CIRCUIT COURT IN THE COUNTY OF JACKSON

STATE OF MICHIGAN

PETER BORMUTH,
Appellant, Case No: 17-2968-AV

v. Hon. John G. McBain

CITY OF JACKSON
Appellee.

On Appeal from 12th District Court in the County of Jackson
Case No. 17J-525950A
Hon. Michael J. Klaeren

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV in pertinent part holds:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. 1963, art 1, § 17 in pertinent part holds:

> No person shall…be deprived of life, liberty or property, without due process of law.

STATUATORY PROVISIONS

MCL 257.328(1) in pertinent part states:

> The owner of a motor vehicle who operates or permits the operation of the motor vehicle upon the highways of this state or the operator of the motor vehicle shall produce, under subsection (2), upon the request of a police officer, evidence that the motor vehicle is insured under chapter 31 of the insurance code of 1956, 1956 PA 218, MCL 500.3101 to 500.3179. Subject to section 907(15), an owner or operator of a motor vehicle who fails to produce evidence of insurance upon request under this subsection or who fails to have motor vehicle insurance for the vehicle as required under chapter 31 of the insurance code of 1956, 1956 PA 218, MCL 500.3101 to 500.3179, is responsible for a civil infraction.

MCL 500.2403(1)(d) in pertinent part states:

> (d) Rates shall not be excessive, inadequate, or unfairly discriminatory. A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided and a reasonable degree of competition does not exist with respect to the classification, kind, or type of risks to which the rate is applicable...A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage, if the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when applicable; and by actual and credible loss and expense statistics or, in the case of new coverages and classifications, by reasonably anticipated loss and expense experience.

Other Authorities

Senate Legislative Analysis, SB 647, March 3, 1986

STATEMENT OF JURISDICTION

The Appellant files this appeal as a matter of right as an aggrieved party under MCR 7.103(A)(1). The appeal is timely under MCR 7.104(A)(2). Hon. Magistrate Fredrick C. Bishop held an informal hearing on this matter on June 28, 2017 and issued a judgment against the Appellant on June 30, 2017. The Appellant filed an Appeal of Judgment on July 10, 2017, which the District Court held timely, since the Court did not mail the Notice of Judgment to the Appellant until July 5, 2017 and it was not received by the Appellant until July 7, 2017. A hearing before District Court Judge Hon. Michael J. Klaeren was held on August 24, 2017, and an Order was issued denying the Appellant's Motion on the same date. The Appellant filed a Motion for Reconsideration on September 11, 2017. The District Court issued an Order denying reconsideration on October 17, 2017. The Appellant filed a timely Claim of Appeal on November 6, 2017.

QUESTIONS PRESENTED

1. Did the Michigan Supreme Court's ruling in *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978) guarantee Michigan residents a due process right to "fair and equitable" auto insurance rates?

   Appellant's Answer: **YES**

   District Court's Answer: **YES** (adjusted on reconsideration)

   Appellee's Answer: **NO**

2. Given the specific facts of this case, were the insurance rates offered to Appellant by the insurance companies excessive for the coverage provided and did they violate the 'fair and equitable' requirement of *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978)?

   Appellant's Answer: **YES**

   District Court's Answer: **NO**

   Appellee's Answer: **NO**

3. Can the Appellant be held responsible a civil infraction under MCL 257.328 when he was denied his due process right to 'fair and equitable' auto insurance rates by inherently unfair insurance company practices (such as whether he had auto insurance for twelve prior consecutive months or whether he owns or rents his domicile) that use factors unrelated to sound actuarial principals when setting rates?

   Appellant's Answer: **NO**

   District Court's Answer: **YES**

   Appellee's Answer: **YES**

STATEMENT OF FACTS

A. Nature of Action

As correctly recognized by the District Court, the nature of this action involves a collateral attack on the constitutionality of the State's enforcement of MCL 257.328. (August 24, 2017, Trans. p. 5, l. 1-25). Owners and operators of vehicles on Michigan highways are required by law to purchase no fault insurance and to produce upon the request of a police officer a certificate showing that the motor vehicle is insured. MCL 257.328(1). However, the Michigan Supreme Court ruled in *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978) that Michigan residents have a due process right to 'fair and equitable rates' for no fault auto insurance since it is required by the State. Fair and equitable rates were unavailable to the Appellant because of rapacious insurance industry practices in this state that violate the holding in *Shavers*.

B. Citation issued on April 5, 2017

The facts of this matter are as follows: Officer Michael Kruso of the City of Jackson Police Department pulled the Appellant over on April 5, 2017 at 2:13 pm near Greenwood and Union streets. Officer Kurso requested the Appellant's driver's license, registration, and proof of insurance and the Appellant provided the documents. Officer Kurso noted that the driver's license and registration were valid, but the proof of insurance had expired, and so issued the Appellant ticket no. J525950, alleging a violation of MCL 257.328(1).

C. Informal hearing held on June 28, 2017

The Appellant requested an informal hearing on the citation and this was held before

Hon. Magistrate Fredrick C. Bishop on June 28, 2017.[1] At the hearing, Officer Kruso testified to the above facts, which the Appellant admitted as true. The Appellant claimed as his defense the due process right of Michigan residents to "fair and equitable" rates. (see *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978)). The Appellant provided the Magistrate with a copy of the decision in *Shavers*. The Appellant provided the Magistrate with his federal 1040 tax form proving that he only made $7,200. in 2016 and proving that he required use of his vehicle to earn this income.[2] The Appellant provided the Magistrate with written quotes from the only three companies available to provide insurance. The insurance desired was PL/PD on a 2005 Toyota Prius worth three thousand dollars ($3,000.). For this basic coverage that does not insure the vehicle itself, Progressive wanted $2,091 per year; Arrowhead wanted $2,516 per year; and National General wanted $5,038 per year.[3] The Appellant testified under oath that the insurance agent specifically told him that he was being placed in a separate risk category because he lacked continuous insurance coverage for the previous twelve consecutive months. The insurance agent indicated that such classification accounted for the high rates he was being offered. The Appellant testified under oath that the insurance agent asked if he rented or owned (his domicile at 142 West Pearl St). When informed that he rented, the agent explained that this also increased the rates he was being offered. The Appellant argued that the rates offered by the insurance companies were excessive and unreasonably high for the insurance coverage provided. He argued that the factors used in determining the rates were unrelated to risk. The Appellant

[1] Court file 17j525950a. There is no transcript of this hearing since Informal hearings before a Magistrate are not recorded by the 12th District Court.

[2] The Magistrate returned this document to the Appellant after verifying the information.

[3] This document also appears as Exhibit D attached to the Appeal of Judgment filed July 10, 2017.

claimed that this combination violated his due process right to 'fair and equitable' rates under *Shavers,* and thus, he could not be held responsible for a civil infraction. The Magistrate accepted the written evidence and the Appellant's testimony. He said it was an interesting argument and stated that he would read *Shavers,* check the Appellant's driving record, and issue a judgment at a future time.

D. Judgment issued on June 30, 2017 but not mailed until July 5, 2017

On June 30, 2017 the Magistrate issued a Judgment holding the Appellant responsible for the civil infraction. The 12th District Court did not mail notice of the judgment to the Appellant until July 5, 2017.[4] The Appellant did not receive said judgment until July 7, 2017 at 6:15 pm after the Court had already closed.[5] The Appellant contacted Kathy Ellis by e-mail on July 7, 2017 about the late notice and was told by Ms. Ellis that, "I will advise my staff to accept your appeal without requiring a bond and will investigate the matter further to see what the delay was." (Trans. p. 3, l. 18-20).

E. Appeal of Judgment filed July 10, 2017

The Appellant filed his Appeal of Judgment on July 10, 2017 at 8:04 am.

[4] See Appeal of Judgment, Exhibit B, date stamped postal envelop.

[5] See Appeal of Judgment, Exhibit C, Affidavit of Peter Bormuth.

F. District Court Hearing on Appellant's Appeal of Judgment held on August 24, 2017

The Appellant posted bond in the amount equal to the fines and costs assessed for the violation ($185.00) and provided the District Court a copy of the receipt at the beginning of the August 24, 2017 hearing in compliance with MCR 4.101(H)(2). (Trans. p. 7, l. 24).

District Court Judge Hon. Michael J. Klaeren conducted the August 24, 2017 motion hearing. The District Court correctly noted that the Appellant was not directly attacking the constitutionality of the INSURANCE CODE OF 1956, Act 218 of 1956, but making a collateral attack based on his due process rights to fair and equitable rates. (August 24, 2017, Trans. p. 5, l. 1-25). The District Court also accurately noted that none of the facts of the case were in dispute by the parties. (Trans. p. 5, l. 1-2, 18-19). The District Court held that even under a collateral attack, the Appellant had the burden of proof of rebutting the presumption of constitutionality, which is accorded to legislative judgment. (Trans. p. 6, l. 17-18).

The Appellant accepted that burden and repeated the argument he made before the Magistrate. The Appellant provide the Court and the City with new evidence in the form of a CPAN study commissioned by the Coalition protecting Auto No-Fault and authored by Douglas Heller showing that insurance companies were using factors such as employment (type of occupation) and home ownership that are completely unrelated to driving risk to set rates. (Trans. p. 8, l. 4-25). The Appellant also provided the Court with sample rates from South Carolina to further emphasize the inequitable and excessive nature of the quotes he was given in Michigan. (Trans. p. 9 l. 13-25; p. 10, l. 1-8).

Mr. Williams for the City argued that *Shavers* no longer applied because legislation has been passed by the legislature since that time to address the issues raised in *Shavers.* (trans. p. 10, l. 10-25). Mr. Williams cited the Michigan Supreme Court decision in *O'Donnell v. State Farm Ins*., 273 NW 2d 829, 404 Mich. 524 (1979) in support of his argument that "you're allowed to have an insurance system that may not provide insurance for everybody who can't afford to have insurance…".[6] (Trans. p. 12, l.7-15).

The Appellant argued that the Supreme Court never renounced its holding in *Shavers* that Michigan residents had a due process right to 'fair and equitable' rates. The Appellant cited the U.S. Supreme Court holding in *Bell v. Burson*, 402 U.S. 535 (1971) on which the Court in *Shavers* based its due process analysis. (Trans. p. 13, l. 14-25).

The Appellant also argued that he was placed in an assigned risk category simply because he had not had continuous insurance coverage for the preceding twelve months and that the insurance companies also inequitably used the factor of whether he rented or owned his dwelling. He noted that these factors do not involve driving record or sound actuarial principals. (Trans. p. 14, l. 1-13).

Mr. Williams then argued the public policy ramifications of a ruling that held that the Appellant was entitled to 'fair and equitable' rates. Mr. Williams noted that there would be no set standards and that it would devolve on the police officer to make a determination of whether or not the person they pulled over could afford insurance. (Trans. p. 15, l. 1-5).

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[6] *O'Donnell* dealt with Section 3109(1) of the Michigan No-Fault Insurance Act which requires that the amount of benefits payable under any no-fault insurance policy must be reduced by the amount of benefits payable to a beneficiary by the state or Federal government. The decision in *O'Donnell* was limited to Section 3109(1) and did not consider the due process right to fair and equitable insurance rates in order to drive a vehicle on Michigan highways under MCL 257.328.

The Appellant responded that such responsibility properly fell on the Courts when there is a due process violation. The Appellant noted that the people have no other recourse when faced with a situation where the State is acting to enforce a due process violation but the Courts. The Appellant argued that a ruling in his favor would prompt action by our legislators in Lansing to address this issue, which is exactly what is required and the entire intent of the Appellant in bringing this action. (Trans. p. 16, l. 3-22).

G. District Court ruling on Appellant's Appeal of Judgment (August 24, 2017)

After hearing the arguments the District Court ruled that:

> However, the right to own a motor vehicle, the right to be able to drive that motor vehicle is in all fairness one step removed from the right to drive. So to the extent one wants to posit that due process litigation or due process considerations attach to the right to have available affordable insurance is more tenuous or attenuated than the right to be able to drive a motor vehicle. (Trans. p. 17, l. 4-10).

The Court further held that:

> Insurance is a heavy -- heavily regulated industry, and under certain circumstances I can see where a claim could be made against the state saying you're not doing enough to properly regulate insurance companies, and therefore you are violating due process. On the other hand insurance companies are private entities and they clearly have some freedom to charge rates they deem appropriate, for lack of a better word, their – their profit line, and what the market will bear. (Trans. p. 18, l. 9-17).

The Court additionally noted that:

> The burden is on Mr. Bormuth to show by a preponderance of the evidence and to – he needs to rebut the presumption of constitutionality which is accorded the no fault scheme…Merely because there's a disparity in rates it doesn't necessarily Mean due process is violated…But the burden is on Mr. Bormuth to establish that there is an improper procedure in place that should not be considered, which appears to cause poor people to pay more money for their premiums. Although, I am not criticizing Mr. Bormuth for sharing his antidotal experience in attempting to obtain insurance. (Trans. p. 19, l. 1-25; p. 20, l. 1-2).

The Court expressed a desire for more information regarding the state's role in regulating insurance industry practices stating that:

> I don't know what are the relevant or legitimate considerations for setting premiums. I have no idea how active a role the state is required to play in what the individual insurance companies do. (Trans. p. 20, l. 13-16).

The Court clearly understood the Appellant's argument saying:

> I do think this is a collateral due process attack I think on, on the no fault statute, not directly, but more, more directly in saying the state is violating my due process because they're not regulating the insurance companies enough and they're allowing insurance companies to charge indigent folks too much money…(Trans. p. 21, l. 7-13)

but the Court concluded that the proof and argument the Appellant had offered the Court was insufficient to rule in his favor and cited *Mudge v. Macomb County*, 580 N.W.2d 845, 458 Mich 87 (1998) in rejecting the Appellant's position:

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. *Mudge v. Macomb County*, 580 N.W.2d 845, 458 Mich 87 (1998) (Trans. p. 22, l. 12-23).

H. Motion for Reconsideration filed September 11, 2017

The Appellant filed a timely Motion for Reconsideration on September 11, 2017. The Appellant made three arguments for reconsideration.

First the Appellant reiterated the argument he made, both before the magistrate and before the District Court, that the U.S. Supreme Court in *Bell v. Burson*, 402 U.S. 535 (1971) made continued possession of a driver's license a significant interest subject to constitutional due

process protections.[7] Then the Appellant again cited the Michigan Supreme Court in *Shavers v. Attorney General* 267 NW2d 72, 402 Mich 554 (1978) which unambiguously held:

> In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates. Consequently due process protections under the Michigan and United States Constitutions (Const 1963, art 1, § 17; US Const, Am XIV) are operative.
>
> (Def. Mot. for Recon., p. 3).

At the motion hearing held on August 24, 2017 the District Court had held:

> However, the right to own a motor vehicle, the right to be able to drive that motor vehicle is in all fairness one step removed from the right to drive. So to the extent one wants to posit that due process litigation or due process considerations attach to the right to have available affordable insurance is more tenuous or attenuated than the right to be able to drive a motor vehicle. (Trans. p. 17, lines 4-10).

The Appellant claimed this was palpable error. In the Order issued on October 17, 2017 the District Court admitted its error with regard to *Shavers*, implicitly acknowledging the Appellant's due process right in this case to 'fair and equitable' rates. (10/17/17 Order, Klaeren, M.).

The Appellant also argued that he had met the burden of proving with a preponderance of evidence that the rates offered him by the insurance company(s) were not fair and equitable given the type of insurance requested. (Def. Mot. for Recon., p. 4). The Appellant argued that the specific facts presented to the Court had not been given due consideration, but dismissed as

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[7] "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970)." *Bell v. Burson*, 402 U.S. 535 (1971) at 539.

anecdotal. (Def. Mot. for Recon., p. 4). The Appellant argued that he had clearly pointed out specific insurance industry practices that caused the excessive rates under MCL 500.2403(1)(d) and the violation of his due process right to fair and equitable rates under *Shavers.* (Def. Mot. for Recon., p. 5). The Appellant met the standard required by *Mudge v. Macomb County*, 580 N.W.2d 845, 458 Mich 87 (1998). The Appellant noted that the Court's protestations that it was left in ignorance about the state's role in regulating the insurance industry was misguided. The Appellant argued that *Shavers* made that duty clear. Since the Legislature has made no-fault insurance compulsory for all motorists, the Courts must make sure that "no-fault insurance is available at fair and equitable rates." (Def. Mot. for Recon., p. 4). And finally the Appellant argued that where a legal right exists, there must be a legal remedy. (Def. Mot. for Recon., p. 6).

The District Court Order of 10/17/17 held that the adjustment for the error relative to the holding in *Shavers* did not affect the forgoing issues and the correctness of the Court's decision on 8/24/17. (10/17/17 Order, Klaeren, M.).

I. Claim of Appeal filed November 6, 2017

On November 6, 2017 the Appellant filed a timely Claim of Appeal with this Court.

LEGAL ARGUMENT

1. THE MICHIGAN SUPREME COURT'S RULING IN *SHAVERS v. ATTORNEY GENERAL,* 267 NW2D 72, 402 MICH 554 (1978) GUARANTEES MICHIGAN RESIDENTS A DUE PROCESS RIGHT TO 'FAIR AND EQUITABLE' NO-FAULT AUTO INSURANCE RATES.

A. STANDARD OF REVIEW

The standard of review on this issue is *de nova*. Pure questions of law are reviewed *de novo*. *United States v. Layne*, 324 F.3d 464, 468 (6th Cir. 2003). An appellate court is to conduct an independent *de nova* review of the record when constitutional facts are at issue. *Jacobellis v. Ohio*, 378 U.S. 184, 190 & n.6, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964). Additionally, liberal construction of the insurance laws in the Appellant's favor is expected. Our courts have often recognized that the insurance industry is of great public interest and insurance laws are to be liberally construed in the interests of the public, policyholders, and creditors. *Attorney General ex rel Comm'r of Ins v Michigan Surety Co*, 364 Mich 299, 325; 110 NW2d 677 (1961).

B. *SHAVERS* GAVE MICHIGAN CITIZENS A DUE PROCESS RIGHT TO FAIR AND EQUITABLE RATES AND ON RECONSIDERATION THE DISTRICT COURT ADOPTED THIS POSITION.

The Michigan Supreme Court in *Shavers* unambiguously held that in choosing to make no-fault insurance compulsory for all motorists, the Legislature made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates. Consequently due process protections under the Michigan and United States Constitutions are operative.[8] The District Court first denied that the right to own a motor vehicle

[8] The Appellant reproduces the pertinent text of the U. S. and Michigan Constitutions in his Table of Authorities.

and the right to be able to drive that motor vehicle are co-equal to the right to drive. (Trans. p. 17, l. 4-10). On the Appellant's Motion for Reconsideration, the District Court recognized this error and conceded that the Appellant has a due process right to fair and equitable rates for no-fault auto insurance. The Court did not accept the Appellant's logical two-step progression from this position and held that this concession did "not affect the correctness of the Court's decision on 8/24/17." (10/17/17 Order, Klaeren, M.).

C. *O'DONNELL* DEALT WITH SUPPLEMENTAL COVERAGES AND BENEFITS, NOT COMPULSORILY COVERAGE AND RATES.

The Appellant notes that the City argued that the Michigan Supreme Court decision in *O'Donnell v. State Farm Ins*., 273 NW 2d 829, 404 Mich. 524 (1979) qualified this due process right and allowed "an insurance system that may not provide insurance for everybody who can't afford to have insurance…". (Trans. p. 12, l. 7-15). This is a clearly erroneous and untenable position. *O'Donnell* dealt with Section 3109(1) of the Michigan No-Fault Insurance Act which requires that the amount of benefits payable under any no-fault insurance policy must be reduced by the amount of benefits payable to a beneficiary by the state or Federal government but it does not also require an analogous set-off of benefits payable to a beneficiary by private health or accident insurance programs, which persons may voluntarily add to the basic no-fault insurance. The principal question presented is in *O'Donnell* is whether § 3109(1) discriminates against the recipients of government benefits in violation of the Equal Protection Clause of the state or Federal Constitutions. This Court can immediately discern the essential difference between *Shavers* and *O'Donnell.* The decision in *O'Donnell* dealt with **supplemental coverages** and benefits paid out under Section 3109(1), not compulsory coverage under MCL 257.328. The Court

found a rational basis for placing the burden of supplemental coverage directly on the shoulders of the individuals who purchase it, rather than spreading that burden throughout the ranks of all compulsory insured. The Court in *O'Donnell* held:

> The Legislature's judgment that the recipients of private benefits should be treated differently from the recipients of government benefits is supported by a rational basis and should therefore be sustained. This distinction rationally promotes the legitimate legislative objectives of enabling persons with economic needs and/or wages exceeding the maximum benefits permitted under the No-Fault Act **to obtain the supplemental coverage they need and of placing the burden of such extra coverage directly on the shoulders of those persons, instead of spreading it throughout the ranks of no-fault insureds.**
>
> *O'Donnell v. State Farm Ins*., 273 NW 2d 829, 404 Mich. 524 (1979)

The Court in *O'Donnell* also specifically noted that, "[T]his opinion is confined to the facts before the Court" and did not purport to extend it to any other governmental actions. Contrary to the City's position, the decision in *O'Donnell* does not remove the due process right to 'fair and equitable' no-fault insurance rates granted to Michigan residents by *Shavers.*

2. THE INSURANCE RATES OFFERED APPELLANT BY THE INSURANCE COMPANIES WERE EXCESSIVE FOR THE COVERAGE PROVIDED, VIOLATING BOTH MCL 500.2403(1)(D) AND THE 'FAIR AND EQUITABLE' REQUIREMENT OF *SHAVERS V. ATTORNEY GENERAL,* 267 NW2D 72, 402 MICH 554 (1978).

A. STANDARD OF REVIEW

The standard of review on this issue is *de nova*. Mixed questions of law and fact are reviewed *de novo*; *United States v. Layne*, 324 F.3d 464, 468 (6th Cir. 2003) (explaining that this Court reviews both pure questions of law and mixed questions *de novo*, while reviewing pure factual findings for clear error); *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993) (explaining that

"mixed questions," including whether proceedings are "fundamentally unfair," are reviewed *de novo*). Additionally, liberal construction of the insurance laws in the Appellant's favor is expected. Our courts have often recognized that the insurance industry is of great public interest and insurance laws are to be liberally construed in the interests of the public, policyholders, and creditors. *Attorney General ex rel Comm'r of Ins v Michigan Surety Co*, 364 Mich 299, 325; 110 NW2d 677 (1961).

B. THE FACTS IN THIS CASE ARE NOT CONTESTED.

The factual component of this issue is not contested. The Appellant provided the Magistrate with his 2016 Federal 1040 form showing that his gross income was $7,200. and that this income derived from walking dogs. The Appellant provided the Court with quotes from the only three companies available to provide insurance. The insurance desired was simply PL/PD on a 2005 Toyota Prius worth three thousand dollars ($3,000.). For this basic coverage that does not even insure the vehicle itself, Progressive wanted $2,091 per year; Arrowhead wanted $2,516 per year; and National General wanted $5,038 per year. (Appeal. of Judgment, Exhibit D). These excessive rates and the lack of competition among insurance companies were due to the fact that the Appellant was placed in an assigned risk category because he had not had continuous insurance coverage for the preceding twelve months. (Trans. p. 14, l. 3-5). The insurance companies also used the factor of whether he rented or owned his dwelling in determining rates. (Trans. p. 14, l. 7-8). Both parties and the Court accepted these facts as true.

C. THESE RATES ARE EXCESSIVE FOR THE COVERAGE PROVIDED, VIOLATING BOTH MCL 500.2403(1)(D) AND THE 'FAIR AND EQUITABLE' REQUIREMENT OF *SHAVERS V. ATTORNEY GENERAL,* 267 NW2D 72, 402 MICH 554 (1978).

The Appellant argued that the facts presented showed that the rates offered the Appellant were excessive for the coverage provided, violating both MCL 500.2403(1)(d) and the 'fair and equitable' requirement of *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978). They range from taking 1/3 of the Appellant's yearly income, to taking 2/3 of the Appellant's yearly income, simply to register and operate a vehicle in Michigan. (Appeal of Judgment, p. 4). The District Court disagreed and dismissed the facts and circumstances of this individual case as anecdotal. (Trans. p. 20, l. 1-6). In his Motion for Reconsideration, the Appellant cited Blacks Law Dictionary which defines 'equitable' as: "*Just; conformable to the principles of natural justice and right. Just, fair, and right,* ***in consideration of the facts and circumstances of the individual case."*** The fundamental determination that this Court must make under *Shavers* is whether the offered rates are "fair and equitable." That determination can only be made by reference to facts and circumstances specific to the case. As the District Court noted, the Appellant bore the burden of proving with a preponderance of evidence that the rates offered him by the insurance company(s) are not fair and equitable. (Transcript, p.19, line 1-3, 22-25). The Appellant met that burden and then had his evidence dismissed by the District Court as antidotal. This Court must reverse and accept the Appellants argument that the rates were unfair and inequitable under *Shavers* and excessive under MCL 500.2403(1)(d) which requires that rates shall not be unreasonably high for the insurance coverage provided. The evidence the Appellant submitted is highly relevant and in no way anecdotal.

D. THE APPELLANT SUBMITTED EVIDENCE SHOWING THAT THESE INEQUITABLE INSURANCE COMPANY PRACTICES ARE WIDESPREAD IN MICHIGAN.

The Appellant also submitted evidence in the form of a CPAN study commissioned by the Coalition protecting Auto No-Fault and authored by Douglas Heller proving that the practice of insurance companies were using factors such as employment (type of occupation) and home ownership that are completely unrelated to driving risk to set rates is a broad problem in the state. (Trans. p. 8, l. 4-25). Liberty Mutual charges people who are unemployed an average of $483.00 more for minimum insurance coverage. They charge $1,259.00 more in Detroit and $996.00 more in Warren to customers purchasing minimum insurance coverage if they are unemployed compared to those who are lawyers. (Trans. p. 8, l. 14-19). The Appellant also provided the Court with sample rates from South Carolina to further emphasize the inequitable and excessive nature of the quotes he was given in Michigan. (Trans. p. 9 l. 13-25; p. 10, l. 1-8).

3. The Appellant cannot be held responsible a civil infraction under MCL 257.328 when he was denied his due process right to 'fair and equitable' auto insurance rates by inherently unfair insurance company practices (such as whether he had auto insurance for twelve prior consecutive months or whether he owns or rents his domicile) that use factors unrelated to sound actuarial principals when setting rates.

A. STANDARD OF REVIEW

The standard of review on this issue is *de nova*. Mixed questions of law and fact are reviewed *de novo*; *United States v. Layne*, 324 F.3d 464, 468 (6th Cir. 2003) (explaining that this Court reviews both pure questions of law and mixed questions *de novo*, while reviewing pure factual findings for clear error); *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993) (explaining that "mixed questions," including whether proceedings are "fundamentally unfair," are reviewed *de*

novo). Additionally, liberal construction of the insurance laws in the Appellant's favor is expected. Our courts have often recognized that the insurance industry is of great public interest and insurance laws are to be liberally construed in the interests of the public, policyholders, and creditors. *Attorney General ex rel Comm'r of Ins v Michigan Surety Co*, 364 Mich 299, 325; 110 NW2d 677 (1961).

B. THESE INSURANCE COMPANY PRACTICES VIOLATE THE DUE PROCESS GUARANTEE IN *SHAVERS* OF 'FAIR AND EQUITABLE' RATES FOR MICHIGAN RESIDENTS.

1. Placing individuals in an assigned risk category because they did not have continuous insurance coverage for the preceding twelve months violates due process rights.

The Appellant was placed in an assigned risk category because he had not had continuous insurance coverage for the preceding twelve months. (Trans. p. 14, l. 3-5). The Court in *Shavers* specifically noted that the placing of motorists in the "Automobile Placement Facility" and classified as an "assigned risk" without the assurance of fair and equitable rates was a due process violation.[9] An individual could terminate their insurance for many legitimate reasons. They could terminate it because they were placing their car in storage for the winter. Conversely, they could park their car for the summer and use a moped for transportation to save gas. They could terminate it because their car broke down and they did not have the money to repair it. Or they could simply have been financially unable to make a payment, needing whatever funds they possessed for rent, food, or medical expenses. None of these scenarios are associated with

[9] "Furthermore, motorists can be placed into the "Automotive Placement Facility" without an assurance of fair and equitable rates, without an opportunity to obtain the same coverage options, and without a right to challenge such placement. These deficiencies, in our opinion, most certainly deny due process." *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978) at 605.

driving record or credible loss and expense statistics, or reasonably anticipated loss and expense experience. Sound actuarial principles are not being used to determine these rates. The insurance companies are just essentially doubling a person's rate for not having provided them with a steady stream of income the preceding year. California made this illegal in 1988 when Ballot Measure 103 was enacted which prohibited auto insurers from considering a driver's prior insurance coverage in setting rates. In 2003, insurance companies (Mercury) sponsored legislation (Sen. Bill 841) allowing the use of insurance continuity as a factor in rate setting, but the California Court of Appeals invalidated the law citing the Department of Insurance's senior actuary, who noted that Mercury's proposal "would result in a surcharge equal to a 40 percent increase in premium for ... policyholders who do not qualify for the 'continuous insurance' discount." *Foundation for Taxpayer & Consumer Rights v. Garamendi*, 132 Cal. App. 4th 1375 (2005).

2. Charging renters higher rates than homeowners also violates due process.

The Appellant testified under oath that the insurance agent asked if he rented or owned (his domicile at 142 West Pearl St). When informed that he rented, the agent explained that this also increased the rates being offered. This clearly has nothing to do with driving record or credible loss and expense statistics, reasonably anticipated loss and expense experience, or sound actuarial principles. There is no greater risk of theft or damage to a vehicle at the same residence, just because a person rents! This practice clearly discriminates against people who do not own property and treats them inequitably.

C. THE DISTRICT COURT WAS PROVIDED WITH THE NECESSARY INFORMATION AND PROOF TO RULE IN THE APPELLANT'S FAVOR.

In the opinion issued on August 24, 2017 the District Court repeatedly expresses a desire for more information about the State's role in regulating the insurance industry. (Trans. p. 20, l. 13-16; p. 21, l. 17-19; p. 22, l. 12-22). The Appellant believes this was misplaced. The Appellant provided the Court with the legal basis for his claim citing *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978). The Appellant provided the District Court with specific factual evidence showing that the rates he was offered were excessive and did not meet the fair and equitable standard of *Shavers.* The Appellant carefully outlined the specific insurance company practices he was challenging. The Appellant deliberately chose to make a collateral attack and not a direct attack on the constitutionality on the No-Fault Act. The Appellant researched the issue and determined that a collateral attack based on the due process guarantee of *Shavers* to fair and equitable rates was the most promising line of argument. The District Court's claim that "I have no idea how active a roll the state is required to play in what insurance companies do" is misplaced. (Trans. p.20, l. 15-16). *Shavers* makes that duty clear. Since the Legislature has made no-fault insurance compulsory for all motorists, the Court must make sure that "no-fault insurance is available at fair and equitable rates."

D. A DUE PROCESS RIGHT WAS ESTABLISHED, SO A LEGAL REMEDY IS DUE.

As early as *Marbury v. Madison*, 5 US 137, 1 Cranch 137 (1803) Chief Justice Marshall established the doctrine relied on by the Appellant.

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> In the 3d vol. of his Commentaries, p. 23. Blackstone states two cases in which a remedy is afforded by mere operation of law. In all other cases," he says, **"it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, when ever that right is invaded."** (bold emphasis added).
>
> *Marbury v. Madison*, 5 US 137, 1 Cranch 137 (1803)

Our modern Supreme Court has consistently upheld that line of legal reasoning. In *Morrissey v. Brewer,* 408 U.S. 471 (1972) the Court stated:

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly,* 397 U. S. 254 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin,* 407 U. S. 67 (1972). **Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible, and calls for such procedural protections as the particular situation demands.** (bold emphasis added).
>
> *Morrissey v. Brewer,* 408 U.S. 471 (1972)

Once the District Court decided on reconsideration that the Michigan Supreme Court did confer a due process right on the Appellant and all Michigan residents to ‘fair and equitable’ no-fault auto insurance rates, a remedy was due. The District Court failed to provide that remedy, thus necessitating this appeal.

E. PUBLIC POLICY RAMIFICATIONS OF A DECISION IN THE APPELLANT'S FAVOR DO NOT CREATE ANARCHY.

The City's argument that a decision in the Appellant's favor would create untenable public policy ramifications is untenable and should be rejected by this Court. (Trans. P. 14, l.16-25; p. 15, l. 1-8). A police officer would still pull over a vehicle and check for proof of insurance under MCL 257.328(1). If the certificate was not produced or if it was not valid, the officer would issue a citation. It would then be the responsibility of the driver to challenge that citation, either by requesting an informal hearing or before a District Court. They would be required to provide factual proof that the insurance rates available to them were excessive and unfair and inequitable under *Shavers.* The City fears a normal judicial process.

F. A RULING IN THE APPELLANT'S FAVOR WILL FORCE THE LEGISLATURE TO ACT.

In 2017, for the fourth consecutive year, Michigan was the most expensive state for car insurance. Insure.com's annual state-by-state comparison of average annual premiums found Michigan's average premium to be $1,076 higher than the national average annual premium.[10] A ruling in the Appellant's favor will force the Legislature to address this situation. In 1979, the Legislature passed the Essential Insurance Act, 1979 PA 145. The purpose of the act was described in the analysis of subsequent legislation, Senate Legislative Analysis, SB 647, March 3, 1986:

> [The Essential Insurance Act] responded to claims that the voluntary insurance market was operating unfairly and that some persons were being denied, or being charged unfairly high rates for, insurance for their…cars not because of factors over which they had some control, such as their driving records, but because of other factors over which they had relatively little control, such as where they lived.

[10] Car Insurance Rates by State, by Penny Gusner, www.Insure.com July 28, 2017

Essentially we have the same problem today with the No-Fault Insurance Act except that it is compulsory and the Uninsured Motorist Fund no longer exists. There is currently bi-partisan interest in Lansing in reforming the No-Fault Act, although consensus does not yet exist on a course of action. If this Court upholds the Appellant's due process right to 'fair and equitable' rates, the issues raised by this case will become part of the discussion, as they rightfully should be.

G. A RULING IN THE APPELLANT'S FAVOR IS CONSISTENT WITH THE LEGISLATIVE INTENT OF THE NO-FAULT ACT.

Millions of Michigan citizens are compelled by their poverty and the excessive rates charged for basis PL/PD no-fault insurance coverage that they must drive "dark". Newspaper articles have suggested that 30% of vehicles registered in Detroit are without insurance coverage. People require transportation in this society to commute to work, to go to job interviews, to secure medical services, or to perform basic tasks like the purchase of groceries or the doing of laundry. The Michigan No-Fault Insurance Act was passed with the specific legislative intent that all Michigan drivers would have coverage. The excessive prices and predatory practices of the insurance companies have undermined this intent, forcing many poor people to drive uninsured. "'[T]he intent of the Legislature, when discovered, must prevail [over] any existing rule of construction to the contrary.'" *Metropolitan Council No 23 v Oakland Co Prosecutor,* 409 Mich 299, 318-319; 294 NW2d 578 (1980), quoting *Michigan Central R Co v Michigan*, 148 Mich 151, 156; 111 NW 735 (1907). In making the purchase of no-fault insurance required by law, the state is obligated to make sure that rates are fair and equitable. By ignoring to enforce that due process guarantee to citizens, the State has actually increased the number of uninsured vehicles on the

road in direct contradiction of the legislative intent behind the No-Fault Act. The Supreme Court explained in *Salas v Clements*, 399 Mich 103, 109; 247 NW2d 889 (1976), that a Court can depart from the literal construction of a statute when such construction would produce an…unjust result and would be clearly inconsistent with the purposes and policies of the act in question." Insurance companies are placing poor people in assigned risk categories unrelated to driving factors, risk or lass statistics, or sound actuary principals that double their rates. Enforcement of MCL 257.328(1), when fair and equitable rates are not available in the marketplace, creates an unjust result and is clearly inconsistent with the ultimate Legislative purpose of the No-Fault Act.

RELIEF REQUESTED

The Appellant respectfully requests the following relief:

1) A decision upholding the due process right of Michigan residents to 'fair and equitable' no-fault automobile insurance rates under *Shavers v. Attorney General,* 267 NW2d 72, 402 Mich 554 (1978).

2) A decision applying *Shavers* to the undisputed facts of this case.

3) A decision holding the Appellant NOT RESPONSIBLE for citation no. J525950

CONCLUSION

This Court took a strong stand against the unconstitutional storm water fee levied by the City of Jackson on its residents. In this case, the City is once again violating the due process rights of Michigan citizens by acting as the strong-arm enforcer for extortionist insurance industry practices. The Appellant respectfully requests that this Honorable Court exhibit the same

intelligence and vigor in defending the due process right of all Michigan citizens to fair and equitable insurance rates.

Respectfully submitted,

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Dated: December 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017 I did mail a copy of my Appellant's Brief to Kyle Williams at 161 W. Michigan Ave., Jackson Michigan 49201 by first class mail.

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