
21 whatever amount they're willing to take on their
22 books as a risk, say \$150, they get reinsurance
23 from the layer between \$150,000 of risk and
24 \$500,000 which is when the MCCA kicks in. Yet no
25 one would argue that the citizens of this state

1 You can argue, one, that the insurance company
2 doesn't have to pass it on. That's just not a
3 real-world consideration, so they're passing it
4 on.

5 The difference in the position that you
6 take, that if I can go look at the individual
7 rate, well, I can go to a different company. If
8 I don't like it, they don't want to give me the
9 information, I can go find me a different company
10 that might be charging me a lower rate. But no
11 matter who I'm going to, I am going to be paying
12 this assessment.

13 I think that's what I'm struggling with,
14 is that no matter who I go to as the insurance
15 company, I'm paying. And I'm precluded from
16 getting any information about how that rate is
17 set. Whereas, on the individual, I mean, I might
18 even go with it, the way the statutory is set up,
19 is that if I go ask my insurance company, give me
20 their rate information, they don't have to do
21 that, or they can refer me to the Insurance
22 Bureau, I recognize that. But I could go get
23 another company. I can go from Company A to
24 Company Z. If Company Z is charging me 200 less,
25 I will say: Okay, I will go with that.

1 have the right to go to the reinsurers, Munich
2 Re, Everest, whoever the carrier is, and see
3 their books and records, see their actuarial
4 models, or see any of that.

5 Instead, what we've said is, insurance
6 companies generally are going to be monitored by
7 the insurance regulators. And the Supreme Court
8 in the *Roy v Continental* case said: That's the
9 Insurance Commissioner's job, to regulate
10 insurers, to regulate every kind of entity that's
11 formed under the insurance code.

12 So the right that you're talking about on
13 an intuitive level only makes sense if you say:
14 Well, you have got the right to see this for
15 every insurance company, every reinsurance
16 company, as well as the MCCA. That has never
17 been recognized as a right of this state, Your
18 Honor, even as to your first-level insurance
19 company, which may or may not be passing along
20 those rates to you.

21 THE COURT: Let's look at it as if I am an
22 individual insurance premium payer. I've got a
23 car, I'm paying. All right. This is a mandatory
24 assessment. In other words, I don't blame the
25 insurance company for getting their money back.

1 But here with that assessment, the
2 practical fact is you can argue that the
3 insurance company doesn't have to pass it on.
4 The practical effect is that every person who has
5 car insurance is paying this assessment and does
6 not have a mechanism to ascertain if it's fair or
7 not.

8 MS. McALLISTER: Well, Your Honor, the
9 body that has the right to decide what part of
10 the records of the MCCA are going to be public or
11 not is the legislature. And the legislature here
12 has indisputably acted and established an
13 exemption under the Freedom of Information Act,
14 just like the legislature has in a number of
15 exemptions of different kinds of records that
16 your government has, that – or other public
17 bodies have, that are not subject to disclosure.

18 If you are a taxpayer of this state, using
19 the same line of reasoning that Your Honor just
20 gave, you're going to pay that tax. Wherever you
21 live in the State of Michigan, the tax to the
22 state is going to be the same. But yet that does
23 not give you the right to go in, and without
24 exception, get the records of how our government
25 does business. There are legislative limits that

1 have been put on that right. This is a
2 legislative limit that we're talking about that
3 the government has put on that right and said:
4 For Freedom of Information Act, these particular
5 records are exempt from the scope of the act.

6 THE COURT: But you acknowledge that that
7 leaves the individual ratepayer without being
8 able to ascertain how the assessment is
9 established or what the criteria used in setting
10 the assessment?

11 MS. McALLISTER: Well, Your Honor –

12 THE COURT: They don't even know whether
13 or not their reserves are excess or not. There
14 could be excess reserves beyond what some
15 actuary – I guess we will get to that.

16 MS. McALLISTER: Yes, we will.

17 THE COURT: Some actuary would say, which
18 would have the effect of potentially reducing the
19 assessment to each insurance policy, car
20 insurance, no-fault policyholder in the State of
21 Michigan. So I think it's always difficult to
22 say that if I have to pay, I can't – I don't
23 have any right to know how the rate was set.

24 Now, this is not an attack, which I think
25 it's a little – it's not an attack. But you

1 actuarial study and certification prepared. And
2 that is made available on the website of the MCCA
3 as well as filed with the Commissioner. And that
4 report is subject to FOIA, annual audited
5 financials, where they use an independent
6 auditor, PWC, to come in, audit their financials.
7 The audited financials are put up on the website
8 and also provided to OFIR and can be obtained
9 through that way. And, in addition, the OFIR,
10 the regulator comes in and does an examination,
11 also does an independent actuarial review. And,
12 likewise publishes that exam report, both
13 available under FOIA as well as available under
14 the MCCA website.

15 Your Honor, in terms of financial data
16 about the MCCA and how it operates, literally
17 this stack in the corner of my desk is what's
18 available right on the MCCA's website. So you
19 are not operating in the dark. You are looking
20 at audited financial statements. You are looking
21 at independent, not just one, but two independent
22 actuarial reports. Those are available. The
23 certifications are filed. The regulators who
24 have gone in and had the right to review every
25 piece of paper that MCCA has and often do, is

1 have really the MCCA being, I guess, sort of
2 insulated by the assessment to the insurance
3 companies saying: We just made this
4 determination and assessed it to the insurance
5 companies. What the insurance companies do with
6 it is up to them. But the reality of it is they
7 pass it on to all the individual rate holders.
8 But the actual amount of the assessment, in
9 reality, is determined by MCCA.

10 MS. McALLISTER: Your Honor –

11 THE COURT: So why wouldn't the ratepayer
12 have some mechanism available to at least have a
13 checks and balances? It might be all right, I
14 don't know. It might be fair. But to leave them
15 in the dark on a mandatory assessment, even
16 though you may not use that terminology for this
17 assessment, it really sort of turns out in the
18 real world sense, because it seems to be a
19 mandatory assessment.

20 MS. McALLISTER: Well, I disagree with a
21 couple of assumptions, Your Honor.

22 THE COURT: All right.

23 MS. McALLISTER: For example, first of
24 all, I disagree that there is no information
25 available. Every year there is an independent

1 also – their report is also available to the
2 citizenry.

3 So there are all these levels of
4 protection that are there to say: No one is
5 cooking the books here, that these are legitimate
6 financial statements that are run by independent
7 auditors, that are run by independent actuaries,
8 and that are also, ultimately, audited, again, on
9 the back side by the regulators who come in to
10 make sure all the independent auditors and
11 actuaries were, in fact, providing accurate
12 information.

13 In addition, the MCCA has provided summary
14 information, some of which is available on the
15 website, some of which is available through OFIR,
16 where you can go and find out how many claims
17 does MCCA have. For example, you can find out
18 various – some of the information about how many
19 people are in which band, in terms of which level
20 of recovery individuals seek. All of that
21 information is on there, Your Honor. It's not a
22 situation that your hypothetical assumes, which
23 is that everybody is operating in the dark here.
24 That's just not the factual context for the
25 operation of the MCCA.

1 And the other thing, Your Honor, that is a
 2 basic premise, which I respectfully disagree
 3 with, is whether or not there has to be something
 4 that gives rise to the right to look at the
 5 documentation. If you assume that the right
 6 arises because they are a public body, which the
 7 Supreme Court has definitively ruled that they
 8 are not, but even if you look at them and say:
 9 Okay: You are a public body, you should be
 10 subject to the Freedom of Information Act. The
 11 legislature has said: This is one of many
 12 situations where we're going to accept you so you
 13 don't have a right under the law to satisfy what
 14 you believe would be an ordinary curiosity of
 15 somebody that would be looking at the situation.
 16 And, of course, we address the situation
 17 that Mr. Giddings raised. And forgive me if I
 18 slip and call him Judge Giddings. I'm not used
 19 to him being behind me instead of in front of me.
 20 But certainly the common law arguments that they
 21 made in their brief, in terms of ability to have
 22 these documents, look at these documents, really
 23 falls apart when you look at the two Supreme
 24 Court decisions with regard to the MCCA.
 25 The Supreme Court in the *Preferred Risk*

1 knows what's going on. This is an entity like
 2 most other insurance companies in this state that
 3 is highly regulated, and that is a subject to the
 4 proper regulatory oversight to make sure to the
 5 extent that there is an incidental benefit which
 6 is how the *Preferred Risk* court described it, to
 7 the extent that there is an incidental benefit
 8 that is attributable to the policies that they
 9 write, that that is protected by the fact that
 10 you have all these various levels of oversight,
 11 independent review, that are going to make sure
 12 that the books and records are accurately kept.
 13 If you think about it, Your Honor, if you
 14 were to go to the MCCA, and we were inviting you
 15 to come in as John Q. Public, and sit down in
 16 front of the table, and we were to hand you the
 17 computer run, with the actuarial data of every
 18 claim that was in the joint, and the roughly
 19 \$17 million that flows in and out on a monthly
 20 basis, out of MCCA to reimburse carriers for
 21 claims, there is nothing that you can do for data
 22 until you had not only a fancy computer, but also
 23 an actuarial degree. That kind of information is
 24 not going to be relevant to the general public.
 25 What is relevant to the general public is that

1 decision, which, of course, like League
 2 General's, is binding on this Court, the
 3 *Preferred Risk* decision says, specifically, that
 4 the MCCA is not intended to benefit the driving
 5 public. It is there to benefit the small
 6 insurers and the medium-sized insurers so that
 7 they do not go insolvent. That is the purpose of
 8 the MCCA. It is not a public purpose to make
 9 sure that all drivers who have catastrophic
 10 claims are paid.
 11 And, in fact, Your Honor, the MCCA, its
 12 very purpose, never pays a claim that would be
 13 submitted by you, me, or anybody else in the
 14 public. Because the MCCA only reimburses your
 15 insurer. Your insurer stays on the risk
 16 regardless of whether the MCCA goes broke or
 17 doesn't go broke.
 18 I would also note – forgive me, Your
 19 Honor. I would also note that the other
 20 distinguishing thing here, we are talking about a
 21 non-profit organization. This is not an
 22 organization that is set up to make a profit, can
 23 make a profit, and is also subject to the laws of
 24 this state that govern those kinds of activities.
 25 So this is not a situation where nobody

1 someone who is properly certified and trained in
 2 the actuarial sciences is able to come in, audit
 3 the records, do it in a thorough manner, and put
 4 their licensure stamp on the records and say that
 5 they are supported.
 6 Again, Your Honor, I think the disconnect
 7 in what I understand Your Honor to be saying and
 8 what we're saying is: You have to have a basis,
 9 a source for the right. Just because you might
 10 have an interest in terms of how something turns
 11 out, or how much it costs you, does not mean that
 12 you have a right to go and look at it. Just like
 13 you don't have a right to go and look at all of
 14 the state records that may affect what Your Honor
 15 will pay when you pay your taxes to the State of
 16 Michigan every year or to the federal government.
 17 THE COURT: But isn't the difference that
 18 this is something that I have to pay in order to
 19 be a driver in the State of Michigan, if I own a
 20 vehicle, I have to have insurance, and this is
 21 something I have to pay, I don't have any
 22 options, I can't go shop in the marketplace and
 23 try to get something a little cheaper. Maybe the
 24 legislature would do something for that, I don't
 25 know. I can't go in the marketplace. I just

1 have to take the amount I am assessed. I can't
 2 ask any questions because of legislative
 3 exemptions and Freedom of Information.
 4 I guess I can go to the website and look
 5 at the actuarial tables, but I can't make any
 6 inquiries about this assessment that really is
 7 mandatory and really almost rises to the level of
 8 interfering with my privilege to operate a
 9 vehicle in the State of Michigan. Because if I
 10 walked in, I said: I refuse to pay this, I can't
 11 get a certificate of insurance, which means I
 12 can't drive my vehicle in the State of Michigan
 13 without insurance, we have over – some
 14 overlapping issues. We have mandatory no-faults.
 15 You got to have – to drive the vehicle you have
 16 to have the insurance.
 17 They added on this assessment so it
 18 doesn't really fall under insurance. I agree
 19 with that assessment. It doesn't fall under it
 20 the way it's set up. It's the assessment that
 21 the individual ratepayer has no say in it, no say
 22 in it whether it was a dollar or it was \$150 a
 23 vehicle. There is no say. And I can't go
 24 anywhere else. I can't go to the marketplace. I
 25 can't go to a different company. Wherever I go,

1 THE COURT: And I agree that that is a
 2 legitimate public interest. I don't want the
 3 insurance companies to go broke. I agree that
 4 the mechanism for reinsurance, if you want to
 5 call it that, the small, the medium-sized
 6 companies say if the luck of the draw had them
 7 with some high percentage of catastrophic claims,
 8 I can see if the public interest not been forced
 9 into bankruptcy.
 10 So I want to be clear, I don't have any
 11 disagreement with the basic premise of the
 12 necessity to protect small and medium-sized and
 13 even large companies. If your numbers just were
 14 up and you have large claims, I could see that
 15 that would be a financial burden. But yet it has
 16 to be balanced with, in my opinion, we will see,
 17 with the individual ratepayer who has to pay it
 18 no matter what, whether – I agree that they have
 19 coverage in the event there was a catastrophic
 20 claim that they were involved in. But they're
 21 paying the rate when they may or may not be a
 22 person who falls in that category, or a family
 23 member may or may not fall in that category. And
 24 they are left out here with no ability to say:
 25 Well, can you explain to me why I'm paying

1 the amount, whatever it is, on an annual basis,
 2 follows me.
 3 MS. McALLISTER: Well, first of all, I
 4 would say that your being able to drive a vehicle
 5 is a privilege, it's not a right, that is
 6 protected by the Constitution. You don't have a
 7 right as a citizen to have a car and to drive it
 8 at any particular insurance rate.
 9 But, secondly, there's always burdens and
 10 obligations that flow with any kinds of
 11 privileges that you might exercise. The
 12 legislature could have said: We are going to
 13 make this reinsurance mechanism because that's
 14 essentially what this is, a reinsurance mechanism
 15 for the insurance industry.
 16 The legislature could have said: We are
 17 going to make this a state agency, and we are
 18 going to have the state funded and pay for all of
 19 the costs associated with taking care of people
 20 that have been catastrophically injured in the
 21 state. They didn't do that. Instead, they said:
 22 This is a reinsurance mechanism that is being set
 23 up for the benefit of the industry so that they
 24 don't go broke when they are paying these claims
 25 which have unlimited lifetime medical benefits.

1 whatever it turns out to be? I think it's about
 2 150 a car. How much is it?
 3 MS. McALLISTER: It's approximately, Your
 4 Honor – for discussion, that's fine.
 5 THE COURT: It could have been five. It
 6 might have been 10 when it started. I don't
 7 know, 10, whatever the amount was. And in order
 8 for them to legally drive a car in the State of
 9 Michigan, they have to pay it anyway.
 10 I'll give you an extra 15 minutes, since I
 11 butted in.
 12 MS. McALLISTER: Well, Your Honor, we're
 13 obviously here to address what you want to talk
 14 about, not what we want to talk about. Otherwise
 15 I would go forward with my slide show here for
 16 your entertainment.
 17 Your Honor, this really is no different
 18 than other private reinsurance carriers. If the
 19 MCCA didn't exist as a backstop mechanism and
 20 reinsurance mechanism for the insurance industry,
 21 they would still have to go out and get insurance
 22 unless they are a heck of a company that's
 23 willing to undertake masses amounts of potential
 24 risk. And obviously the smaller you are the
 25 bigger the risk that one claim will sink you if

1 you have a paraplegic or some catastrophically
2 injured individual that's going to require
3 millions and millions and millions of dollars of
4 care over their lifetime. But that would not
5 give you the right, even in that situation, even
6 though you have to pay your insurance rates and
7 your insurance premiums, those premiums are going
8 to be based on whatever amount the reinsurer says
9 this is what we are going to charge you this
10 year, insurance company, in order to cover those
11 risks.

12 Your Honor, there is never a situation –
13 consumers can clearly shop around. I agree with
14 your argument with respect to the fact that
15 consumers can shop around. But if you look at
16 it, you're always going to pay at least a base
17 amount for your insurance, because the state
18 mandates that you have certain levels of coverage
19 which you have no right to decline. And because
20 of that, you're always going to have a situation
21 where there is some element of payment that is
22 being made. That does not, however, convert to
23 the insurance companies who are always going to
24 charge you a certain minimum amount, whether the
25 MCCA exists or not, into state bodies that you

1 has taken on this issue. And, as part of the
2 judiciary, not only do you have to, in my humble
3 opinion, have to abide by what the legislature
4 has said, you also have to abide by what the
5 Michigan Supreme Court has said in the *Preferred*
6 *Risk* decision and the *League General* decision,
7 which, I submit to Your Honor, undercuts the
8 entire underpinnings of what has been argued by
9 these claimants here.

10 I won't try to argue that point any
11 further, Your Honor. But I do want to make sure
12 I have addressed your question before I sit down
13 and turn the podium over to – Mr. Sinas is
14 running up behind me ready to go here, so I want
15 to make sure I answered your questions.

16 THE COURT: Thank you very much. I
17 appreciate it.

18 MS. McALLISTER: Thank you, Your Honor.

19 THE COURT: Mr. Sinas?

20 MR. SINAS: Thank you, Your Honor. May it
21 please the Court, my name is George Sinas from
22 the law firm of Sinas, Dramis, Brake, Boughton &
23 McIntyre and Reisig. And I'm here in my capacity
24 today as the general counsel for CPAN and also
25 for the named Plaintiffs in the caption.

1 are entitled to go and see all of their actuarial
2 reports and see all their books and records. It
3 certainly wouldn't extend to, beyond that, to the
4 reinsurance mechanism, which is what we have
5 here.

6 I understand the policy type of argument
7 that Your Honor is advancing. I think it's the
8 same that my colleagues across the aisle here are
9 advancing in terms of why they think it would be
10 a good idea, from a public policy standpoint, to
11 make information available. But the issue before
12 the Court in which undoubtedly we will be arguing
13 up and down the chain however Your Honor decides,
14 with all due respect –

15 THE COURT: I'm just the first-line
16 decision maker. Once I learned that, it made my
17 job a lot easier.

18 MS. McALLISTER: Well, I haven't had the
19 honor with Mr. Giddings yet. But Mr. Sinas and I
20 spent a fair amount of time in those upper courts
21 arguing these kinds of issues over the years and
22 may again.

23 But the bottom line is you are tasked not
24 to decide what the public policy is, that really
25 is the legislature's job. And the legislature

1 CPAN, as the Court knows, is a broad-based
2 organization. It consists of numerous
3 organizations, associations and private
4 individuals, which has been in existence for
5 almost 10 years, and has been created regarding a
6 common interest in the preservation of the
7 Michigan Auto No-Fault Insurance System as it was
8 originally conceived by our legislature.

9 Today I'm joined by my co-counsel,
10 Professor Noah Hall, from Wayne State University
11 of Law School, and a visiting professor at the
12 University of Michigan. And, also, as the Court
13 knows, my other co-counsel, Plaintiff for the
14 Brain Injury Association of Michigan, and I'm
15 sorry, but I can't refer to him in any other way
16 other than Judge Giddings. So that's just the
17 way it is.

18 I want to take a moment before proceeding
19 with my introduction. I want to make a reference
20 to the amicus curiae that have appeared on behalf
21 of the Plaintiffs in this case. They have filed
22 two separate briefs. The first was a joint brief
23 filed by the Michigan State Medical Society, the
24 Michigan Osteopathic Association, Michigan
25 Association of Chiropractors, and the Michigan

1 Orthopedic Society. That brief was authored by
2 Joanne Swanson of the Kerr Russell firm.

3 The second brief was a brief filed by
4 the NAACP, an organization that has been in the
5 forefront of the affordability issue of no-fault
6 for many, many years. And that brief was
7 authored by Mr. Butch Hollowell who was
8 Michigan's former insurance consumer advocate. I
9 say that because I urge the Court to carefully
10 consider the wisdom that is contained in both of
11 those briefs as they really further underscore
12 the societal significance of the issues in this
13 case.

14 In terms of the format of our
15 presentations, here is what we purport to do:
16 Professor Hall will make CPAN's argument with
17 regard to the FOIA and constitutional claims that
18 CPAN and the named Plaintiffs are making. He
19 then will be followed by Judge Giddings who will
20 make an argument on behalf of BIA regarding the
21 common law claims. And unless further
22 clarification is required, CPAN will rely upon
23 the arguments made by BIA regarding those common
24 law issues.

25 So before turning the podium over to my

1 Michigan, *Shavers v Attorney General*. The
2 importance of the *Shavers* decision to the issues
3 in this case simply cannot be over-emphasized.
4 It provides the legal lens through which this
5 Court should analyze the specific FOIA
6 constitutional and common law issues that will be
7 discussed by my colleagues, because those
8 constitutional principles articulated in *Shavers*
9 are really inextricably connected with the claims
10 made in the Plaintiff's.

11 And it is indeed, Your Honor, to use the
12 Defense's words, the law, the basis of the rights
13 that Claimants have in this case to the
14 information that they seek, a law that the
15 Defendant just doesn't want to deal with.

16 What did *Shavers* tell this Court and all
17 of us here in Michigan? It held that the
18 compelled purchase of privately sold insurance
19 policies so fundamentally affected the liberty
20 and the property of Michigan citizens that it was
21 absolutely necessary to extend the due process
22 safeguards and equal protection guarantees to the
23 entire system so that Michigan citizens could
24 purchase no-fault insurance at a, quote, fair and
25 equitable rate, a phrase used about eight times

1 able colleagues, I would like to make the brief
2 introductory comment regarding the nature of this
3 case and its significance to the citizens of
4 Michigan. And it is, after listening to my
5 esteemed adversary give her presentation, it is
6 the key issue that the Defendant clearly wants to
7 avoid in this case. And the prelude to this key
8 issue occurred 40 years ago when the Michigan
9 legislature enacted the Michigan Auto No-Fault
10 Insurance law, which, at the time, was
11 revolutionary. It implemented a compulsory auto
12 no-fault insurance system that obligates the
13 owners and registrants of every vehicle in this
14 state to buy insurance. And, if they don't, they
15 are subject to criminal conviction and the
16 possibility of imprisonment. Nobody can opt out.
17 Nobody.

18 Now, we should think about that for a
19 minute, given the context of this case. The
20 notion that our government can compel its
21 citizens to do business with private enterprise,
22 or go to jail if they refuse, was so novel and so
23 potentially dangerous that it set the stage for
24 one of the most significant Supreme Court
25 decisions in the history of the State of

1 in that case. And the court found that those
2 protections were lacking in the no-fault system,
3 and, therefore, declared it unconstitutional
4 unless the legislature responded with curative
5 legislation, which it did a few months later in
6 the form of the essential insurance act.

7 And after that bill was passed, the
8 Plaintiffs in *Shavers* abandoned any further
9 constitutional challenges. However, the *Shavers*
10 case continues to be a very important cornerstone
11 of Michigan Auto No-fault and constitutional law,
12 as the NAACP brief pointed out when it listed the
13 dozens and dozens of appellate court decisions
14 and recent Supreme Court decisions where *Shavers*
15 continues to be cited time after time after time.

16 But the best way and the most helpful way
17 for me to emphasize the importance of *Shavers* to
18 this Court in the case at bar is to take just a
19 few minutes to actually reflect upon the words
20 used in this case. Because, Your Honor, I
21 passionately believe that those words are the
22 intellectual, academic and scholarly construct of
23 a decision in this case.

24 Here is what the Court said in its words.
25 Quote:

1 "In choosing to make no-fault insurance
2 compulsory for all motorists, the legislature has
3 made the registration and operation of a motor
4 vehicle inexorably dependent on whether no-fault
5 insurance is available at fair and equitable
6 rates.

7 Consequently, due process protections,
8 under the Michigan and United States
9 Constitution, are operative. The availability of
10 no-fault insurance and the no-fault insurance
11 rate regulatory scheme are accordingly subject to
12 due process scrutiny." Closed quotes.

13 And then in articulating that important
14 principle, the Court goes on to make this
15 observation. The Court tells us that because of
16 the compulsory nature of the no-fault insurance
17 and role that it plays in furthering the general
18 welfare of this society, the auto insurance
19 industry, in essence, becomes the surrogate of
20 government. This is a powerful notion. And here
21 is what the Court said so that you don't have to
22 take my words for it. Quote:

23 "In effect, insurance companies are the
24 instrument through which the legislature carries
25 out a scheme of general welfare. There exists a

1 open to public inspection only after the filing
2 becomes effective."

3 This certainly is questionable due
4 process.

5 "Individuals must have the knowledge
6 necessary to protect themselves against erroneous
7 or discriminatory underwriting and rate-making
8 decisions." Closed quotes.

9 So, Your Honor, I respectfully submit that
10 these words of *Shavers*, these tools that will
11 help courts get through these issues, give rise
12 to two fundamentally important take-away
13 principles that ought to control the adjudication
14 of the issues in this case. Principle number 1:
15 Because the MCCA plays such a fundamental role in
16 the overall operation of the Michigan statutory
17 no-fault system, it clearly should be subject to
18 the strict due process scrutiny that is
19 referenced and required by *Shavers*.

20 And although the MCCA may technically be
21 labeled a, quote, "private association," given
22 this clear language in *Shavers*, it ought to be
23 easy to deem that association, quote, "one of the
24 instruments in which the legislature carries out
25 a scheme of general welfare so that the action of

1 sufficiently close nexus between the state and
2 the challenged action of the regulated activity
3 so that the action of the regulated activity may
4 fairly be treated as that of the state itself."
5 Closed quotes.

6 And finally *Shavers* articulates a
7 principle that really is at the core of this
8 case. That principle is this:

9 The people's right to due process in the
10 context of Michigan's auto no-fault insurance
11 system can only be protected if our citizens have
12 full knowledge and full access to any information
13 that is relevant to rate-making, not full access
14 to the information that the MCCA decides to post
15 on its website. That's not in conformity with
16 the constitutional protections that are enshrined
17 in this important decision.

18 And if you look at the words again, you
19 see that principle of knowledge so clearly
20 stated. *Shavers*. Quote:

21 "Due process, at a minimum, requires that
22 persons affected have notice as to how their
23 rates are determined in an adequate remedy
24 regarding that determination. Filings and
25 supporting information submitted by insurers are

1 the entity may be treated as the head of the
2 State itself."

3 And the second principle, the public's
4 right to access information that is relevant to
5 the insurance rates they pay is fundamental at
6 the core of the constitutional protection
7 guaranteed by *Shavers*.

8 Therefore, Your Honor, I submit it's
9 pretty easy to see that if there is no
10 transparency in no-fault, there is no justice.

11 So we ask in this case for nothing more
12 than this: For this Court to open the door of
13 the Catastrophic Claims Association so that our
14 citizens and our lawmakers are able to access
15 information that they have a constitutional right
16 to obtain the facts, all of the facts that impact
17 the mandatory insurance premiums that they are
18 forced to pay in this state.

19 And, you know, Your Honor, as a concluding
20 observation, in a free society citizens should
21 have a right to know about matters such as this.
22 And obtaining that knowledge should never be this
23 difficult. Because when it is, citizens can only
24 wonder. And in this case they do wonder what is
25 it that the MCCA is trying to hide.

1 The relief we request here is modest
 2 relief. But it is, make no mistake about it,
 3 that the foundation of our entire legal system,
 4 what we seek here is the truth, the whole truth
 5 and nothing but the truth.
 6 With those thoughts in mind, it's my
 7 pleasure to introduce my co-counsel Professor
 8 Noah Hall from Wayne State University. Thank
 9 you, Your Honor.
 10 THE COURT: Professor Hall?
 11 MR. HALL: Thank you, Your Honor. Thank
 12 you for your time here today.
 13 THE COURT: Why don't you set your things
 14 on the other side on the table rather than on the
 15 machine?
 16 MR. HALL: I am sorry. We didn't get to
 17 see the rest of that Powerpoint presentation,
 18 Your Honor.
 19 I would like to pick up where co-counsel
 20 left off, and, frankly, where Your Honor left off
 21 in questioning some of the arguments and
 22 assertions made by counsel of MCCA.
 23 Specifically I want to talk about the
 24 Freedom of Information Act and how it applies
 25 here, and what this Court's duty is under the

1 like to start with the Freedom of Information Act
 2 and its definition of public body that is central
 3 to our arguments and central to MCCA's defense.
 4 The MCCA says over and over again they're
 5 not a public body. They say it in their brief.
 6 They said it in correspondence before this Court.
 7 They've said it in correspondence with our
 8 client. That assertion that the MCCA is not a
 9 public body fails so many ways that, frankly, it
 10 is kind of a waste of this Court's time to keep
 11 making the same assertion over and over again.
 12 I will start with the statutory definition
 13 of public body right out of the Freedom of
 14 Information Act. Unlike a state agency
 15 definition or a definition of a state actor or a
 16 public body, for other purposes, albeit the
 17 Administrative Procedure Act, or liabilities of
 18 state officers, the Freedom of Information Act
 19 has its own definition of public body. And it's
 20 a far more broad definition of public body that's
 21 contained in those other statutes.
 22 The Freedom of Information Act says that a
 23 body is a public body if it meets one of two
 24 requirements. And it doesn't need to meet both
 25 of them. Just one of the two. It was either

1 Freedom of Information Act as well as the
 2 citizens.
 3 Picking up where Your Honor left off with
 4 opposing counsel, opposing counsel is stressing
 5 to Your Honor the need to follow the words of the
 6 legislature. This Court must uphold the
 7 legislature's laws. Of course, that's true, but
 8 that's not the complete story.
 9 This Court also must uphold the
 10 constitutional rights of citizens as provided by
 11 the U.S. Constitution and the Michigan
 12 Constitution. And this Court must uphold the
 13 common law unless it was expressly amended or
 14 altered or appealed in some way by an act of the
 15 legislature.
 16 So what we are dealing with here is the
 17 constitutional rights and the common law rights
 18 as well as the statutory enactments. And I think
 19 it's misleading to simply say that this Court
 20 must follow one section of the Michigan Compiled
 21 Laws and ignore the entire Freedom of Information
 22 Act, the Michigan Constitution, as well as the
 23 strong body of case law supporting a common law
 24 right to have information.
 25 So if it's okay with Your Honor, I would

1 created by statutory authority or funded
 2 primarily through statutory authority.
 3 Here the Michigan Catastrophic Claims
 4 Association was very much created by statutory
 5 authority. That's the organic statute, MCL
 6 500.3104, that's been brought to this Court's
 7 attention in response by both parties in this
 8 proceeding.
 9 And, as Your Honor very eloquently and
 10 precisely described, the MCCA is funded by
 11 statutory authority. Even if the check written
 12 is to your private insurance company, and your
 13 private insurance company takes \$1,000 of your
 14 check and puts it in their account, and takes
 15 \$150, bundles it up with the other \$150 and sends
 16 it up to the MCCA, none of that changes the
 17 statutory analysis that this entire funding
 18 scheme is provided, actually mandated, by
 19 statute. So clearly the MCCA meets the public
 20 body definition.
 21 Furthermore, if the MCCA weren't the
 22 public body, there would be no dispute, no need
 23 for the legislature to attempt to exempt the MCCA
 24 records from disclosure as a public body. MCCA
 25 is not a public body. The records aren't subject

1 to disclosure under the Freedom of Information
2 Act. They might be subject to disclosure under
3 the common law claims.

4 If MCCA is not a public body, its records
5 aren't subject to disclosure, that's not the tact
6 the legislature took in attempting
7 unconstitutionally, to exempt these records. The
8 legislature didn't say the MCCA is not a public
9 body. Instead, the legislature said: The
10 records of the MCCA, actually the records of a
11 wholesale carve-out of about a half dozen
12 insurance associations, are exempt from
13 disclosure. It's a very different statutory
14 definition.

15 Finally, Your Honor, the notion that the
16 MCCA isn't a public body as determined by the
17 Supreme Court is completely misleading statement
18 of law to this Court. The Supreme Court's case
19 League General, was deciding one issue and one
20 issue only, which is whether the MCCA is a state
21 agency subject to the Michigan Administrative
22 Procedures Act. The definitions for state
23 agencies and state actors under the
24 Administrative Procedure Act are very different
25 and very narrow under the public body that's been

1 Frankly, you articulated it better than I would.

2 The legislature, nonetheless, carved out,
3 at the time of FOIA, about 20 exceptions to
4 disclosure on the FOIA. Things like personal
5 records. Medical information. Attorney/client
6 privilege information. Communications with your
7 counselor, even your spiritual counselor. The
8 legislature specifically exempted those records
9 from disclosure under FOIA.

10 If you look under 15.243, which is where
11 the Michigan Compiled Laws, the legislative
12 exemptions to FOIA are enumerated, the original
13 list that FOIA was passed in 1976 have about 20
14 items on the list. It went down to the letter
15 T, if anyone's counting. Well, over the years
16 the legislature has come across new types of
17 information and new situations which warrant
18 exemptions from disclosure. Despite the strong
19 public policy purposes of FOIA, time to time some
20 things should be exempted. Typically and
21 constitutionally, when the legislature wants to
22 identify a new record or a new type of
23 information, that should be exempted from
24 disclosure, it adds to that list at 15.243.

25 So in 1976, when FOIA was enacted, 15.243

1 at issue under FOIA. So to keep citing the
2 League General cases, citing controlling Supreme
3 Court law, that this Court is compelled to
4 follow, in determining that MCCA is not a public
5 body is entirely misleading. The most factually
6 and legally correct statement that could be made
7 is that the Supreme Court has yet to rule
8 definitively whether the MCCA is a public body.
9 But here we have the clear language of the
10 statute, legislature's actions, as well as the
11 different definitions between the APA and FOIA
12 that lead us to this conclusion.

13 So the MCCA is a public body. That's
14 beyond dispute. Then the question is: Did the
15 legislature carve out an exemption for the MCCA's
16 records from its own statutory scheme.
17 Admittedly, this is where things get voluminous
18 in terms of briefing to the Court. The story
19 goes something like this:

20 The Freedom of Information Act, as it was
21 enacted in 1976, with a huge public purpose
22 behind it of enabling the public to have
23 information about the goings on of government and
24 public bodies so they are more informed. The
25 Court's well aware of the purpose behind FOIA.

1 went down to letter T of exemptions, about 20 of
2 them. Now they used up the whole alphabet, they
3 went down to Y. For some reason they started
4 writing at number two. They had kept going. So
5 they've added about 10 more since 1976. So
6 15.243 now has about 30 exemptions. And the
7 legislature here could have easily done that.
8 They could have simply said, the legislature
9 could have simply enacted a public act that
10 amends the Freedom of Information Act 15.243 as
11 subsection Q, R, S, Z, whatever it needs to be,
12 and says: Records of the MCCA relating to
13 whatever types of information are exempt from
14 disclosure under FOIA. Of course, that's not
15 what the legislature did.

16 The legislature could have even gone into
17 MCL – gone into Chapter 31, dealing with the
18 Michigan catastrophic claims association, the
19 organic statute for this agency and made clear
20 that in its organics statute they were exempting
21 certain records from disclosure. The legislature
22 didn't do that.

23 Instead, the legislature enacted a Public
24 Act that failed, first of all, to identify in its
25 title what it was doing. There was no mention,

1 whatsoever, of exemption from disclosure under
 2 FOIA. It then did a wholesale carve-out, not
 3 just of specific record, not just specific
 4 records of the MCCA, but of all records of a list
 5 of insurance industry associations, and attempted
 6 a wholesale carve-out of all of those records
 7 from the Freedom of Information Act. That
 8 violates Article 4, Section 25 of the
 9 Constitution.

10 And while counsel for the MCCA has urged
 11 this Court to uphold the law as they see it,
 12 meaning the language of 500.134 from the Michigan
 13 legislature, CPAN and BIAMI respectfully urge
 14 this Court to uphold the law, meaning Article 4,
 15 Section 24 and Section 25 of the Michigan
 16 Constitution as well as due process requirements
 17 that we have already addressed.

18 Here is the problem with what the
 19 legislature did. This is not just some little
 20 old nitpicky lawyerly problem. This is a very
 21 big problem, and is very misleading to the
 22 general public. The Freedom of Information Act
 23 is a rather unique statute in that citizens often
 24 go with directives, don't use an attorney. This
 25 Court might have seen cases before where a

1 those other exemptions, that when the citizen
 2 reads the FOIA exemptions, they are aware that
 3 they're reading a full list.

4 Now, to try to save this unconstitutional
 5 enactment, 500.134, counsel for MCCA points to a
 6 section of FOIA, 13(1)(d), which says:

7 "Other records as specifically described
 8 and exempted by statute."

9 Now, this is a very narrow exemption. And
 10 the legislature used clear language specifically
 11 described with the intent of creating a small
 12 opening so that a record that's described, for
 13 example, in the Social Security acts, or the
 14 Criminal Code, and is identified, specifically,
 15 and the legislature at the time of that enactment
 16 said this record should be exempted from FOIA,
 17 that it's cross-referenced in there and does so.
 18 That's not what they did here, though. Here they
 19 didn't describe the specific record elsewhere in
 20 the code, and then refer back to that as being
 21 exempt under FOIA.

22 Instead, they carved out a whole category
 23 of public body's records and exempt them
 24 wholesale from FOIA. That's not how the system
 25 is supposed to work. When you combine that with

1 citizen, Joe Citizen, writes up on a piece of
 2 paper a Freedom of Information Act request to a
 3 state agency to get information. Most citizens
 4 don't have the resources to hire law firms to
 5 write their Freedom of Information Act requests.
 6 They do it themselves.

7 The Michigan Attorney General's office has
 8 even provided really useful information to help
 9 citizens identify which information is subject to
 10 FOIA and what's exempt. All this is based on the
 11 FOIA statute itself, so that when a Michigan
 12 citizen opens the Michigan Compiled Laws to read
 13 about the Freedom of Information Act, they go to
 14 one place, the Freedom of Information Act. That,
 15 what's required by Article 4, Section 25 of the
 16 Michigan Constitution, which says that no laws
 17 may be altered, amended or repealed by reference
 18 only.

19 If the legislature wants to make a change
 20 in that law, they have to republish and reenact
 21 that entire law at length. The reason it's very
 22 straightforward, if the legislature wants to
 23 exempt information from FOIA, it shouldn't bury
 24 that exemption in the insurance code at 500.134,
 25 it should put it right in FOIA ideally with all

1 the fact that the legislature in this Public Act,
 2 Public Act 349 of 1988, didn't even say in the
 3 title to the act that they were amending FOIA,
 4 altering FOIA, or exempting records of disclosure
 5 from FOIA, you're left with a very confusing
 6 picture as a Michigan citizen.

7 FOIA says one thing: The organic statute
 8 for the agency is silent and buried elsewhere in
 9 the insurance code as a wholesale exemption from
 10 FOIA with a title that doesn't even identify that
 11 that's what the statute does. At the end of the
 12 day Michigan citizens are left simply not knowing
 13 what the law was. And there is a solution to all
 14 of this, of course. The legislature can enact an
 15 exemption to FOIA, recodify FOIA, 15.243, and
 16 clear up any confusion for Michigan citizens.

17 With that, Your Honor, unless there's any
 18 questions on the Freedom of Information Act and
 19 constitutional claims, I would like to turn it
 20 over to my co-counsel, Mr. Giddings.

21 THE COURT: Thank you, Professor.

22 MR. HALL: Thank you for your time, Your
 23 Honor.

24 THE COURT: Judge Giddings?

25 MR. GIDDINGS: Good afternoon, Your Honor.

1 Again, I'm James Giddings appearing on behalf of
2 the Plaintiffs, the Brain Injury Association of
3 Michigan, Richard K. and Eileen Ikens, Doctor
4 Kenneth and Susan Wisser and Gregory A. and Karen
5 Wolfe.

6 Before the Court is the Defendant's motion
7 for summary disposition brought under MCR 2.116
8 (C)(8). And they have referenced another aspect
9 that they call, alternatively, a (C)(10) motion.

10 We also had a summary disposition motion
11 under (C)(10) which we have withdrawn as
12 indicated in our last documentation. The reason
13 being that the case is not factually ripe for
14 decision. It's a (C)(10) case. We have
15 attempted to reach an agreement as to a
16 stipulation of facts. We were not successful in
17 doing that. So, as it stands now, there are a
18 raft of disputed facts. And so, for the same
19 reason, any ruling on MCCA's alternative (C)(10)
20 motion would be premature because the Defendant
21 has not answered complaints of CPAN or the Brain
22 Injury Association. There's been no meaningful
23 discovery. And a (C)(10) motion must be
24 supported, as you well know, by affidavits,
25 depositions, admissions, and other documentary

1 of Michigan, auto policy holders, the ratepayers.
2 These auto insurance ratepayers claim their
3 financial interest as Michigan auto policy
4 holders who are entitled to fair and reasonable
5 rates. And the rates that are set by MCCA
6 directly affect their pocketbook. And if our
7 ratepayers don't pay, and they're caught
8 operating their own motor vehicle in violation of
9 the law, as I'm sure you well know, they can go
10 to jail. There is that sanction. They will pay
11 a fine. I never heard of a failure to pay in a
12 insurance no-fault case in Michigan where
13 somebody didn't at least didn't pay a fine.

14 We also assert on behalf of the
15 Plaintiffs, a special private and economic
16 personal interest of catastrophically injured
17 victims of covered automobile accidents to be
18 assured that the adequacy of their current and
19 future care will not be in jeopardy because of
20 the MCCA's mismanagement or because of deficient
21 rate-setting practices.

22 Now, the MCCA has argued that we have no
23 special interest, asserting that the MCCA is
24 funded entirely by private insurers. They
25 attempt to reinforce this argument by stating

1 evidence.

2 So that's where we stand. We have a
3 (C)(8) motion before the Court. And people are
4 here on behalf of the Brain Injury Association. I
5 am here to contest that motion.

6 I would point out, initially,
7 parenthetically, that the Defendant, in its
8 brief, from reasons that are not clear to me,
9 consistently misrepresented BIAMI Plaintiff's
10 position talking about where our focus is, the
11 public interest. That is not our focus. For
12 example, the Defendant attributes to the BIAMI
13 Plaintiffs, a claim that Plaintiff's common law
14 right, quote, and this is their language, quote:

15 "Hinges on whether the interest involved
16 is public."

17 We make no such claim, never made any such
18 claim anywhere in our documentation, or, for that
19 matter, in the complaint. They make similar
20 assertions throughout their brief.

21 Our claim is not based on an assertion of
22 public interest that somehow entitles us to
23 examine MCCA records. The interest we assert on
24 behalf of the binding Plaintiffs is not a public
25 interest, but a special private economic interest

1 that the Supreme Court, in *League General v MCCA*,
2 I don't think you probably need a citation, found
3 that, and, again, these are their words, not
4 mine, quote:

5 "Any benefit to the policyholders from the
6 MCCA is merely incidental."

7 That's contained in their response to our
8 submission and that of CPAN on page 17. The
9 Supreme Court never said that. The Supreme Court
10 never made that statement. The *League General*
11 court never made mention of the word, quote,
12 "policyholders" in that decision. They never
13 made mention of any benefit to policyholders
14 arising from the creation of the Michigan
15 Catastrophic Claims Association. The only
16 benefit they mentioned was an incidental benefit,
17 quote, "to the public," which is not surprising
18 given that the Supreme Court said that the sole
19 issue before them in that *League General* case was
20 whether MCCA was a state agency. The special
21 interest we claim is not some self-serving lawyer
22 created concept. Rather, it's a distinction
23 established by the Michigan Supreme Court. The
24 Michigan Supreme Court declared, as Mr. Sinas has
25 already referenced in *Shavers v Michigan Attorney*

1 General, that, quote:
 2 "Michigan motorists are constitutionally
 3 entitled to have no-fault insurance made
 4 available on a fair and equitable basis." They go
 5 on and require that ratepayers have, quote,
 6 "notice" as to how their rates are determined,
 7 and an adequate remedy regarding that
 8 determination.
 9 So long as the Defendant, MCCA, carries on
 10 its rate-setting practices in secret, the
 11 Plaintiffs, Michigan's ratepayers, and, frankly,
 12 the other Plaintiffs, have no way of determining
 13 how the rates are set, or if the rates which are
 14 being paid are in fact excessive, discriminatory,
 15 or unreasonable.
 16 Now, one of the things MCCA says is:
 17 Well, we have audits, financial statements,
 18 certified. They are on our website. Statements
 19 about the sufficiency of our reserves. The
 20 interesting thing about all that documentation
 21 is, it doesn't say a word one about the
 22 rate-setting process, and about whether or not
 23 the actuarial standards, which are being
 24 employed, are being properly employed. And so
 25 it's nice that they put that information out

1 Justice Boyle's opinion in *Preferred Risk* is
 2 pretty informative as to who ultimately is paying
 3 the freight in the situation.
 4 The Defendant, MCCA, has acknowledged that
 5 it has not filed reports under 2406 of the
 6 Insurance Code. And we claim, again, in our
 7 complaint, that there's no meaningful review,
 8 evaluation, or oversight of the assessments set
 9 by the MCCA.
 10 The common law of this state, the historic
 11 common law, which is still viable under Article
 12 3, Section 7, Michigan courts have for years
 13 recognized the rights of access to public records
 14 to citizens. And that's the *Nowack* case, which
 15 is cited in our brief. In *Nowack* the Court
 16 acknowledged the right of an individual to
 17 inspect the public records because of a, quote,
 18 "special interest not possessed by the citizens
 19 generally."
 20 And that, as I indicated, incorporated
 21 into Michigan jurisprudence by Article 3, Section
 22 7, Defendant argues that its records are not
 23 public. Although it makes no difference to the
 24 claim of the Brain Injury Association Plaintiffs
 25 whether they are public or private. We happen to

1 there. But in terms of the constitutional rights
 2 of Michigan ratepayers, it's meaningless.
 3 Further, the catastrophically injured
 4 victims of accidents covered – involving covered
 5 vehicles are entitled to know that the assets are
 6 being managed by MCCA are not jeopardized by
 7 mismanagement or poor rate-setting practices.
 8 This Court should reject the MCCA's
 9 meritless claim that the Plaintiffs enjoy no
 10 special interest separate from that of the
 11 general public.
 12 I might indicate that for the purposes of
 13 the (C)(8) motion, the Court must accept as true
 14 the allegations which would make – which include
 15 that it is the policyholders and not the
 16 taxpayers and not the public or anyone else who
 17 ultimately pays the entire cost of the care and
 18 treatment of catastrophically injured victims in
 19 excess of the statutory allowance prescribed by
 20 3104, despite the insistence of MCCA to the
 21 contrary that it's the caregivers.
 22 That is – that's our allegation. It may
 23 turn out that we can't prove it. We believe that
 24 we can prove it. We think ultimately there would
 25 be no question. And, as a matter of fact,

1 disagree. I'm not going to discuss at length.
 2 I've set forth 12 reasons at pages 13 and 14 of
 3 my original brief, which I think are persuasive
 4 reasons why these records are in fact public.
 5 But even if these records are considered
 6 private records of a private association, our
 7 right of access is unencumbered, because it's not
 8 the nature of the record that's important, it's
 9 the nature of our interest that is significant
 10 and compelling.
 11 This conclusion is evidenced by the common
 12 law right of the shareholders and others to
 13 inspect the books and records of private
 14 corporations as long as the individual can show
 15 some, quote, "interest at stake which renders the
 16 inspection necessary." That's from *People ex*
 17 *rel. Bishop v Walker*, a case that I cited again.
 18 Other jurisdictions in American
 19 Jurisprudence follow the same rule including *In*
 20 *Re: Steinway*. I reference that because it has a
 21 lengthy rationale discussion about the importance
 22 of the right of a person seeking the records.
 23 That is 159 NY 250. It's an old case, 1899. Not
 24 as old as *Bishop*, however, which is an 1861 case.
 25 The Defendant says the shareholder's right

1 to access to public records is not analogous
2 here. Actually, we suggest, it's the perfect
3 analogy for the simple reason that Michigan auto
4 insurance ratepayers are the *de facto* owners of
5 MCCA. They have paid and continue to pay and
6 will pay in the future unless the legislature
7 changes its entire process, all the catastrophic
8 claims in excess of the statutory limits, as well
9 as the administrative costs of the Michigan
10 Catastrophic Claims Association.

11 I might add, with regard to the common law
12 claim, other common law cases that we cited in
13 the brief, and I'm not going to repeat citations
14 here, underscore the fact that the Plaintiffs
15 have a right to corporate business records
16 regardless of whether or not they are a
17 shareholder. This is an important thing, because
18 although we claim we are *de facto* owners, their
19 cases, many cases in English common law that make
20 clear that regardless of any ownership interest,
21 if you had a legitimate interest in the subject
22 matter contained in the books of a corporation,
23 even if you were a, quote, "stranger that is not
24 a shareholder," you could bring an action and
25 obtain a writ that would entitle you to inspect

1 not foreign at all. It's a part of our body of
2 law. And in *In Re Sanderson* 289 Michigan 165,
3 which you have there, it says, and I quote – by
4 the way, this is from page, I believe, 174.
5 Quote, the common law, including the English
6 statutes of early application made the law of the
7 northwest territory by the ordinance of 1787
8 continued to be the law of Michigan during the
9 territorial period. And the early constitution
10 adopted that as Michigan common law. Of course,
11 that's been reincorporated with each new
12 constitution and now with Article 3, Section 7 of
13 the Michigan Constitution, all incorporated.
14 It's a part of the Michigan law. It's a part of
15 our legal history, if you will, the foundation of
16 Michigan law.

17 So there is no question that under the
18 common law, persons have the right to access
19 private records that affect their legal rights,
20 that affect their financial rights, affect their
21 personal interest. Plaintiffs and the Michigan
22 policyholders have a specific and
23 constitutionally-protected financial interest
24 that is directly and significantly impacted by
25 the rate-setting practices of the MCCA. We know

1 those records that relate to you and your
2 business.

3 And such cases as *Gary and Hopkins*,
4 *Corporation of Barnstable v Lathy* and *Mayor of*
5 *Lynn v Denton*, these are all English cases from
6 the 18th century, actually.

7 Now, the Insurance Institute of Michigan
8 and the Michigan Insurance Coalition dismissed
9 this early English case law as mere, quote,
10 "foreign authority." That's at page 6 of their
11 amicus brief. But they're wrong.

12 And, excuse me, Your Honor, for just one
13 second here. I want to provide something, if I
14 might do that. These are cases that – actually
15 I have two cases which you already have
16 referenced to in my response. May I approach the
17 bench?

18 THE COURT: You may.

19 (Counsel hands the Court a document.)

20 MR. GIDDINGS: I have given this to
21 counsel, the *Sanderson* case and the *Phillips*
22 case. *Phillips* was authored by then Chief
23 Justice Clifford Taylor. And in that he notes at
24 page 426, note 10, how the English common law was
25 adopted as part of Michigan jurisprudence. It's

1 that because *Shavers* told us so.

2 The Plaintiffs here have a right of the
3 direct action under MCCA to secure under that
4 which Plaintiffs are entitled to under common
5 law, the information mandated by *Shavers*, since
6 it is not otherwise available.

7 The Defendants have argued, I will briefly
8 comment, they say: Our common law claims,
9 BIAMI's common law claims are preempted by the
10 Freedom of Information Act, referencing, again,
11 this act which has been discussed on the record,
12 500.134. And they say it specifically preempted
13 the common law.

14 The legislature can preempt the common
15 law. That's clear from both newspapers and from
16 the *In Re: Midland Publishing* case. But they
17 didn't do it here.

18 Assuming for the moment that Section 134
19 is constitutional, at most exempts MCCA records
20 from a breach of the FOIA, but it does not
21 foreclose common law rights to information
22 because it does not touch on the request for
23 records grounded on some lawful basis other than
24 the FOIA. In other words, to put it another way,
25 134 will preempt the common law with regard to

1 Plaintiff's interest-based claim for information
2 only if the FOIA itself, as originally enacted,
3 encompassed such a request for information as
4 made by Brain Injury Association Plaintiffs. It
5 didn't do that and we know that. We know that by
6 looking at the preamble which talks about public
7 access to certain public records. That's not our
8 claim.

9 Moreover, MCL 15.231 recites the policy of
10 the FOIA, and talks about both complete
11 information about the affairs of government so
12 that the people shall be informed so that they
13 can, quote, participate in the democratic
14 process. That has nothing to do with the
15 financially, personally based claims of the Brain
16 Injury Association Plaintiffs.

17 We are not here participating, at least in
18 specifics, into the democratic process. We seek
19 information which affects our pocketbook, which
20 affects our rights in a process which we are
21 compelled, without information, to participate.
22 And that is the information. And that is not, I
23 suggest, in a fair reading of 231 within the
24 scope of the Freedom of Information Act.

25 We are making no claim on behalf of the

1 stuff. So what did I find out? Resulting trust
2 is really where you have an interest in property
3 where the beneficial and legal interest becomes
4 separated.

5 And MCCA, the Defendants have given us a
6 quote at page 26-27 which describes perfectly our
7 situation. MCCA has no beneficial interest in
8 the literally billions of dollars of preserves in
9 their possession. They have no beneficial
10 interest. And we know that because everything
11 that they do with those funds is controlled by
12 statute or by their arrangements with the
13 carriers. And all those premium dollars that
14 they get, they say, are paid by the carriers. We
15 say they're paid by Michigan's Automobile
16 ratepayers.

17 But what is not disputed is there is this
18 separation of claim. They believe they have the
19 legal interest in this. The beneficial interest
20 is somewhere else. And they acknowledge that the
21 beneficial interest is elsewhere. They say the
22 beneficial interest is in the insurance carriers,
23 AAA, State Farm. They may be right. I think
24 there is some beneficial interest there. But the
25 fact that the Plaintiffs don't hold beneficial

1 general public for the general public interest.
2 By its express terms FOIA addresses only access
3 to public records, generally, not all records.
4 If the records in the possession of MCCA are
5 private, arguably in limitation to or amendment,
6 the FOIA can have no effect on Plaintiff's common
7 law claim.

8 Likewise, if the person making a request
9 enjoins a special interest, as we have claimed we
10 have alleged, it's not disputed. And separate
11 and distinct of that of the general public, FOIA
12 does not address such a claim. There is no
13 preemption, we suggest, based of our common law
14 claims as a result of MCL 500.134.

15 I am going to briefly finish up here. I
16 know it's been a long afternoon for you. The
17 Defendants say there is no resulting trust. At
18 page 26-27 of their brief in support they give a
19 definition of resulting trust, and it sure looks
20 like what we've got. And a resulting trust,
21 really, simply, and to be honest, before this
22 whole thing ever started, I never had never even
23 heard of a resulting trust. And I started
24 digging. This is what you do when you retire,
25 and hang out in the library and cause trouble and

1 interest doesn't mean there is no resulting
2 trust. There is a resulting trust. They, in
3 effect, conceded the existence of a resulting
4 trust.

5 We say the real benefit is either in the
6 insurance, our Plaintiffs, the ultimate
7 ratepayers, or the catastrophically injured
8 victims. But by any definition it's a resulting
9 trust.

10 And to underscore the point of one of the
11 arguments I make, I will repeat it here.
12 Supposing the MCCA board took control of the
13 funds and decided to invest in a couple of Las
14 Vegas casinos, you know, and some wise thing, you
15 know, maybe pay each other some consulting fees,
16 is MCCA really suggesting that the carriers
17 couldn't come here and try to impose a resulting
18 trust to prevent this wasting of assets? I'm
19 sure that they could. And the same thing is true
20 that there was some conspiracy between the
21 carriers and MCCA. Those parties who are
22 impacted, those stakeholders, like the
23 ratepayers, the injured victims, could come in
24 and request the imposition of a resulting trust.
25 This is a resulting trust. And because of that,

1 this Court can require them to provide
2 information insight into how they are operating,
3 and, more specifically, what it is they're doing
4 with massive amounts of funds that they have at
5 their disposal.

6 Constructive trust is a little different,
7 but essentially it's legal fiction. It's not a
8 real trust. And persons seeking a constructive
9 trust has the burden to establish a circumstance
10 justifying the imposition of a constructive
11 trust. Michigan authorities have repeatedly held
12 that constructive trusts may be imposed in any
13 circumstances that would render an unconscionable
14 or inequitable result. And the circumstances are
15 there is an array, literally, thousands and
16 thousand of cases nationally, hundreds in
17 Michigan. Probably the accurate case that most
18 precisely describes it is *Kent v Klein*, a case
19 that I cited in my brief, 352 Michigan 652. It
20 stated that constructive trusts, quote, and their
21 forms and varieties, are practically without
22 limit, being raised by courts of equity whenever
23 it becomes necessary to prevent a failure of
24 justice.

25 Well, here we claim that the MCCA operates

1 "We reverse the Court of Appeals
2 affirmance of summary disposition with regard to
3 Plaintiff's unjust enrichment and constructive
4 trust counts." Plural. So there was a count for
5 unjust enrichment and a separate count for
6 constructive trusts.

7 So apparently Justice Riley was not aware
8 that the Court of Appeals might subsequently
9 arrive at a different deal. But that is the
10 binding law of this state at this time. It can
11 stand as a separate count. It's kind of a
12 non-issue because we could have added it as a
13 prayer for relief at the end of Count I. In the
14 name of precision, that is what the law requires,
15 it can stand as a separate count.

16 We request that the Court deny the (C)(8)
17 motion and ask if you have any questions.

18 THE COURT: No questions.

19 MR. GIDDINGS: Thank you, Your Honor.

20 THE COURT: Ms. McCallister?

21 MR. HALL: If I may take 30 seconds just
22 to clarify a procedural matter on the summary
23 disposition motion between the two sets of
24 Plaintiffs?

25 THE COURT: We could go back *ad infinitum*.

1 entirely with funds provided by the ratepayers.
2 They set the rates without oversight. It affects
3 the rates that the ratepayers pay. And they're
4 not. And the information required by *Shavers* is
5 not made available. Without the transparency, we
6 suggest, that constitutes a failure of justice
7 and a basis for this Court to at least rule that
8 our claims in that regard are viable.

9 We also had a little nip-talk here with
10 counsel over whether or not a constructive trust
11 can exist as a claim. They cited two unpublished
12 Court of Appeals cases, two unpublished federal
13 cases, two other federal cases and a bankruptcy
14 case. They didn't cite any Supreme Court cases
15 in support of their position.

16 There is one Supreme Court case which I
17 believe is dispositive: *Kammer Asphalt Paving v*
18 *East China Township Schools*. And in that opinion
19 Justice Riley detailed the essence of the claims
20 before the court, including one for constructive
21 trust. These claims were dismissed by the trial
22 court. The Court of Appeals affirmed, and the
23 Supreme Court overturned the Court of Appeals and
24 reinstated the counts and stated as follows.
25 Quote:

1 Thirty seconds.

2 MR. HALL: I assure you I will not make
3 any legal argument, whatsoever, Your Honor. I
4 simply want to clarify for the record that the
5 CPAN Plaintiffs are moving for summary
6 disposition on both (C)(8) and (C)(10) with
7 respect to the FOIA claims.

8 THE COURT: Okay. Ms. McAllister?

9 MS. McALLISTER: As are we, Your Honor,
10 with regard to the CPAN claims.

11 Your Honor, I know it has been a long
12 afternoon, and we certainly, probably not only
13 tried your patience, but the wrists of your court
14 reporter as well.

15 But there are a couple of points that I
16 think are critical to be made at this juncture.
17 First of all, Mr. Sinas spoke eloquently about
18 *Shavers* and read portions of *Shavers* to the
19 Court. There never has been a holding, Your
20 Honor, in this state, that says every aspect of
21 an insurance company's records are available on
22 constitutional grounds.

23 The only thing that the *Shavers* court said
24 was: Your rates, there has to be a mechanism for
25 filing the rates with the government. After the

1 legislature adopted Chapter 21 of the Insurance
2 Code, everybody dropped the argument as to
3 whether or not the Constitution was implicated
4 because of the fact that there was a mechanism
5 for filing rates that was put into the Insurance
6 Code. Those include when a carrier is charging
7 the MCCA assessment as part of their rates, that
8 those have to be filed. So I don't think that
9 there is any equal protection or due process
10 implication here. But even if you say that there
11 is, then what is the test to be applied?

12 Mr. Sinas said: Well, it's got to be
13 strict scrutiny, that's why you would have to go
14 our way. I beg to differ on the basis of the
15 *Shavers* decision itself. At page 612 of the
16 *Shavers* opinion the Court stated that the test to
17 determine whether legislation enacted, pursuant
18 to the police power, comports with due process,
19 is whether the legislation bears a reasonable
20 relation to a permissible legislative objective.
21 It then continues on page 613 to say the same
22 analysis applies for equal protection. And a
23 classification must be sustained if the class
24 itself is rationally related to a legitimate
25 government interest.

1 Mr. Hall got up and argued about various
2 points. I would ask the Court to note, as I
3 indicated in my original presentation, that they
4 were conceding that FOIA has any number of
5 exemptions that apply to it, that the legislature
6 does have the right to make an exemption to the
7 Freedom of Information Act, even if you assume
8 that you have a public body at play. He also
9 confirmed that the legislature had put in an
10 exception to FOIA for the MCCA. His argument
11 isn't that it doesn't exist. He doesn't like
12 where they put it, i.e: The Insurance Code,
13 instead of with the other elements of the Freedom
14 of Information Act.

15 For that, Your Honor, and that's really
16 his argument under Section 25 of the
17 Constitution, the FOIA Act itself, and I'm
18 referring to MCL 15.243(1)(d), specifically said:
19 That records are information specifically
20 described and exempted from disclosure by
21 statute, could be enacted.

22 So when FOIA itself was passed, it
23 included this exception that said records can be
24 exempted from here. It never said that it had to
25 be part of the same statute or that anything else

1 So even if you accept the argument that
2 *Shavers* is implicated in this case, which we
3 dispute, then it still is only a rational basis
4 test under the requirements of *Shavers*.

5 And is there a rational basis for what the
6 legislature has done with regard to the MCCA?
7 Indeed, there is. And it was recognized in the
8 *Preferred Risk* decision, as well as *League*
9 *General*, when the Supreme Court indicated that
10 there is only an incidental benefit that affects
11 the public, that the primary beneficiaries of the
12 acts of the legislature with regard to the MCCA
13 are the smaller insurers who have an interest in
14 making sure that they have a source of funds to
15 reimburse them in the event that they are
16 disproportionately impacted.

17 And, in fact, I think the *Preferred Risk*
18 case said it best at page 728. And this is,
19 quote, Section 3104, which is the MCCA, is not
20 intended to protect or benefit no-fault insureds.
21 The rights and benefits it establishes flow only
22 to insurers. So if we need a rational basis, I
23 submit to you, respectfully, that the Supreme
24 Court has already established what that is. And
25 it is not implicated in this case.

1 applied.

2 And, in fact, if you look back to the 1895
3 decision of *Mok*, which is *M-O-K, v Detroit*
4 *Building and Savings Association*, the Court said
5 that you can have a situation where you amend in
6 a different statute as long as the amendment
7 doesn't require you to omit or add words to the
8 original statute that would render them
9 inapplicable. There is nothing that you have to
10 do to FOIA, because FOIA says you can have
11 exceptions to this. And all the legislature did
12 is follow that direction and put in an exemption
13 as was implicated.

14 If I could finally turn to the arguments
15 of Mr. Giddings. Most of his arguments, I
16 respectfully state, are in his brief, and are
17 dealt with in our brief. But I think when you're
18 thinking of the relationships here, he has
19 emphasized heavily that it's a trust
20 relationship, that when you buy your insurance
21 policy, you're somehow entrusting your money to
22 the insurance carrier and entrusting the MCCA,
23 even though you're not paying anything directly
24 to the MCCA. And in support of that, of course,
25 he cites these very old cases that he says he

1 found in the library. I would ask Your Honor not
2 to even go back that far, because you can go back
3 to the *Droulliard v Metropolitan Life Decision*,
4 which is a 1981 decision for the Michigan Court
5 of Appeals. And I think it says it very simply:

6 "As a general rule, the relationship
7 between the parties to a contract of insurance is
8 that of debtor and creditor, that is of one
9 contracting party to another contracting party
10 rather than of a trustee and the Latin word for
11 trust." That is quoting the *Droulliard* opinion.

12 This is not a trust-arising relationship.
13 If you don't even have a trust relationship when
14 you give your insurance premium to your insurance
15 company, you certainly don't have a trust
16 relationship that would suddenly spring into
17 existence when you go one step removed.

18 The Courts have been very clear in
19 Michigan, including the Supreme Court in the
20 *Harts v Farmers* case which we cited in our brief
21 to say this relationship is not a trust type of
22 relationship that gives rise to trust
23 relationships. It is, instead, a situation of
24 debtor and creditor. It is simply a contract
25 that you have bought to cover your claims if and

1 statutes unconstitutional, or to imply a trust
2 type of common law relationship that the statutes
3 don't recognize, nor does the case law.

4 We respectfully submit that the
5 legislature, if they want to pass this bill, as
6 they have advocated for it here in the courtroom
7 today, and create the rights that they're
8 advocating, they are the body that should make
9 this decision, not this Honorable Court. Thank
10 you.

11 THE COURT: Just point of clarification.

12 MS. McALLISTER: Sure.

13 THE COURT: So, as I understand it, your
14 position is that, say, I don't know what the time
15 period is, on an analyzed basis, MCCA determines
16 what they feel their needs are to adequately
17 satisfy the existing claims or potential new
18 claims that might come in; is that correct?

19 MS. McALLISTER: Both, Your Honor, yes.

20 THE COURT: And then they come up with a
21 dollar amount. And then they assess the
22 participating insurance company; is that correct?

23 MS. McALLISTER: That's correct, Your
24 Honor, on a per-car basis.

25 THE COURT: Based on how many cars they

1 when you should file them.

2 As the final point, I understand the
3 policy arguments that have been tossed around the
4 courtroom today. But as much as counsel and I
5 and I'm sure Your Honor think that we could craft
6 a very workable solution, that we could come to a
7 public policy arrangement that we would all like,
8 we, under the Separation of Powers Doctrine, have
9 not been given that authority. That authority
10 was given to the legislature. It made the
11 decision to treat the MCCA as it did including
12 the exemption from the Freedom of Information
13 Act. The Supreme Court has recognized and
14 affirmed the status of the MCCA, and who the real
15 beneficiaries of it are.

16 And I respectfully submit that this Court
17 should grant our motions for summary disposition
18 and uphold those principles and let them take
19 this argument that they've made to the
20 legislature. Because, as we noted in our brief,
21 they've tried it in front of the legislature and
22 couldn't get a bill through. So now they have
23 come to this Court asking you to, all of a
24 sudden, declare things unconstitutional.
25 Notwithstanding the presumption against finding

1 have insured. And that the insurance companies,
2 in order to underwrite no-fault insurance in the
3 State of Michigan, have to participate in the
4 MCCA process?

5 MS. McALLISTER: That's correct, Your
6 Honor.

7 THE COURT: And that once the per-car
8 determination is made for each insurance company,
9 then the insurance company, in turn, as I
10 understand the language, can pass that on to the
11 individual car owner that has insurance with
12 them; is that correct?

13 MS. McALLISTER: They can, right. They
14 can include it as part of their rates.

15 THE COURT: So if it comes \$150, say it's
16 part of their rate for our purposes, \$150.

17 Now, if I understood you correctly, it's
18 your position that if the individual car owner
19 ratepayer wanted to inquire from their insurance
20 company how that \$150 was determined, they had a
21 right to do that; is that correct?

22 MS. McALLISTER: They had a – they have a
23 right to go in and ask with respect to their
24 entire premium how it is calculated.

25 THE COURT: Right.

1 MS. McALLISTER: There's a right given in
2 Chapter 21 in the Insurance Code to do that. And
3 if they are not satisfied with the managerial
4 conference with the insurance carrier about that,
5 then they have the right to request a hearing
6 with the Commissioner of Insurance on that issue.
7 It's a right given under Chapter 21 under the
8 Michigan Insurance Code.

9 THE COURT: So they have that right. But
10 inside that rate, under this hypothetical, \$150
11 for the catastrophic insurance fund?

12 MS. McALLISTER: Yes.

13 THE COURT: Or whatever you would call it?

14 MS. McALLISTER: Yes.

15 THE COURT: So they go to the insurance
16 company. They say: Tell me how you got this
17 \$150. And the insurance company, I assume, will
18 say we got it from MCCA. Because MCCA assessed
19 us on a per-car basis. They told us that for
20 this calendar year, this is how much we assessed?

21 MS. McALLISTER: That could be the
22 response that they give. But I would submit that
23 would be sort of the lazy response if a carrier
24 gave that. And it's one that could be appealed
25 to the Commissioner, if that's what they got.

1 statements that the actuarial reserves were based
2 on triangular development methods. It tells them
3 what actuarial method was used to develop the
4 reserves. And it indicates that they are
5 computed in accordance with accepted
6 lost-reserving standards. So those are in here.

7 THE COURT: Do they have any information
8 on how the MCCA decided to set the rate?

9 MS. McALLISTER: Yes.

10 THE COURT: They would have to extrapolate
11 that information, let me put it that way.

12 MS. McALLISTER: The insurer would have to
13 extrapolate the information from the
14 publicly-available information, which would
15 include what the indicated adjustment was based
16 on the data, and the amount that the MCCA arrived
17 upon for the actual assessment. They can, in
18 either – they can assess an amount that is not
19 projected to deal with any of the past deficits.

20 So, for example, between June 2011, which
21 is the end of their fiscal year, to June 2012,
22 the assessment resulted – the deficit for the
23 MCCA went from one billion to two billion. An
24 extra billion-dollar assessment deficit occurred
25 during that year.

1 THE COURT: So let's take it through.
2 They appealed to the Commissioner. The insurance
3 company, we say, says that \$150 was what was
4 assessed us by MCCA.

5 MS. McALLISTER: Yes.

6 THE COURT: We don't have the information
7 as to how they arrived at that number.

8 MS. McALLISTER: Are you saying the
9 insurance company says that?

10 THE COURT: Right.

11 MS. McALLISTER: That wouldn't be an
12 accurate statement, if that's what they said.

13 THE COURT: What information does the
14 insurance company give?

15 MS. McALLISTER: The insurance company has
16 access to all of the audited financial records of
17 the company in MCCA. That's the stack.

18 THE COURT: Aren't these the same records?

19 MS. McALLISTER: Yes, Your Honor. And
20 they include things like a full statement of what
21 their liabilities are on their books. They
22 include all of the assets that the MCCA has, what
23 its IBNR is, which is incurred but not reported.
24 The factor that they put in for future claims.
25 And they have the actuarial reports which include

1 THE COURT: All right.

2 MS. McALLISTER: So all of that
3 information is available. What's not available,
4 what they are wanting, and what we are here
5 arguing about is personal claims information in
6 terms of how old was each of the people when they
7 were in this accident. How old are they now.
8 And how much has each of them been paid. That's
9 the information that we are saying is personal,
10 confidential information that isn't discoverable
11 under any view of Freedom of Information Act, let
12 alone out of the MCCA's records.

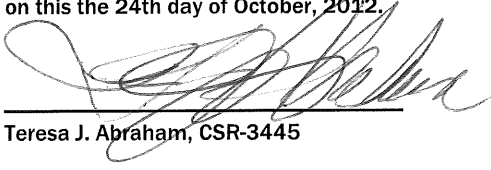
13 THE COURT: Let me go back to my
14 hypothetical. I'm just John Smith, ratepayer.
15 And I say: Well, why am I being charged this
16 \$150 a car? We will call it XYZ Insurance
17 Company. I go to XYZ saying: Give me an
18 explanation of our rate. XYZ says: Well, that's
19 what the MCCA assessed us.

20 Under your suggestion, then, then I could
21 appeal that to the Insurance Bureau, I guess,
22 saying: I want to know how this \$150 was arrived
23 at. And the Insurance Bureau would say: That's
24 what MCCA assessed, but the Insurance Bureau
25 wouldn't have authority to tell me how MCCA set

1 that rate.
 2 MS. McALLISTER: I respectfully disagree,
 3 Your Honor. I'm not sure where you are getting
 4 that perception from. Because the Commissioner
 5 is the ultimate regulator with respect to the
 6 MCCA, just like he is with respect to the
 7 insurance companies. And he has sent his people
 8 in there. The examiners have been in and looked
 9 at all of our books and records.
 10 THE COURT: But you would agree there is a
 11 difference between me, as John Smith, member of
 12 the public, saying: How did you set the rate,
 13 versus me hearing from the Insurance Commissioner
 14 that: Okay, I went in and checked that it's
 15 okay?
 16 MS. McALLISTER: Your Honor, then you just
 17 look at the same financial audited reports that
 18 are out there. You are assuming, I think, Your
 19 Honor, with all due respect, that John Q Public,
 20 if they received the actuarial reports, that
 21 would probably fill this room, that underlying
 22 the one-plus billion dollars that the MCCA pays
 23 every year, that they would then magically be
 24 able to absorb that and translate that into:
 25 Okay, \$150. They wouldn't be able to. This is

1 Don't you dare give out this information because
 2 you have no right to give out our personal
 3 information. We could be identified from the
 4 fact that, you know, we are a paraplegic who was
 5 in an accident five years ago. And now at age 30
 6 they can pretty well figure out where I am in
 7 that range.
 8 So the kind of information that they're
 9 asking isn't the kind of information that Your
 10 Honor is talking about John Q. Public being able
 11 to come up with \$150.
 12 THE COURT: Thank you.
 13 MS. McALLISTER: Thank you, Your Honor.
 14 THE COURT: I'll take it under advisement
 15 and I will let the parties know.
 16 MS. McALLISTER: Thank you, Your Honor.
 17 MR. GIDDINGS: May I make one comment,
 18 Your Honor?
 19 THE COURT: You know how that goes? So we
 20 will take it under advisement. I will issue a
 21 written opinion.
 22 (Proceedings concluded at 3:22 p.m.)
 23
 24
 25

1 an expert inquiry any way you go about it.
 2 THE COURT: I agree. But isn't part of
 3 their request saying: MCCA, tell me how you got
 4 to \$150?
 5 MS. McALLISTER: No, that's not their
 6 request. Their request is: We want to know all
 7 of the claimants, and what age they were at the
 8 time the claim was made, how old each of those
 9 people are now, and how much you have paid them.
 10 And the Brain Injury Foundation wants to
 11 go one step further, and they've asked for –
 12 they've asked for the actuarial standards which
 13 are summarized and set forth in the actuarial
 14 reports that I just read to Your Honor in terms
 15 of what methods that were used by the actuary.
 16 So they're not asking: How did you come
 17 up with \$150, Your Honor. If they were, we would
 18 have a different lawsuit. This lawsuit is about:
 19 Did they get all of our claimants that have filed
 20 claims, by their age, time of the accident, the
 21 age at the time that we gave them the list. And
 22 how much each of those people have been paid.
 23 I'm sure it won't surprise Your Honor to
 24 know that we have been getting threatening
 25 letters from claimants and their lawyers saying:

1 STATE OF MICHIGAN)
 2 COUNTY OF INGHAM)
 3
 4 I, TERESA J. ABRAHAM, Certified
 5 Shorthand Reporter in and for the County of
 6 Ingham, State of Michigan, Thirtieth Judicial
 7 Circuit Court, do hereby certify that the facts
 8 stated in the foregoing pages are true and correct,
 9 and comprise a complete, true and correct
 10 transcript of the proceedings taken in this matter
 11 on this the 24th day of October, 2012.
 12 
 13
 14 Teresa J. Abraham, CSR-3445
 15
 16
 17
 18 Date: November 6, 2012
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