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STATE OF MICHIGAN

IN THE SUPREME COURT

CARLONDA NAISHE SWOOPE

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF THE MIDWEST,

Defendant/Appellee.

Supreme Court No. 166790

Court of Appeals No.: 364924

Wayne County Circuit Court
Case No.: 21-011492-NF

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THE MICHIGAN ASSOCIATION FOR JUSTICE'S AMICUS CURIAE BRIEF

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STATEMENT OF BASIS OF JURISDICTION AND OF QUESTIONS INVOLVED

On December 14, 2023, the Court of Appeals issued its decision in this case as an unpublished opinion. See *Swoope v Citizens Insurance Company of the Midwest*, Docket No. 364924, unpublished decision rel'd 12/14/23. On January 25, 2024, the Court of Appeals approved its opinion for publication. (See Plaintiff/Appellant's Exhibit 1).

A central question that this Court must address involves interpretation of the phrase "taken unlawfully" in MCL 500.3113(a). Specifically, does that phrase encompass unlawful use (such as driving on a suspended license, driving drunk, etc.)? Amicus Curiae, the Michigan Association for Justice, emphatically submits that the answer to this question is "NO." We defer to Plaintiff/Appellant's Application as to the other questions involved in this appeal.

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INTRODUCTION[1]

This appeal involves the unlawfully taken vehicle disqualification under the No-Fault Act, MCL 500.3101 *et seq*. Clearly, the No-Fault Act disqualifies persons who have been injured in motor vehicle accidents where the vehicle was "taken unlawfully." MCL 500.3113(a). But the No-Fault Act does not disqualify injuries sustained during unlawful *use* of a vehicle. Binding case law observes a clear distinction between unlawful ***use*** and unlawful ***taking***. Driving on a suspended license is an unlawful use, not an unlawful taking.

"[T]he plain meaning of the phrase 'taken unlawfully'" in MCL 500.3113(a) refers to "gain[ing] possession of a vehicle contrary to Michigan law." *Spectrum Health Hosp. v Farm Bureau Mut Ins Co*, 492 Mich 503, 517; 821 NW2d 117 (2012). "MCL 500.3113(a). . . does not encompass the unlawful *use* or *operation* of a motor vehicle" *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 741; 896 NW2d 32 (2016) (Emphasis in original).

Given this case law, this issue appeared long settled. Enter the COA in *Ahmed v Tokio Marine Am Ins Co*, 337 Mich App 1; 972 NW2d 860 (2021) and in this case. The COA in *Ahmed* held that violations of Motor Vehicle Code statutes constitute unlawful takings under MCL 500.3113(a) because the statutes are associated with criminal penalties. *Ahmed*, 337 Mich App at 19 fn 8. In so holding, the *Ahmed* panel incorrectly interpreted this Court's holding in *Spectrum* and brazenly disregarded *Monaco's* holding (which relied on *Spectrum*). *Ahmed's* holding also impermissibly injects fault into this *no-fault* case.

So, too, does the COA's holding in this case. The COA in this case held that Swoope unlawfully took the vehicle because "operating a vehicle without a valid license is unlawful for purposes of MCL 500.3113(a)." *Swoope v Citizens Ins Co of the* Midwest, ___ Mich App ___

[1] No party or their counsel authored this Brief, in whole or in part. No party or their counsel made any monetary contribution intended to fund the preparation or submission of this Brief.

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(2023) at slip op. *6. The COA determination in this case was based on the *Ahmed* Court's clearly erroneous interpretation of law. *Id.* Inexplicably, **the COA in this case did not mention *Monaco* at all**. As in *Ahmed*, the COA in this case violated the rules of stare decisis in ignoring *Monaco*.

The COA has already decided another case based on its erroneous decision in this case.[2] Others will surely follow. This Court must correct the COA's clear legal error to prevent further material injustice. This Court should grant leave to appeal or alternatively enter a peremptory Order that makes clear that the phrase "taken unlawfully" in MCL 500.3113(a) does not encompass unlawful use to correct COA's incorrect ruling of law.

THE MICHIGAN ASSOCIATION FOR JUSTICE'S STATEMENT OF INTEREST

The Michigan Association for Justice (MAJ) is a non-profit association of more than 1500 Michigan attorneys engaged primarily in litigation and trial work. MAJ members tirelessly work to represent injured Michiganders. MAJ recognizes an obligation to assist this Honorable Court on important issues of law that would substantially affect the administration of justice in the State of Michigan.

Many MAJ members represent motor vehicle accident victims and/or their healthcare providers who are subject to the provisions of the Michigan No-Fault Act (and case law interpreting same). As noted above, binding precedent prior to the Court of Appeals decision in this case and in *Ahmed*, *supra*, made clear that MCL 500.3113(a) only disqualifies a person from no-fault automobile insurance benefits where there was an unlawful ***taking***. The Court of Appeals' decision in this case (grounded in the *Ahmed* decision) rewrites MCL 500.3113(a) to now include unlawful ***use*** notwithstanding the Legislature's clear language to the contrary.

[2] See *Pena-Cruz v. State Farm Mut. Auto. Ins. Co.*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 2024 (Docket No. 364284) (noting at *32 that "*Swoope* plainly resolves this case.").

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MAJ has a bona fide interest in the outcome of this case. If the Legislature wanted to disqualify persons who are injured in motor vehicle accidents due to unlawful use, the Legislature would have expressly said so (it didn't). Narrowing the No-Fault Act to preclude coverage where unlawful use of a motor vehicle is involved would substantially upset the administration of justice in this State. So, too, would allowing the injection of "fault" into a statutory benefit scheme that expressly excludes fault from the eligibility analysis. MAJ therefore has a genuine interest in guiding this Court to correct the COA's error in this case. Regardless of this Court's decision on the other questions involved in this appeal, a clear mandate from this Court that MCL 500.3113(a)'s unlawfully taken requirement does not encompass unlawful use is needed.

ARGUMENT

I. THE COURT OF APPEALS IN THIS CASE CLEARLY ERRED IN HOLDING THAT SWOOPE'S DRIVING WHILE UNLICENSED SATISFIED THE "TAKEN UNLAWFULLY" REQUIREMENT UNDER MCL 500.3113(A)

A. THE PLAIN AND ORDINARY MEANING OF THE PHRASE "TAKEN UNLAWFULLY" IN MCL 500.3113(A) ENCOMPASSES ONLY VIOLATIONS OF STATUTES THAT CRIMINALLY PROHIBIT "TAKINGS"

Under the Act, a person is disqualified from no-fault benefits if "[t]he person was willingly operating. . . a motor vehicle. . . that was taken unlawfully, and the person knew or should have known that the motor vehicle. . . was taken unlawfully." MCL 500.3113(a).[3] This Court in *Spectrum* parsed the meaning of this phrase:

> The word "unlawful" commonly means "not lawful; contrary to law; illegal," and the word "take" is commonly understood as "to get into one's hands or possession by voluntary action."

[3] This is the current version of §3113(a) as amended by 2014 PA 489 (effective Jan. 13, 2015). The prior version of §3113(a) disqualified a person from no-fault benefits where "[t]he person was using a motor vehicle. . . which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." Thus, the phrase "taken unlawfully" was never amended such that published case law interpreting it remains binding with regard to this phrase.

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Spectrum at 516 – 517. Therefore, this Court in *Spectrum* found that the plain meaning of "taken unlawfully" refers only to a situation where a person *obtains possession of a vehicle in violation of Michigan law*. *Id*. at 517. "[I]n this context, the term 'unlawful' can only refer to the Michigan Penal Code." *Id*. at fn 22. Therefore, this Court looked to statutes in the Michigan Penal Code that specifically "**prohibit 'takings**'" (MCL 750.413 and MCL 750.414). *Spectrum* at 517. (Emphasis supplied). This Court also noted that a person could violate MCL 750.414 *without* unlawfully taking the vehicle (MCL 750.414 prohibits "taking" or, alternatively "using," without authority). *Spectrum* at 517 fn 24. This Court clarified, however: "[A]s a result, **not all violations of MCL 750.414 necessarily constitute unlawful *takings* within the meaning of MCL 500.3113(a)**." *Id*. (Emphasis supplied) In other words, MCL 500.3113(a) distinguishes between unlawfully taking and unlawfully using a vehicle.

The COA in *Monaco* had occasion to decide the purely legal question of whether the phrase "taken unlawfully" in MCL 500.3113(a) encompasses unlawful use. On appeal, the defendant insurer argued that violations of the Michigan Vehicle Code rendered the minor's taking the vehicle unlawful. *Monaco* at 749 – 750. The COA in *Monaco* rejected these arguments based on this Court's holding in *Spectrum*: "Alison did not "gain[] possession of [the] vehicle contrary to Michigan law." *Monaco* at 750 (citation omitted). The *Monaco* Court aptly noted that the defendant insurer's arguments "conflate the unlawful use or operation of a motor vehicle with the unlawful taking of a vehicle." *Id*.

Spectrum and *Monaco* make it abundantly clear that the plain meaning of the phrase "taken unlawfully" in 500.3113(a) focuses on the way in which a person obtains possession of a motor vehicle. An unlawful taking occurs under MCL 500.3113(a) where *possession of the vehicle* was

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achieved *contrary to the Michigan law*. Clearly, the Michigan Penal Code contains laws that specifically prohibit obtaining possession of motor vehicles under delineated circumstances.

The provisions of the Michigan Vehicle Code on which Defendant/Appellee (and the COA in this case) rely **do not** prohibit "takings." The COA in this case cited two provisions of the Michigan Vehicle Code: MCL 257.301(1) (prohibiting driving without a license) and MCL 257.310e(4) (prohibiting a person under 17 years old from driving on level 1 license without a licensed parent/guardian or other licensed driver).[4] As noted, these statutes make it unlawful to *drive* (i.e., use/operate) a motor vehicle under specified circumstances. They do not in any way relate to "takings."

Of significance, the term "use" was contained in the prior version of MCL 500.3113(a) before the Legislature amended it to its current form. Specifically, MCL 500.3113(a) previously contained a "savings clause" that might save a person from disqualification from benefits even where there was an unlawful taking. Where it was determined that there was an unlawful taking, the person was disqualified from benefits "unless the person reasonably believed that he or she was entitled **to take *and use*** the vehicle." former MCL 500.3113(a). In drafting the current version of MCL 500.3113(a), the Legislature could have written that the disqualification applies to vehicles that were "taken ***or operated/used*** unlawfully." The Legislature did not do so.

Spectrum and *Monaco* were decided under the former MCL 500.3113(a). *Spectrum* analyzed both the phrase "taken unlawfully" and the old savings clause. *Monaco* involved only interpretation of the phrase "taken unlawfully." The Legislature discarded the savings clause from the current MCL 500.3113(a). However, it kept the phrase "taken unlawfully." Statutory amendments that retain language from former versions retain the meaning given to it by prior case

[4] Defendant/Appellee and the COA did not identify any statutes in the Michigan Vehicle Code that prohibit "takings."

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law unless "clearly superseded." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191 – 192; 880 NW2d 765 (2016). "[W]hen the operative statutory language interpreted by the Supreme Court in the previous case remains the same after amendment, the intervening amendment of the statute does not clearly overrule or supersede the Supreme Court's prior interpretation." *In re AGD*, 327 Mich App 332, 341; 933 NW2d 751 (2019) (citing *Associated Builders*, 499 Mich 191 fn 32). *Spectrum's* interpretation of the savings clause is no longer applicable. Nevertheless, *Spectrum's* interpretation of the phrase "taken unlawfully" (and *Monaco's* relying on *Spectrum*) remain binding and precedential.

B. THE COURT OF APPEALS' RELIANCE ON *AHMED* IN THIS CASE IS MISPLACED

The COA in this case was emboldened by the *Ahmed* Court's opinion that *Spectrum* "noted generally, any violation of the criminal law that leads to a taking of a motor vehicle" amounts to an unlawful taking under MCL 500.3113(a)." *Swoope* at slip op. *5. The *Ahmed* Court tried to justify its opinion by interpreting this Court's clarification "in this context" (*Spectrum* at 517 fn 22) as specifically referencing "the illegality at issue in the case" (joyriding) and not §3113(a) generally. *Ahmed* at 11 fn 5.

Ahmed's interpretation of *Spectrum* is wholly incorrect. By "in this context," this Court was referencing the term "unlawful" in the context of "taken" in MCL 500.3113(a). That's because the rules of statutory construction require Courts to take into account the context in which the Legislature uses its words. *Krohn v Home-Owners Ins* Co, 490 Mich 145, 156 – 157 (2011). "In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." *G.C. Timmis & Co. v. Guardian Alarm Co.*, 468 Mich. 416, 417; 662 NW2d 710 (2003). This Court made clear that's what it was doing in *Spectrum* in the very next sentence:

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> **When the words are considered together**, the plain meaning of the phrase "taken unlawfully" readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law.

Spectrum at 517. (Emphasis supplied). This Court in *Spectrum* therefore clearly meant that "taken unlawfully" in MCL 500.3113(a) "can **only** refer to the Michigan Penal Code." *Spectrum* at 517 fn 22. (Emphasis supplied).

The COA's interpretation of "taken unlawfully" in this case (and in *Ahmed*) divorces the term "taken" from "unlawfully." This is improper under the rules of statutory construction. Moreover, neither COA panel explained how violations of the cited Michigan Vehicle Code statutes "**lead[] to** a taking of a motor vehicle." *Swoope*, ___ *Mich App* ___ at slip op. *5; *Ahmed* at 11 fn 5. Sequentially, one "takes" (i.e., gains possession of) a motor vehicle before driving/operating it. The COA in *Ahmed* acknowledged this: "As we have noted in this opinion, driving a car always constitutes a taking of it, but taking it does not always require driving." *Ahmed*, 337 Mich App at 19 fn 8. Yet the statutes relied on to find an unlawful taking in this case (MCL 257.301(1) and MCL 257.310e(4)) are not violated until the prohibited driving/operation occurs. Clearly, these statutes do not address "takings" at all (unlike statutes within the Michigan Penal Code).

The *Ahmed* Court also referenced *Monaco* as having considered an "unlawful taking under a criminal provision of the Michigan Vehicle Code, MCL 257.1 et seq." *Ahmed* at 11 fn 5. This characterization is blatantly inaccurate. As previously noted, the COA in *Monaco* expressly rejected the defendant insurer's argument that violations of the Michigan Vehicle Code are a basis to find an unlawful taking under MCL 500.3113(a).

Ahmed labeled *Monaco's* holding as dicta "because its analysis was at an end upon ***its*** **determination** of the fact that plaintiff authorized Alison to take the car." *Ahmed* at 19. This

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statement is obviously incorrect. In *Monaco*, a jury (not the COA) had already determined that the minor driver had authorization. The defendant insurer did not appeal this factual determination. The **only** issue before the COA in *Monaco* was the legal question of whether an unlawful taking under MCL 500.3113(a) encompasses unlawful use. The COA's ruling in *Monaco* that it does not ***was therefore completely necessary*** **to answer the only question before it**. As Plaintiff/Appellant aptly notes, it was *Ahmed's* discussion of *Monaco* that was dicta. The COA in *Ahmed* (not a jury) had determined (prior to its discussion of *Monaco*) that the *Ahmed* plaintiff had taken the vehicle unlawfully. (See Plaintiff/Appellant's Br., p 27 - 28). The COA in *Ahmed* was thus bound to follow *Monaco*. MCR 7.215(C); MCR 7.215(J)(1).

The COA in this case completely relied on *Ahmed* notwithstanding its manifest misinterpretation of Spectrum's construction of the phrase "taken unlawfully." *Monaco* correctly interpreted *Spectrum* in this regard and held ***as a matter of law*** that an unlawful *taking* **does not** encompass unlawful *use*. Significantly, **the COA in this case failed to mention *Monaco* at all** even though it is a published opinion. The COA's failure to do so violated the rules of stare decisis as embodied in MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rules of stare decisis."). Furthermore, MCR 7.215(J)(1) mandates that:

> A panel of the Court of Appeals **must follow the rule of law established by a prior published decision of the Court of Appeals on or after November 1, 1990**, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

Monaco has not been modified by this Court nor by a special panel of the COA. Therefore, a discussion of *Monaco* by the COA in this case was required. The COA in this case was not free to disregard *Monaco* based on *Ahmed's* disagreement with it. The COA's failure to even mention *Monaco* in its decision in this case is quite telling.

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Given the above, it is clear that **the COA's wholesale reliance on *Ahmed* in this case is misplaced**.

II. A RULE OF LAW THAT INJURED PERSONS ARE DISQUALIFIED FROM NO-FAULT BEENFITS UNDER MCL 500.3113(A) FOR VIOLATIONS OF ANY CRIMINAL STATUTE (INCLUDING THE MICHIGAN VEHICLE CODE) IMPERMISSIBLY IMPLICATES FAULT IN VIOLATION OF THE FUNDAMENTAL RULES OF THE "NO FAULT" LAW.

The very letter of the No-Fault Act mandates that benefits are payable "without regard to fault." MCL 500.3105(2). The COA's declaration (based on *Ahmed*) that any violation of the criminal law satisfies the "taken unlawfully" requirement in MCL 500.3113(a) cannot be permitted to stand. This holding impermissibly injects fault into this *no*-fault case.

The COA has previously rejected fault as a basis for no-fault benefit denial:

> This approach was rejected by the Legislature when it adopted a no-fault system of motor vehicle insurance. **A no-fault system would be considerably less useful if coverage could be denied because of the dangerous manner in which the insured's act (i.e., operation, maintenance, or use) was performed.**

Wagner v Michigan Mut Liability Ins Co, 135 Mich App 767, 776; 356 NW2d 262 (1984). (Emphasis supplied).

The COA holding thus impermissibly conflates unlawful use with unlawful taking. In so doing, this case clears the way for the wholesale use of fault to disqualify other drivers who unlawfully (i.e., negligently) operated their vehicle. This lengthy list includes: drunk drivers, speeding drivers, those who run stop signs, those who pass in a no-passing zone, and so on. Medical bills for these individuals will be left uncovered. The cost of these unpaid bills will undoubtedly be passed on to taxpayers even though no-fault insurers collect premiums to provide no-fault benefits to them. This is clearly not what the Legislature intended when it unequivocally decreed that no-fault benefits are payable regardless of fault. MCL 500.3105(2). Clearly, the

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Legislature did not intend for "any violation of the criminal law" to disqualify a person from receiving no-fault benefits. To the contrary, the Legislature plainly only intended that violations of the Michigan Penal Code statutes prohibiting "takings" to serve as a basis for disqualification under MCL 500.3113(a) (as detailed above and in Plaintiff/Appellant's Brief). Otherwise, the Legislature would not have chosen the term "taken" to qualify the term "unlawfully." It is therefore incumbent that this Court address the clear misinterpretation of the Legislature's intent with respect to the phrase "taken unlawfully" in MCL 500.3113(a).

CONCLUSION / RELIEF REQUESTED

The COA's reasoning in this case is incorrect because it completely disregarded *Monaco* (and it is based on the COA's highly flawed opinion in *Ahmed*). The COA saw fit to publish its erroneous decision. Therefore, this Court must act to prevent material injustice to Swoope and other plaintiffs who will be affected by it. For the reasons set forth above, this Court should grant leave and/or enter a peremptory Order correcting COA's incorrect ruling of law in this case.

Respectfully submitted,

MILLER & TISCHLER, P.C.

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Dated: May 28, 2024

STATEMENT OF COUNTABLE WORDS

Wayne J. Miller, attorney for Amicus Curiae, MAJ, makes this statement pursuant to MCR 7.212(B)(1) – (B)(3). This Brief was typed using the Microsoft Word program. This program has

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a function which can calculate the total number of words contained in a document. According to that program function, the countable elements of this Brief contain 3,243 words.

Respectfully submitted,

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/s/Wayne J. Miller

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Dated: May 28, 2024

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2024, I electronically filed the foregoing document and Certificate of Service, with the Clerk of the Court using the E-file and serve system which will electronically send notification to all counsel of record listed on said pleadings.

/s/ Susan Robinson
Susan Robinson