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STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals
(Riordan, PJ, and Boonstra and Gadola, JJ)

SPINE SPECIALISTS OF MICHIGAN, PC,

Plaintiff-Appellant,

v

MEMBERSELECT INSURANCE COMPANY,

Defendant/Appellee.

Supreme Court Case No. 165445

Court of Appeals Case No. 358296

Macomb County Circuit Court
Case No. 2020-003355-NF
Hon. Edward Servitto, Jr. (P27600)

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PLAINTIFF/APPELLANT SPINE SPECIALIST OF MICHIGAN, PC'S SUPPLEMENTAL BRIEFING IN SUPPORT OF ITS LEAVE APPLICATION

ORAL ARGUMENT REQUESTED

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QUESTION ASKED

This Court directed the Clerk to schedule oral argument on the Application for Leave to Appeal that Plaintiff/Appellant, Spine Specialists of Michigan, PC, filed from the Court of Appeals' published opinion in this case. In doing so, it also instructed the parties to file supplemental briefs under MCR 2.312(E) "addressing whether the Court of Appeals correctly held that the tolling provision of the one-year-back rule, MCL 500.3145(3), does not apply to claims for personal protection insurance no-fault benefits that accrued, MCL 500.3110(4), before the amendment to § 3145 took effect on June 11, 2019." See *Spine Specialists of Michigan, PC v MemberSelect Ins Co*, ___ Mich ___, 997 NW2d 45 (2023).

On the same date that this Court issued that order in this case, November 22, 2023, it also directed that oral argument be scheduled on the Application for Leave to Appeal filed by Defendant-Appellant, Citizens Insurance Company, from the Court of Appeals' published opinion in *Encompass Healthcare, PLLC v Citizens Ins Co*, ___ Mich ___, 985 NW2d 499 (2023). That case also interpreted the new statutory tolling provision, MCL 500.3145(3), which was adopted by the Legislature in 2019. See generally, 2019 PA 21.

As in this case, the parties in *Encompass* were instructed to file supplemental briefs addressing, among other things, "whether the Court of Appeals correctly applied the tolling provision of the one-year-back rule, MCL 500.3145(3), to claims that accrued, MCL 500.3110(4), before the amendment to 3145 took effect on June 11, 2019." Id. This Court also directed that oral argument be scheduled in both cases for the same future session.

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INTRODUCTION

The issue on appeal in both of these PIP benefits cases is whether the new statutory tolling provision under MCL 500.3145(3) of the No-Fault Act applies to PIP lawsuits filed after the effective date of the amended No-Fault Act, i.e., June 11, 2019. If so, MCL 500.3145(3) applies to PIP claims for "products, services, and accommodations" provided on behalf of a person injured in a motor vehicle accident before June 11, 2019.

Here, the Court of Appeals concluded that PIP claims for services provided before June 11, 2019 are precluded unless a lawsuit was filed within one year of when services were provided REGARDLESS of whether (or when) a formal denial of that claim for PIP benefits was issued. In other words, it refused to apply the new statutory tolling provision, i.e., MCL 500.3145(3) to PIP lawsuits brought after the No-Fault Act was amended in 2019.

The Court of Appeals erred by affirming the trial court's holding that the one year back rule precluded Spine Specialists claim for PIP benefits for services provided before the No-Fault Act was amended. In its published opinion, the Court of Appeals concluded that MCL 500.3145(3) could not be applied "retroactively." In support of that holding, the Court of Appeals relied largely on this Court's decision in *Andary v USAA Cas Ins Co*, 512 Mich 207, ___ NW2d ___ (2023). But, it was a mistake for the Court of Appeals to do so.

MCL 500.3145(3) is merely a procedural rule. It does not affect substantive rights. It is not a statute of limitations. It is not a damages limiting provision. It is not a cap on damages. It is no more than a procedural rule that tolls the one year back rule when no formal denial has been issued. Effectively, it is a statutory provision that reinstates the judicial tolling permitted for decades in Michigan when a claim for insurance benefits was

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not formally denied. See *Lewis v Detroit Auto Inter-Ins Exch*, 426 Mich 93, 393 NW2d 167 (1986), reversed by *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 702 NW2d 539 (2005).

Unlike this case, *Andary* involved substantive rights to recover PIP benefits as promised when PIP coverage was secured. The new statutory tolling provision, MCL 500.3145(3), does not present a similar question of retroactive application. The one year back rule under MCL 500.3145(1) has been characterized as a damages-limiting provision. It is analogous to a statute of limitations but it is not the same as a statute of limitations. See generally, *Joseph v Auto Club Ins Ass'n* , 491 Mich 200, 208, 815 NW2d 412 (2012).

No change was made to the one-year back rule when the Legislature added the new statutory tolling provision. The only change was that a statutory provision restored the judicial tolling that this Court recognized before *Devillers*, supra. This Court should reverse the Court of Appeals' published decision because it erred by concluding that MCL 500.3145(3) does not apply to all PIP lawsuits filed after the No-Fault Act was amended.

COUNTER-STATEMENT OF FACTS

For brevity's sake, Spine Specialists will not repeat the underlying facts in this case. It instead relies upon the Statement of Facts provided in Application for Leave to Appeal. That being said, however, it is worth pointing out that MemberSelect did not formally deny the claims made by Spine Specialists for PIP benefits at issue in this case until August, 2020. It is unclear why it did so even then as its position in this case has always been that a formal denial was not needed to avoid statutory tolling under the amended No-Fault Act because the new statutory tolling provision did not apply retroactively, according to them. Presumably, it did so to avoid the possibility of paying penalty interest on PIP benefits owed under MCL 500.3142 or to avoid paying attorney fee sanctions under MCL 500.3148.

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STANDARD OF REVIEW

The parties agree that the standard of review on appeal is de novo as summary disposition was sought under MCR 2.116(C)(7) and MCR 2.116(C)(10). See *Maiden v Rozwood*, 461 Mich 109, 597 NW2d 817 (1999). [Plaintiff/Appellant's Application for Leave to Appeal, at p xi; Defendant/Appellee Answer to Application for Leave to Appeal, at p 4].

ARGUMENT

In responding to the leave application, MemberSelect argued that the lower courts got it right because this Court previously concluded under that the one year back rule is a damages-limiting provision. And, consequently, according to MemberSelect, it must be substantive, not procedural, Respectfully, that claim is mistaken as no previous court has said that the one year back rule's damages-limiting function makes it substantive, rather than procedural. Even if a court had previously said that, it begs the question in this case.[1]

Here, the question is whether MCL 500.3145(3) – the new statutory tolling provision, not the one year back rule itself under MCL 500.3145(2) – is merely a procedural, non-

[1]The only judge who actually said that before the Court of Appeals issued its published decision in this case was the same Court of Appeals judge that authored the published opinion below. In *Henry Ford Macomb v Farmers Ins Exch*, unpublished per curiam opinion of the Court of Appeals, Docket No. 327572, issued September 30, 2016, Judge Gadola noted in his dissenting opinion that this Court distinguished the one year back rule from a statute of limitations in *Joseph*, supra. He concluded that "the rule represents a statutory cap on damages a claimant is entitled to recover", citing *Joseph*, 491 Mich at 216. He then concluded that "[i]t is apparent that the one year back rule is substantive in nature, rather than procedural, because it reflects legislative policy consideration other than court practice and procedure." Slip op at 3 (Gadola, J, dissenting). The majority opinion, in contrast, reached a different holding than Judge Gadola because it held that "we are not dealing with a substantive question. We are dealing with a procedural question of how to calculated the designated time period as set forth in a statute that fails to provide a method for its calculation." Slip op at 5. This Court denied leave to appeal from that decision. 501 Mich 901, 902 NW2d 419 (2017).

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substantive, rule that mitigates the harsh effects of the one year back rule when no formal denial was issued. Repeatedly, in responding to the leave application, MemberSelect discusses the one year back rule under MCL 500.3135(2) as if it is the same as the new statutory tolling provision under MCL 500.3145(3). Clearly, that is not the case. The one year back rule existed before the Legislature adopted the new statutory tolling provision. It was not changed in 2019. The only change was the addition of a procedural rule that tolled the one year back rule based on whether (and when) a formal denial was issued.

Whether MCL 500.3145(3) applies to PIP claims for services provided before June 11, 2019 is a different question than the one posed in *Andary*. The question in *Andary* was whether persons who contracted for PIP benefits before the No-Fault Act was amended are entitled to recover PIP benefits for all reasonable charges incurred for reasonably necessary products, services and accommodations even if provided after June 11, 2019. In *Andary*, this Court held that such PIP insureds had a contractually vested right to recover PIP benefits under the No-Fault Act as it existed before 2019, without being subject to the caps that the Legislature later imposed when the No-Fault Act was amended.

The Court of Appeals' published opinion in this case creates a bright-line rule as to how the amended No-Fault Act should be applied. But, whether that bright line rule should be applied to the new statutory tolling provision is a very different question than the one posed in *Andary* where the new statutory provisions capping PIP benefits were contested.

While it relied on this Court's holding in Andary to conclude that MCL 500.3145(3) could not be applied "retroactively", the Court of Appeals issued its published opinion without even bothering to perform the same legal analysis that this Court found controlling in deciding a retroactivity question. See *Andary*, supra at 246, applying the operative test

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for determining whether a statutory provision should be applied retroactively from *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38-39, 852 NW2d 78 (2014).

If the Court of Appeals had applied *LaFontaine*, supra, it likely would have reached a different conclusion in this case than this Court reached in the *Andary* case. See *infra*. Instead of distinguishing apples from oranges, the Court of Appeals in its published opinion simply said that an apple is fruit, an orange is fruit, so apples and oranges are the same.

The Court of Appeals should have recognized that statutory caps like the ones that this Court refused to apply retroactively in *Andary* are not the same as a statutory tolling provision (or a statute of limitations). Similarly, statutory caps are not the same as a so-called damaging-limiting provision like the one year back rule under MCL 500.3145(3). It was a mistake for the Court of Appeals to simply observe that *Andary* did not apply the amended No-Fault Act retroactively and then, apply that holding as grounds for concluding that the new statutory tolling provision under MCL 500.3145(3) did not apply retroactively.

I. THIS COURT'S HOLDING IN *ANDARY* HAS NO APPLICATION IN THIS CASE BECAUSE NO SUBSTANTIVE RIGHTS ARE AFFECTED BY APPLYING A MERE PROCEDURAL RULE LIKE THE NEW STATUTORY TOLLING PROVISION TO TOLL A DAMAGES-LIMITING PROVISION LIKE THE ONE YEAR BACK RULE.

This Court has asked whether the statutory tolling provision under MCL 500.3145(3) applies to PIP lawsuits filed after the No-Fault Act was amended. If so, the one year back rule may be tolled for PIP claims based on services provided before the No-Fault Act was amended. The lower courts rejected that argument and applied the one year back rule despite the new statutory tolling provision. The Court of Appeals relied upon its published decision in *Andary v USAA Cas Ins Co*, 343 Mich App 1, 996 NW2d 784 (2022). That

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decision was reversed, in part, and affirmed, in part, by this Court's subsequent decision after leave to appeal was granted. See *Andary*, supra, 512 Mich 207, __ NW2d __ (2023).

In *Andary*, supra, this Court held that the scope of PIP benefits owed under an auto insurance policy vests when a person insured by that policy is injured in a covered motor vehicle accident. The scope of PIP benefits cannot be subsequently changed even when the Legislature amends the No-Fault Act, as it did in 2019, by capping the PIP benefits owed. The *Andary* case addressed only whether caps on in-home family member provided attendant care under MCL 500.3157(10) and medical bills under MCL 500.3157(7) applied retroactively. Neither the long standing one year back rule provision nor the new statutory tolling provision under MCL 500.3145(3) were addressed by this Court's opinion in *Andary*.

To the extent that the Court of Appeals in its published opinion in *Andary* was broader than what this Court held, it has no weight and the Court of Appeals' reliance on that holding in this case is misplaced. This Court has spoken since the Court of Appeals issued its published decision in this case. It did not simply affirm the Court of Appeals' holding in *Andary*. Instead, it provided a much more limited holding by affirming that MCL 500.3157(7) and MCL 500.3157(10) could not be applied retroactively. It is this Court's legal analysis that should be considered in addressing the operative question in this case.

The Court of Appeals acknowledged below that the context in this PIP case was different than *Andary*. Nonetheless, it applied its earlier retroactivity holding in *Andary* broadly to all new statutory provisions without conducting the same detailed legal analysis that this Court did. It is essential where the context of the case is different, as it admittedly is in this case, that the retroactivity question be properly analyzed. It is not sufficient to

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mechanically apply what this Court held in *Andary* to all new statutory provisions under the amended No-Fault Act. Substantive rights are not affected by all new statutory provisions.

Andary was an exceptional case dealing with the rights of so-called "legacy patients" only. It did not establish a broad general rule that all new statutory provisions under the amended No-Fault Act cannot be applied retroactively. Instead, it simply held that the new statutory caps on PIP benefits could not be applied retroactively to PIP insureds that both contracted for PIP benefits (and also were injured) before the No-Fault Act was amended.

Unlike this case, *Andary* involved *substantive* provisions of the amended No-Fault Act that affected *vested rights* of persons injured in motor vehicle accidents before June 11, 2019 to recover PIP benefits. This Court held that substantive changes to the PIP benefits owed to "legacy" patients could not be applied retroactively so as to alter entitlement to recover PIP benefits for injuries sustained in accidents before June 11, 2019.

This case, in contrast, involves no substantive provisions and no vested rights! It merely addresses whether a *procedural* provision that tolls the one year back rule may be applied in PIP lawsuits filed after June 11, 2019. If so, tolling is available on PIP claims for services provided before the No-Fault Act was amended where no formal denial was issued so long as the PIP claim was pursued with reasonable diligence by the PIP claimant (or, as in this case, providers acting under an assignment of rights from that PIP claimant).

The lower courts clearly erred by relying on the Court of Appeals' published holding in *Andary* to broadly hold that even procedural, non-substantive, provisions like tolling, did not apply to PIP claims for services provided before June 11, 2019. For all PIP lawsuits filed after the No-Fault Act was amended, procedural, non-substantive, provisions like tolling under MCL 500.3145(3) should be applied. This Court should reverse the Court of Appeals' published opinion and clarify the limits on its non-retroactivity holding in *Andary*.

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II. THE COURT OF APPEALS ERRED BY HOLDING THAT THE ONE YEAR BACK RULE PRECLUDED PIP CLAIMS FOR SERVICES PROVIDED BEFORE THE NO-FAULT ACT WAS AMENDED BECAUSE 500.3145(3) IS A PROCEDURAL RULE THAT APPLIES TO PIP LAWSUITS FILED AFTER THE LAW WAS AMENDED.

A. The one year back rule is a damages limiting provision and it does not affect substantive rights such as entitlement to recover PIP benefits; instead, it limits the damages, i.e. PIP benefits, that can be recovered.

This Court concluded in *Cameron v Auto Club Ins Ass'n*, 476 Mich 61, 97-98, 718 NW2d 784 (2010), and then again, in *Joseph*, supra, that the one year back rule under MCL 500.3145(1) is not a statute of limitations, but a damages-limiting provision. *Linden v Citizens Ins Co of America*, 308 Mich App 89, 97-98, 862 NW2d 438 (2014), citing *Cameron* and *Joseph*. Effectively, the one year back rule is a statutory provision akin to the common law equitable doctrine of laches, albeit with a more precise timing requirements.[2]

It is axiomatic that "[t]he purpose of the one-year period of limitations [now MCL 500.3145(1)] is to encourage claimants or persons acting on their behalf to bring their claims to court while those claims are still fresh." *Geiger v DAIIE*, 114 Mich App 283, 291, 318 NW2d 833 (1982), citing *Burns v Auto-Owners Ins Co*, 88 Mich App 63, 279 NW2d 43 (1979), *Aldrich v Auto-Owners Ins Co*, 106 Mich App 83, 307 NW2d 736 (1981). But, it is also likewise true that "[t]he 'one year back' portion of § 3145(1) has a similar policy." Id.

In other words, the one year back rule is designed to ensure that PIP insurers are not prejudiced by a delay in pursuing claims for PIP benefits. It is not a substantive

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[2]Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583, 458 NW2d 659 (1990), citing *Bartnicki v Wayne Co Drain Comm'r*, 18 Mich App 200, 205, 170 NW2d 856 (1969), lv den 382 Mich 783 (1969). "To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay." *Schmude Oil*, 184 Mich App at 583, citing *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982).

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provision because it does not affect vested rights, i.e., the entitlement to PIP benefits. Instead, it merely limits the damages, i.e., the PIP benefits that actually can be recovered.

No changes were made to MCL 500.3145 in 2019 that transformed the one year back rule into a substantive provision. The only changes to the one year back rule were the following: 1) moving it to a separate subsection from the one year notice provision; and 2) clarifying that it would now be subject to the new statutory tolling provision. Otherwise, the statutory one year back rule is the same as it was before the No-Fault Act was amended.

To the extent that MemberSelect has focused its argument on the one year back rule – MCL 500.3145(2), not MCL 500.3145(3) – by arguing that the one year back rule is a substantive provision, it has completely missed the mark. The issue is not whether the one year back rule under MCL 500.3145(2) is substantive or not. The question is whether the new statutory tolling provision is substantive. To be substantive, it must affect vested rights. But, tolling is mere procedural mechanism. As such, it affects no substantive rights.

In answering the leave application, MemberSelect compared the new statutory tolling provision under MCL 500.3145(3) to statutory limitations on recovering damages for non-economic loss in medical malpractice cases. See generally, MCL 600.1483. It did so because the Court of Appeals in *Zdrojewski v Murphy*, 254 Mich 50, 657 NW2d 721 (2002) concluded that statutory provisions capping damages that can be recovered are substantive, not procedural. Id, citing this Court's holding in *McDougall v Schanz*, 461 Mich 15, 30, 597 NW2d 148 (1999). See also this Court's decision in *Phillips v Mirac, Inc*, 470

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Mich 415, 434, 685 NW2d 174 (2004) (affirming damages caps under the owners liability statute for rental car companies when a leased motor vehicle is involved in an accident).[3]

Respectfully, and recognizing that the answer to the application was filed before this Court issued its opinion in *Andary*, MemberSelect has inadvertently proven the point that Spine Specialist is making in seeking reversal of the Court of Appeals' published opinion. Caps on damages are substantive. The one year back rule provision, MCL 500.3145(2), is not substantive because it does not alter a PIP claimant's right to recover PIP benefits. It merely limits that recovery in manner similar to common law laches when a PIP claimant has delayed pursing a claim for PIP benefits owed. The one year back rule did not change when the No-Fault was amended. It simply got its own subsection under MCL 500.3145.

The new statutory tolling provision under MCL 500.3145(3) also is not substantive. It is even more clearly a purely procedural provision. That is true because it does not affect any vested rights. It merely adds a statutory caveat to the one year back rule by requiring both formal denial of a claim and reasonable diligence in pursuing a claim for PIP benefits.

The amended No-Fault Act has two caps on the damages that can be recovered: MCL 500.3157(7) and MCL 500.3157(10). This Court correctly held in *Andary* that those provisions do not apply retroactively to limit the damages that can be recovered by person injured in a motor vehicle accident who had PIP coverage before the law was amended. Like other statutory damages cap provisions, MCL 500.3157(7) and (10) are substantive. But, clearly, the same cannot be said of the one year back rule or its new tolling provision.

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[3]See also, generally, *Wessels v Garden Way, Inc*, 263 Mich App 642, 646, 689 NW2d 526 (2004), where the Court of Appeals affirmed caps on non-economic loss damages in product liability cases under MCL 600.2946a, citing *Kenkel v Stanley Works*, 256 Mich App 548, 665 NW2d 490 (2003), *Phillips*, and *Zdrojewsk*i, supra.

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B. MCL 500.3145(3) applies to all PIP lawsuits filed after the No-Fault Act was amended in 2019 because it is merely a procedural provision that limits the damages recovered due to delay in pursuing payment of PIP benefits owed and it does not affect entitlement to recover PIP benefits.

In 2019, the Legislature amended the No-Fault Act to include a statutory tolling provision that applied to the one year back rule on recovering damages in a PIP action. In so doing, the Legislature modified a procedural provision, i.e., the one year back rule, so that its application would be tolled until a claim for PIP benefits was formally denied. The Legislature did so in 2019 by adding MCL 500.3145(3), which provides the following:

> A period of limitations applicable under subsection (2) to the commencement of an action and the recovery of benefits is tolled from the date of a specific claim for payment of the benefits until the date the insurer formally denies the claim. This subsection does not apply if the person claiming the benefits fails to pursue the claim with reasonable diligence.

Unlike other new provisions added when No-Fault Act was amended, the Legislature did not provide that implementation of the new statutory tolling provision would be delayed. Accordingly, the new statutory tolling provision must be applied to all PIP lawsuits filed after June 11, 2019, which was the effective date of the amended No-Fault Act. 2019 PA 21/22.

As Justice Viviano correctly observed in his concurring opinion in *Buhl v City of Oak Park*, 507 Mich App 236, 244, 968 NW2d 348 (2021), "a statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment". To simply call it "retroactive" application is a misnomer in such cases because a statute can be applied to claims that accrued even before it was enacted where, as in this case, it is merely a procedural provision that does not affect any vested rights.

As this Court previously observed in *Rookledge v Garwood*, 340 Mich 444, 457, 65 NW2d 785 (1954), "[a] statutory defense, though a valuable right, is not a vested right and

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the holder thereof may be deprived of it after the cause of action to which it may be interposed has arisen." Similarly, in *Lahti v Fosterling*, 357 Mich 578, 589, 99 NW2d 490 (1959), this Court affirmed that same basic legal conclusion when it stated the following:

> The question of determining what is a vested right has always been a source of much difficulty to all courts. The right which defendants claim sprang from the kindness and grace of the legislature. It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it.

See also *Paul v US Mut Financial Corp*, 150 Mich App 773, 784, 389 NW2d 487 (1986) (statutory usury defense is "a valuable, but not vested right" and "the holder may be deprived of this by legislative action"). In Paul, the Legislature added a business entity exception to the category of qualified lenders subject to the statutory usury defense. That amendment extinguished the statutory usury defense for all future cases filed afterwards. The one year back rule defense to paying PIP claims can similarly be modified and thus, the new statutory tolling provision applies to all PIP cases filed after the law was amended

Here, Spine Specialists claimed PIP benefits for services provided on behalf of Woods before June 11, 2019. Progressive paid some, but not all, of Spine Specialists' claims for services provided for Woods before June 11, 2019. But, Progressive did not deny the balance of those PIP claims until the fall of 2020. Spine Specialists promptly sued Progressive in September, 2020. Consequently, the one year back rule does not preclude Spine Specialists' claims for PIP benefits in this case because its application was tolled.

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III. THE COURT OF APPEALS FURTHER ERRED BY FOCUSING ON WHEN CLAIM FOR PIP BENEFITS ACCRUED AS OPPOSED TO WHEN THE PIP LAWSUIT WAS FILED IN DETERMINING WHETHER THE NEW STATUTORY TOLLING PROVISION UNDER MCL 500.3145(3) SHOULD BE APPLIED IN THIS CASE.

In its published opinion, the Court of Appeals also relied upon the accrual provision in the No-Fault Act, MCL 500.3110(4), to support its holding that the operative date for determining whether MCL 500.3145(3) applied was the date that the claim for PIP benefits accrued, and not the date that the PIP lawsuit was filed to recover the PIP benefits owed. But, that reliance was misplaced as the operative question when it comes to applying a statutory tolling provision like MCL 500.3135(3) is when the PIP lawsuit was filed.

MCL 500.3110(4) succinctly states that "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors loss is incurred." No changes were made to MCL 500.3110 when the No-Fault Act was amended in 2019. Consequently, the damages that can be recovered in a PIP case are limited by the one year back rule to claims for PIP benefits that accrued within one year of the date when the PIP lawsuit was filed. See MCL 500.3145(2).

But, here, the question is not how the one year back rule is applied. The question is how the new statutory tolling provision under MCL 500.3145(3) should be applied. Again, the Court of Appeals erred by rotely applying legal precedent that is applicable only when substantive rights are involved. It is the same mistake that the Court of Appeals made in applying this Court's holding in *Andary* to the distinct issue presented in this case.

The Court of Appeals observed that "[t]he substantive rights and liabilities of the parties are determinable according to the law as it stood when the causes alleged by the plaintiff accrued. Slip op at 4, citing *Jones v Williams*, 172 Mich App 167, 171, 431 NW2d

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419 (1988). But, it then proceeded to forego any analysis of whether the new statutory tolling provision under MCL 500.3145(3) affected the substantive rights of the parties. It instead assumed that substantive rights were affected as the one year back rule would not limit the damages recovered if its application was tolled since no formal denial was issued.

That is again the fundamental error that the Court of Appeals made in this PIP case. It applied precedent applicable only when substantive rights are involved. And, it did so without ever wrestling with the underlying question of whether strictly applying the one year back rule to limit the PIP benefits recovered in this case truly affects a substantive right.

Not every new provision in the amended No-Fault Act is a substantive provision. Simply because such provisions are the result of legislative action is not enough. In *McDougall v Schanz*, 461 Mich 15, 597 NW2d 148 (1999), this Court concluded that statutory requirements for qualifying medical experts were substantive, not procedural. That decision was controversial, at best, as evidenced by the narrow majority in that case and the dissenting opinions. Now, this Court appears to be questioning that holding as it was applied to statute of limitations in medical malpractice cases. See this Court's recent order in *Carter v DTN Mgmt Inc*, Supreme Court Docket No. 165425, instructing the parties to file supplemental briefing to address whether "whether *Gladych v New Family Homes, Inc*, 468 Mich 594, 600[, 664 NW2d 705 (2003) correctly held that statutes of limitations are substantive in nature" and also further asking whether Gladych "should be overturned."

Gladych was based on this Court's holding in *McDougall* that a statutory provision is procedural (as opposed to substantive) "only when 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified.'" *Gladych* at 58. This Court in *Gladych* concluded that the statute of limitations for medical malpractice

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cases was substantive, not procedural. But, in doing so, this Court arguably ignored well-established precedent in Michigan and other jurisdictions holding that statute of limitations are procedural, and not substantive. Evidently, this Court is weighing this question again.

If statutes of limitations are found to be procedural, there is no viable argument that the one year back rule, much less the new statutory tolling provision under MCL 500.3145(3), affects substantive rights. But, even if this Court does not reach that conclusion, and *Gladych* stands, it still provides no support for a similar holding in this case because the one year back rule is not a substantive provision. It is a procedural rule akin to laches, albeit it with a more concrete touchstone for its application and MCL 500.3145(3) is not a substantive provision as it merely limits damages and does not preclude litigation.

The distinction between a statute of limitations and a damages limiting provision like the one year back rule is important. A statute of limitations runs from when the claim accrues whereas a damages limiting provision like the one year back rule is based on when legal action was filed. In *Howard v Gen Motors Corp*, 427 Mich 358, 385-387, 399 NW2d 10 (1986), Justice Brickley astutely summarized that distinction between statute of limitations and such back rule provisions (in his footnote 11) when he stated the following:

> A perusal of the limitations of actions section of the Revised Judicature Act reveals that, like the above-quoted examples, most statutes of limitations require that actions "be commenced" within certain time periods. Generally, "the period of limitations runs from the time the claim accrues." MCL 600.5827; MSA 27A.5827. By contrast, the point of reference for the one- and two-year-back rules is the date of the filing of the application. The [one- and two-year-back] rules come into play only if compensation is awarded.

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The same can be said about the No-Fault Act's one year back rule under MCL 500.3145(2). The operative date for applying the one year back rule is when the PIP lawsuit was filed as that is akin to filing an application for workers compensation benefits.

In *Howard*, supra, Justice Brickley further noted that "the one- and two-year-back rules [under the WDCA] do not serve the same purposes as do typical statutes of limitations." Therefore, he concluded, and no justice disagreed with him, that there is " no logical reason for characterizing the one- and two-year-back rules as statutes of limitation." He further observed that the one- and two-year-back rules under the WDCA "concern the time period for which compensation may be awarded once a determination of rights thereto has been made." In other words, a procedural limitation on what can be recovered and not a substantive provision affecting entitlement to recover workers compensation benefits. Thus, the operative date for applying MCL 500.3145(3) is when the PIP lawsuit was filed.

IV. IF THIS COURT VIEWS THE QUESTION AS WHETHER MCL 500.3145(3) SHOULD BE APPLIED RETROACTIVELY, THE FOUR FACTORS IDENTIFIED IN *LAFONTAINE* AND LATER APPLIED BY THIS COURT IN *ANDARY* CLEARLY DEMONSTRATE THAT APPLYING A STATUTORY TOLLING PROVISION DOES NOT AFFECT THE PARTIES' SUBSTANTIVE RIGHTS AS THE RIGHT TO RECOVER PIP BENEFITS AND THE DUTY TO PAY BENEFITS IS UNCHANGED.

In *Andary*, supra, this Court addressed the question of whether the statutory caps on PIP benefits that can be recovered under MCL 500.3157(7) and MCL 500.3157(10) applied retroactively. Relying on its earlier decision in *Buhl*, supra, which reaffirmed in 2021 that *LaFontaine*, supra, is the correct "legal framework for determining whether a modified statute applies retroactively", this Court summarized the four *LaFontaine* factors to be considered in addressing retroactivity of new statutory provisions by stating the following:

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> In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [*LaFontaine*, 496 Mich at 38-39 (citations omitted]. *Andary*, supra, 512 Mich at 246-247.

At the outset, this Court acknowledged the "absence of express legislative intent for retroactive application of MCL 500.3157. The same can clearly be said of MCL 500.3145.

Moreover, the legal question here is not nearly as difficult as in the *Andary* case. MCL 500.3145 does not use language that makes it "appear to be prospective on [its] face" as this Court said about MCL 500.3157(7) and (10). There is no similar language found in MCL 500.3145 that would suggest that its provisions apply only after July 1, 2021. Nor does the Insurance Code provide any support for reaching a different conclusion. Thus, the first factor clearly supports the claim that MCL 500.3145(3) applies retroactively.

The second factor under *LaFontaine* is less clear-cut. It states that "a statute is not regarded as operating retroactively merely because it relates to an antecedent event." In this PIP case, there are several antecedent events. As in the *Andary* case, the operative PIP coverage in this PIP case was secured before the No-Fault Act was amended. Second, the motor vehicle accident occurred before the amended law became effective on June 11, 2019. Third, the PIP benefits in dispute were incurred before June 11, 2019. But, as previously noted, the operative question when it comes to both a statutory tolling provisions and one year back rule provisions is when the legal proceedings were started.

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As with MCL 500.3157(7) and (10), MCL 500.3145(3) is a new statutory provision adopted when the Legislature amended the No-Fault Act in 2019. But, unlike those damages cap provisions, MCL 500.3145(3) says nothing about how it should be applied. So, where does that leave us when applying the second LaFontaine factor in this case?

Fundamentally, the antecedent events in this case are not relevant to determining whether MCL 500.3145(3) applies retroactively. None of the antecedent events support a holding that MCL 500.3145(3) applies retroactively. Here, the Court of Appeals erred by relying on the fact that the services provided by Spinal Specialists in April and May of 2019 were incurred before the No-Fault Act was amended. Yes, that was an antecedent event. But, it simply has no bearing on whether the statutory tolling provision should be applied. Furthermore, it shifts the focus from the fact that those claims were never formally denied.

Simply put, the second *LaFontaine* factor regarding antecedent events is merely a caution against making precisely the sort of mistake that the Court of Appeals made in this case by rotely applying this Court's holding in *Andary* to an admittedly different context by referencing the date when the services were incurred as a controlling factor in its decision. The Court of Appeals did not heed that caution in this case because it never bothered to assess the "retroactivity" question under the legal framework established in the LaFontaine case. It instead mechanically applied this Court's holding in Andary to MCL 500.3145(3).

While it is Spine Specialists' position that this case hinges on whether MCL 500.3145(3) is procedural as opposed to substantive in nature, and that the question here is not truly a question of retroactive application, it is easy to see how this question could characterized as a "retroactivity" question. So, accordingly, it is worth discussing the *LaFontaine* factors as the Court may be interested in considering them.

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Ultimately, both approaches lead to the same conclusion – MCL 500.3145(3) applies to all PIP lawsuits filed after the No-Fault Act was amended. The most pertinent factors under *LaFontaine* address similar questions about whether the statutory provision in question is substantive or procedural. That is where neither the Court of Appeals' published decision, nor MemberSelect's attempts to now defend it, hold water in this case.

The third *LaFontaine* factor directly addresses whether a new statutory provision is substantive (as opposed to procedural) because it notes that the problem with applying new statutory provisions retroactively can "impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions already past." *Andary*, supra at 252, quoting from *LaFontaine*, supra at 39. But, here, as previously discussed, no vested rights are affected. The entitlement to recover PIP benefits has not changed. The duty to pay PIP benefits owed has not changed. The only change concerns application of a statutory laches-like provision that may in some cases limit the damages recovered (depending entirely on how both the PIP claimant and the responsible PIP insurer acted).[4]

Clearly, no vested contractual rights have been affected. Spine Specialists is entitled to recover PIP benefits for services provided based on the assignment of rights. MemberSelect, in turn, is entitled to argue that the one year back rule precludes recovery of damages for services provided by Spine Specialists in April and May 2019. But, as previously stated, that question is procedural, not substantive. And, so too is the question of whether the new statutory tolling provision under MCL 500.3145(3) should be applied.

[4]Similarly, to the extent that the Court of Appeals relied on other antecedent events as controlling in reaching the holding that it did – like the date that the PIP claimant was injured – that reliance also was misplaced with MCL 500.3145(3).

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The fourth *LaFontaine* factor is consistent with the 2nd and 3rd factors because it provides that a "remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute." *Andary*, supra, citing *LaFontaine*, supra. As no vested rights are affected by the new statutory tolling provision under MCL 500.3145(3), or for that matter, the one year back rule, which has always existed, but now can be found under MCL 500.3145(2), the fourth *LaFontaine* factor presumably has no application to the question that this Court has asked. To the extent it does have any bearing, it clearly supports Spine Specialists' position because it affirms that procedural statutory provisions may be applied retroactively, even if MemberSelect is correct, which it is not, in focusing on antecedent events instead of when the PIP lawsuit was filed and the fact that a formal denial was only issued afterwards.

CONCLUSION

This Court should reverse the Court of Appeals' published decision in this PIP case which held that the new statutory tolling provision, MCL 500.3145(3), does not apply to PIP lawsuits filed after the amended law became effective on June 11, 2019. MCL 500.3145(3) is a procedural, not substantive rule, unlike a cap on damages, and accordingly, it should be applied to all PIP lawsuits filed after June 11, 2019. This Court's holding in *Andary* and its application of the *LaFontaine* factors for determining whether a statutory provision should be applied retroactively only further support such a conclusion. PIP insurers that formally denied PIP claims for services provided more than one year before a PIP lawsuit will filed can still avail themselves of the one year back rule under MCL 500.3145(2). MemberSelect did not do so until 2020 so the one year back rule has no application.

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(unless MemberSelect can show that payment was not pursued with reasonable diligence). Without question, many claims for PIP benefits will still be barred by the one year back rule because the requirements of the new statutory tolling provision simply cannot be satisfied even in cases where no formal denial was issued. In sum, PIP insurers are still protected from the prejudice that can be caused by undue delay in pursuing a claim for PIP benefits.

RELIEF REQUESTED

Plaintiff/Appellant, Spine Specialists of Michigan, PLLC, respectfully requests that this Honorable Court reverse the Court of Appeals' published decision to affirm the trial court's holding that summarily dismissed its PIP claims under MCR 2.116(C)(7) and(C)(10) because the lower courts erred by concluding that the new statutory tolling provision under MCL 500.3145(3) did not apply to claims for PIP benefits for services provided before the No-Fault Act was amended in 2019 as MCL 500.3145(3) is merely a procedural rule that should be applied to all PIP lawsuits filed after the amended No-Fault Act was effective.

Respectfully submitted:

Dated: February 21, 2024

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CERTIFICATE OF COMPLIANCE

I, Steven A. Hicks, certify that Plaintiff/Appellant Spine Specialists of Michigan, PC's Supplemental Briefing that is being filed today complies with the type-volume limitation under the appellate court rules. I am relying on the word count of the word-processing software used to produce the supplemental briefing. The supplemental brief used a 12 point proportional font and the word count for this briefing is calculated as 7,524 words.

Dated: February 21, 2024

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