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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CARLONDA NAISHE SWOOPE

Supreme Court No.:_____
Court of Appeals No: 364924

Plaintiff/Appellant,

v

Wayne Circuit Court
Case No 21-011492-NF
Hon. Dana M. Hathaway

CITIZENS INSURANCE COMPANY
OF THE MIDWEST

Defendant/Appellee

PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

_____/

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PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

NOTICE OF FILING OF PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ORDER BEING APPEALED AND REQUESTED RELIEF

Plaintiff-Appellant Carlonda Nashe Swoope submits this Application for Leave to Appeal from an Opinion and Order originally entered by the Court of Appeals dated December 14, 2023 as an unpublished decision. See *Swoope v Citizens Insurance Company of the Midwest*, docket no. 364924, unpublished decision rel'd 12/14/23. Subsequent to that decision, the case was referred for publication and the opinion was approved for publication on January 25, 2024. A copy of the Court's Opinion and Order is attached as **Exhibit 1.**

As explained more fully below, the Court of Appeals erred in its ruling overturning the decision of the Trial Court. The Court of Appeals ignored published precedent, specifically *Monaco v Home-Owners Ins Co*, 317 Mich App 738; 896 NW2d 32 (2016), which makes it clear that MCL 500.3113(a) only prohibits PIP benefits on the basis of an unlawful taking of a vehicle and not when one unlawfully operates the vehicle of another.

The Court of Appeals' decision is contrary to the decision of this Court in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich

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503; 821 NW2d 117 (2012). This Court in *Spectrum Health* stated that "the term 'unlawful' can only refer to the Michigan Penal Code[.]" *Spectrum Health*, 492 Mich at 517 n 22.

For the reasons stated herein, Carolonda Swoope requests that this Court grant her Application for Leave to Appeal, and either by way of a peremptory order or after full briefing on the merits, reverse the decision of the Court of Appeals and remand this matter back to the Wayne County Circuit Court for trial of the matter, together with such other relief as may be deemed warranted by this Court.

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STATEMENT JUSTIFYING LEAVE TO CONSIDER ISSUES PRESENTED IN APPEAL

This Court should grant leave to appeal pursuant to MCR 7.305(B)(3) and MCR 7.305(B)(5)(a) and (b). This case involves a legal principle of major significance to this state's jurisprudence, with respect to the area of no-fault benefits, and specifically the application of MCL 500.3113(a) and considerations of the meaning of "taken unlawfully" in that statute, when evaluated through the lens of whether Ms. Swoope "knew or should have known" that her use of the vehicle in question was an unlawful taking, under MCL 500.3113(a).

The Court of Appeals erroneously interpreted MCL 500.3113(a) to cover unlawful *use* of a vehicle, instead of unlawful *taking* of the vehicle. The Court of Appeals' decision is contrary to the logic of the decision of this Court in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012). This Court in *Spectrum Health* stated that "the term 'unlawful' can only refer to the Michigan Penal Code[.]" *Spectrum Health*, 492 Mich at 517 n 22. This Court further explained that a vehicle is taken unlawfully "if it is taken without the authority of its owner." *Id*. at 518

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n 25.

There is also an inherent conflict between the logic behind the Opinion of the Court of Appeals and published Michigan case law, specifically *Monaco v Home-Owners Ins Co*, 317 Mich App 738; 896 NW2d 32 (2016). The Court of Appeals erroneously analogized the instant situation with that presented in *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1; 972 NW2d 860 (2021), which is easily distinguishable on the facts. In *Ahmed*, there was a legally binding document which expressly prohibited the plaintiff from driving the vehicle. Here, Ms. Swoope was not expressly prohibited from using the vehicle, and there was certainly no document that Ms. Swoope could consult to determine whether the owner of the vehicle would deny permission in an emergency situation. The Court of Appeals in *Swoope* ignored the published precedent of the Court of Appeals in *Monaco*, which makes it clear that MCL 500.3113(a) only prohibits PIP benefits on the basis of an unlawful taking of a vehicle and not when one unlawfully operates the vehicle of another[1]. A genuine issue of fact remains as to

1 Although *Monaco*, 317 Mich App 738, was decided under the previous version of MCL 500.3113(a), the current statute does not lend itself to the Court of Appeals' interpretation that driving the vehicle of another in contravention of the MVC constitutes an unlawful taking. There is nothing from the text of 2014 PA 489 to indicate that the Legislature intended to expand the definition of "taken unlawfully" to include using the vehicle of another in violation of the MVC.

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whether Ms. Swoope unlawfully took the vehicle, under the statute, and the Court of Appeals was in error.

Had the legislature intended to create the rule imposed by the Court of Appeals, it easily could have stated that the driver merely needed to know that he or she was taking the vehicle "without permission." Instead, it required knowledge that the act was "unlawful." MCL 500.3113(a). The Court of Appeals' decision improperly narrows the application of Michigan's No-Fault Law, and ought to be overturned.

If allowed to stand, the Court of Appeals' decision in this case will have significant ramifications on the area of no-fault law. This Court should reverse the decision of the Court of Appeals and reinstate the decision of the trial court, and remand this matter to the Wayne County Circuit Court for trial.

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

DOES THE INSTANT APPLICATION FOR LEAVE TO APPEAL ARISE FROM A CLEARLY ERRONEOUS RULING BY THE COURT OF APPEALS?

Plaintiff/Appellant says: Yes.

Defendant/Appellee says: No.

The Court of Appeals says: No.

DID THE TRIAL COURT PROPERLY CONCLUDE THAT DEFENDANTS WERE NOT ENTITLED TO SUMMARY DISPOSITION BASED ON MCL 500.3113(a) SINCE MATERIAL ISSUES OF FACT REMAINED AS TO WHETHER MS. SWOOPE HAD PERMISSION TO USE THE VEHICLE?

Plaintiff/Appellant says: Yes.

Defendant/Appellee says: No.

The Court of Appeals says: No.

DID THE COURT OF APPEALS ERRONEOUSLY INTERPRET MCL 500.3113(a) TO COVER UNLAWFUL USE OF A VEHILE, INSTEAD OF UNLAWFUL *TAKING* OF THE VEHICLE?

Plaintiff/Appellant says: Yes.

Defendant/Appellee says: No.

The Court of Appeals says: No.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arises from a claim for Michigan No-Fault Personal Injury Protection (PIP) benefits filed by Plaintiff/Appellant Carlonda Naishe Swoope ("Ms. Swoope") related to injuries she sustained in an October 27, 2020 motor vehicle accident.

Ms. Swoope testified that on October 27, 2020, she was sleeping over at her friend of four years, Kandice Valentine's house and that the following morning she woke up to a notification that her mother was having a medical emergency. (**Ex 2,** Dep of Ms. Swoope, pp. 9, 33). Ms. Swoope testified that her mother was caring for Ms. Swoope's children while the emergency was ocurring. (**Ex. 2,** p. 37). On the way to her mother's house, Ms. Swoope quickly went through a fast-food drive-through, Burger King, to bring her children food. (**Ex. 2**, p. 37). Ms. Swoope knew she was going to be at the Emergency Room at Harper Hospital with her mother for an extended time and could not leave her children without food. (**Ex. 2**, p. 37).

After getting food for her children and arriving at her mother's house the subject accident occurred. Ms. Swoope was in the right lane, and a

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truck turned into her vehicle from the left lane. (**Ex. 2**, p. 34-35). Ms. Swoope was injured in the accident. (**Ex. 2**, p. 39-40). When the police arrived to the scene of the accident, Ms. Swoope declined going in the ambulance because her mother was still home waiting to go to the hospital. (**Ex. 2**, p. 36).

Ms. Swoope took an Uber from the scene of the accident to her mother's house. (**Ex. 2**, p. 36). The Uber then took Ms. Swoope and her mother to Harper Hospital in Detroit, Michigan where they were both evaluated. (**Ex. 2**, p. 36).

Plaintiff was injured on October 27, 2020. On November 11, 2020, Plaintiff submitted an Application for Benefits to the Michigan Automobile Insurance Placement Facility ("MAIPF") for assignment of benefits related to the accident. In her Application for Benefits, Ms. Swoope, in response to question 42(k) answered "yes" to the question of whether she had permission to operate the vehicle. (**Ex. 3**, App for Benefits). However, Ms. Swoope left the follow-up question to 42(k) which asks "If Yes, from who? _____" blank in her Application for Benefits. (**Ex. 3**, App for Benefits). Ms. Swoope believed she had implied permission to use her friend's

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vehicle due to a medical emergency her mother was having. The claim was assigned to Citizens Insurance Company of the Midwest ("Citizens"). On September 2, 2021, Plaintiff filed suit against Defendant Citizens alleging that Citizens had failed to pay for medically necessary, reasonable, and related no-fault benefits due as a result of the accident.

Citizens moved for summary disposition under MCR 2.116(C)(10), alleging that Plaintiff did not have permission to use the vehicle, and so MCL 500.3113(a) operates to bar Plaintiff from receiving no-fault benefits.

The trial court denied Citizens' motion without oral argument, holding that "Whether Plaintiff had permission to use the vehicle is a question of fact for the trier of fact." (Order of the Trial Court, 10/24/2022, **Ex. 4**).

Defendant Citizens moved for reconsideration of the trial court's order, and the trial court denied that motion for reconsideration on January 24, 2023. (Order of the Trial Court, 1/24/23, **Ex. 5**).

Citizens filed an Application for Interlocutory Appeal on February 13, 2023, (Citizens' Application for Interlocutory Appeal, **Ex. 6**) along with a Motion for Immediate Consideration. The Court of Appeals granted that

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Application and Motion for Immediate Consideration on March 24, 2023. (Order of the Court of Appeals, 3/24/23, **Ex. 7**). The matter was briefed and argued, and on December 14, 2023 the Court of Appeals, in an unpublished opinion, reversed the trial court and remanded the matter for further consideration. See *Swoope v Citizens Insurance Company of the Midwest*, docket no. 364924, unpublished decision rel'd 12/14/23. (**Ex. 1**). Defendant sought publication of the decision, which was granted on January 25, 2024.

The instant Application for Leave to Appeal to the Michigan Supreme Court followed.

LAW AND ARGUMENT

For the reasons stated below, the Court of Appeals' decision was in error, and should be reversed. This matter should be returned to the trial court and set for trial.

STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

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ARGUMENT

THE TRIAL COURT PROPERLY DENIED SUMMARY DISPOSITION WHERE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER CAROLONDA SWOOPE UNLAWFULLY TOOK HER GOOD FRIEND'S MOTORVEHICLE THAT WAS INVOLVED IN THE OCTOBER 27, 2020 MOTOR VEHICLE ACCIDENT AND WHETHER MS. SWOOPE KNEW OR SHOULD HAVE KNOWN THAT SHE DID NOT HAVE AUTHORITY TO USE HER FRIEND'S MOTOR VEHICLE.

The primary purpose of Michigan's No-Fault Act is "to provide victims of motor vehicle accidents assured, adequate and prompt reparation for certain economic losses", *McCormick v Carrier,* 487 Mich 180, 234; 795 NW2d 517, 547 (2010), quoting in part, *Shavers v Attorney General,* 402 Mich 554, 578-579; 267 NW2d 72, 77 (1978). The no-fault system was designed to provide victims of motor vehicle accidents adequate and quick reimbursement for certain economic losses. *Meemic Ins Co v Fortson*, 506 Mich 287, 297; 954 NW2d 115 (2020). The trial court properly denied summary disposition because there exists a genuine issue of material fact as to whether Carlonda Swoope unlawfully took her friend Kandace Valentine's motor vehicle that was involved in the motor vehicle accident that is the subject of this case and whether Ms. Swoope knew or should

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have known that the vehicle was taken unlawfully.

The sole issue in this appeal is whether Ms. Swoope acted in a manner that implicated MCL 500.3113(a) when taking her good friend's motor vehicle on May 24, 2020. MCL 500.3113(a) provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully. MCL 500.3113(a).

To deny no-fault insurance benefits under §3113(a) as a matter of law as Citizens argued in its motion for summary disposition, it must be established that Carlonda Swoope (1) willingly operated or used her friend Kandace Valentine's vehicle, (2) after taking Ms. Valentine's vehicle unlawfully, and (3) that she knew or should have known that Ms. Valentine's vehicle was taken unlawfully.

There is no question that the first of these three elements was established; Ms. Swoope was willingly operating or using Ms. Valentine's

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vehicle on the night of October 27, 2020. This leaves the two remaining elements of defense predicated on §3113(a). The first level of inquiry when applying §3113(a) concerns whether the taking of a vehicle was "unlawful." *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 747; 896 NW2d 32 (2016). If the taking was lawful, the inquiry ends because the statute is inapplicable. *Id*. Where there is an unlawful taking, the next step in the analysis is to determine whether the claimant "knew or should have known that the motor vehicle ...was taken unlawfully." The statute does not apply if, although an unlawful taking occurred, the claimant did not know and did not have reason to know that the taking was unlawful. *Id*. Here, Ms. Swoope was responding to a family medical emergency and did not know or have reason to know that the taking, under those circumstances, was unlawful.

A. The Trial Court Properly Held That There Is an Issue of Fact as to Whether Ms. Swoope Unlawfully Took Her Friend's Motor Vehicle.

The Supreme Court first addressed the meaning of the phrase "taken unlawfully" in §3113(a) in *Spectrum Health Hosps v Farm Bureau Mut Ins of*

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Mich, 492 Mich 503, 517; 821 NW2d 117 (2012).[2] The *Spectrum Health* Court held that the meaning of the phrase "taken unlawfully" in §3113(a) "embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law." *Id*. at 517. In determining whether possession of a vehicle is "contrary to law," the Court noted that the Michigan Penal Code contains several statutes that prohibit "takings," including two statutes that prohibit "joyriding," MCL 750.413 and MCL 750.414. *Id*., at 517. MCL 750.413 provides in pertinent part that "[a]ny person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony." MCL 750.414 provides in relevant part that "[a]ny person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor."

The *Spectrum Health* Court held that both joyriding statutes "make it

2 As discussed more fully below, §3113(a) previously provided that a person was precluded from collecting PIP benefits if "[t]he person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." The "knew or should have known" language now contained in §3113(a) was added by 2014 PA 489. Thus, the Supreme Court's opinion in *Spectrum Health* considered the pre-2014 amendment of the statute and its determination was limited to a consideration of the meaning of "taken unlawfully" in that earlier version. The *Spectrum Health* decision, therefore, did not involve interpretation of the "knew or should have known" language that was added to §3113(a) two years later.

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unlawful to take a motor vehicle without authority, effectively defining an unlawful taking of a motor vehicle as that which is unauthorized." *Id.*, at 517-518. The Court thus concluded that the phrase "taken unlawfully" in §3113(a) "applies to anyone who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it." *Id.*, at 518 (emphasis in original). The Court confirmed that §3113(a) "examines the legality of the taking from the driver's perspective." *Id.*, at 522 (emphasis in original).

In *Spectrum Health*, the claimant, Craig Smith, was injured in a motor vehicle accident while driving his father's vehicle. *Id.*, at 511. Mr. Smith's father had forbidden Mr. Smith from operating the vehicle because he did not have a valid driver's license, but permitted Mr. Smith's girlfriend, Kathleen Chirco, to operate the vehicle. *Id.*, at 512. The evidence established in that case that the father instructed Ms. Chirco in Mr. Smith's presence not to allow Mr. Smith to drive the vehicle. *Id*. On the night of the accident, Mr. Smith asked Ms. Chirco for the keys to his father's car, and, although she initially resisted, Ms. Chirco ultimately gave Mr. Smith the keys. Mr. Smith later crashed the vehicle. *Id*.

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In the companion case to *Spectrum Health*, *Progressive Marathon Ins Co v DeYoung*, Ryan DeYoung was injured in a motor vehicle accident while driving his wife's vehicle. *Id*., at 513. Similar to *Spectrum Health*, the plaintiff's wife had forbidden DeYoung from operating her vehicle because he was a named excluded driver on the insurance policy with Progressive. *Id*. On the night of the accident, DeYoung took the key to his wife's car out of her purse and took the vehicle, contrary to his wife's standing instructions and without her permission. *Id*.

This Court ultimately held in *Spectrum Health* that §3113(a) precluded PIP benefits for both of the claimants involved in the two companion cases because the claimants took the respective vehicles contrary to the express prohibition of the vehicle's owner, in violation of MCL 750.414. *Id*., at 524, 537-538. This Court's rejection of the claimants' claims was "premised on the notion that a person cannot take a vehicle contrary to an owner's express prohibition and maintain that he or she did not 'unlawfully take' the vehicle under MCL 500.3113(a)." *Rambin v Allstate Ins Co*, 495 Mich 316, 326; 852 NW2d 34 (2014).

Following its decision in Spectrum Health, the Supreme Court

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decided *Rambin v Allstate Ins Co*, supra.[3] In *Rambin*, the Court analyzed a question that it did not reach in *Spectrum Health*, whether MCL 500.3113(a) requires the person using the motor vehicle to know that such use has not been authorized by the vehicle's owner. *Rambin*, at 327. In *Rambin*, the plaintiff was injured when the motorcycle he was operating was involved in an accident. Plaintiff, however, claimed that a person whom he believed was the owner of the motorcycle loaned him the motorcycle. The motorcycle actually was owned by another who had reported it stolen several weeks before the accident. The plaintiff argued in *Rambin* that he did not knowingly lack authority to take the motorcycle because he believed that the person who gave him access to the motorcycle was the rightful and legal owner of the motorcycle.

This Court held in *Rambin* that, considering MCL 750.414 "as a whole," the statute "properly requires a showing of knowingly taking without authority or knowingly using without authority." *Id.*, at 332. The *Rambin* Court concluded that the plaintiff could present evidence that he did not run afoul of MCL 750.414, and thus did not unlawfully take the

3 *Rambin*, like *Spectrum Health* construed §3113(a) in its form prior to the 2014 amendment of that statute.

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motor vehicle under §3113(a), because plaintiff did not "knowingly" lack authority to take the motor vehicle since he took the vehicle "believing that he had authority to do so." *Rambin*, at 333, 336. "Stated differently, plaintiff's argument that he did not unlawfully take the motorcycle under MCL 500.3113 is subject to the criminal statute that prohibits an unlawful taking, MCL 750.414, under which plaintiff may present evidence to show that he did not knowingly take the motorcycle without the owner's authority." *Id*., at 333-334.

After the Supreme Court decided *Rambin*, the Legislature in 2014 PA 489 amended §3113(a) to its current language. While the statute previously read that a person was not entitled to PIP benefits if the person "was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle," the amended language now reads that a person is not entitled to PIP benefits if the person "was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully."

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According to the Michigan Senate's Legal Analysis report, 2014 SB 1140 was written in response to the holding in *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 599-600; 808 NW2d 1 (2010). A copy of the Bill Analysis for 2014 SB 1140 is attached as **Exhibit 8** to this brief. *Henry Ford* held that, under the prior version of §3113(a), only a person who had unlawfully taken a vehicle *and* used it could be excluded from no-fault benefits. *Henry Ford*, at 602-603. The Court of Appeals concluded in *Henry Ford* that a passenger in a stolen vehicle, who was not involved in the taking of the vehicle but who was aware of the fact that the vehicle had been stolen, was not precluded from obtaining PIP benefits. *Id*., at 600-601. The Legislature thereafter passed the amended version of §3113(a), which according to the legislative analysis "clarifies" the "unlawful taking" exclusion to PIP benefits under §3113:

> "The bill clarifies the exclusions to personal protection insurance benefits under Section 3113. Before the *Henry Ford Health System* decision, some understood that if a person was knowingly using a stolen motor vehicle and was injured in an accident, that person would be ineligible for PIP benefits through the State's no-fault system. The *Henry Ford Health System* Court, however, held that only a person who had unlawfully taken and used the

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> vehicle could be excluded from no-fault benefits. The bill will ensure that a person who willingly uses a stolen vehicle at the time of a car accident and injury is not protected by no-fault." Senate Legislative Analysis, SB 1140 (**Ex. 8**).

Consistent with the legislative analysis, the Legislature amended §3113(a) to its current language, which provides that a person is not entitled to PIP benefits if the person "was willingly operating *or willingly using* a motor vehicle or motorcycle *that was taken unlawfully*, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully." (Emphasis added).

After the amendment to §3113(a), the Court of Appeals decided *Monaco v Home Owners Ins Co*, 317 Mich App 738; 896 NW2d 32 (2016). The Court of Appeals noted in *Monaco* that §3113(a) was amended in 2014 PA 489, but held that the amended version of the statute "still generally bars the recovery of PIP benefits by a person who operated a vehicle that he or she had 'taken unlawfully.'" *Id.*, at 747. In *Monaco*, a 15-year-old driver who was not legally authorized to drive by herself was injured in a motor vehicle accident and sought no-fault benefits. *Id.*, at 744. A jury determined that the driver had permission from the owner of the vehicle – her mother

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– to drive the vehicle at the time of the accident. *Id*. Based upon the jury's conclusion, this Court held that the driver did not unlawfully take the vehicle within the meaning of §3113(a). *Id*., at 748-749. In so ruling, this Court held that there is a difference between "unlawfully taking a motor vehicle and unlawfully using a vehicle," and only the former is relevant for the purposes of determining whether an unlawful taking occurred under §3113(a). *Id*., at 749.

The Court of Appeals again addressed the amended language of §3113(a) in *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1; 972 NW2d 860 (2021), the case that the Court of Appeals in the instant case relies upon in making its decision. In *Ahmed*, the plaintiff was involved in a motor vehicle accident while driving a rental car, which had been rented by his wife. *Id*., at 5. The plaintiff did not have a valid driver's license, and the rental agreement provided that only a licensed driver was authorized to use, operate, or drive the motor vehicle. *Id*. The Ahmed Court held that plaintiff's taking of the vehicle was in violation of MCL 750.414, and thus was "unlawful" under §3113(a), because the rental agreement prohibited plaintiff's use and operation of the rented vehicle and thus his use and

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operation of the vehicle was without the authority of the owner. *Id*., at 13-15.[4]

Here, the trial court properly held that, under the facts of this case, there is a question of fact as to whether Ms. Swoope unlawfully took her good friend's vehicle. Unlike in *Spectrum Health* and *Ahmed*, there is no evidence that Ms. Swoope's use of the motor vehicle on October 27, 2020, was expressly "unauthorized" by Ms. Valentine. Unlike the two claimants in *Spectrum Health*, there is no evidence that Ms. Swoope took the vehicle against the express prohibition of the owner. Additionally, there is no evidence that Ms. Swoope took the vehicle in violation of an express contractual prohibition against Ms. Swoope using the vehicle, as in *Ahmed*. Under the circumstances where Ms. Swoope's mother was experiencing a medical emergency, Ms. Swoope believed that she had implied consent to take the vehicle. The evidence, viewed in the light most favorable to the plaintiff, creates a question of fact as to whether Ms. Swoopes had Ms.

4 After explicitly finding that the acts of the plaintiff in taking the vehicle against the terms of the rental agreement constituted an unlawful taking, id. at 15, the *Ahmed* Court engaged in a completely unnecessary discussion of whether the plaintiff's driving of the vehicle without a valid operator's license constituted a separate basis for concluding that he had unlawfully taken the vehicle. This discussion necessitated criticism and rejection of the Court's prior published decision in *Monaco*, *supra*. Somewhat remarkably, among the *Ahmed* Court's critiques of *Monaco* was that much of its commentary was dictum. *Ahmed*, 337 Mich App at 19. Thus, *Ahmed* represents one of those hopefully rare circumstances in which a panel of the Court of Appeals rather shamefully criticizes in what is pure dictum a prior panel opinion for containing dictum.

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Valentine's authority to take the vehicle on October 27, 2020. *Ahmed*, at 25-26.

Defendants, as the parties moving for summary disposition, had the initial burden of proof to show that there was no genuine issue of material fact. MCR 2.116(G)(4). While defendants focused their proofs and argument on whether Ms. Swoope "knew or should have known" that he unlawfully took her friend's vehicle (discussed below), defendants failed to offer conclusive evidence that Ms. Swoope took her friend's vehicle "unlawfully" in light of the particular circumstances presented to Ms. Swoope. Because a genuine issue of material fact exists as to whether Ms. Swoope unlawfully took her friend's vehicle, the trial court properly denied defendants' motion.

B. The Trial Court Also Properly Held That There Is an Issue of Fact as to Whether Ms. Swoope Knew or Should Have Known That She Unlawfully Took Her Friend's Vehicle.

Even if this Court concludes that the evidence, when viewed in the light most favorable to the plaintiff, conclusively establishes that Ms. Swoope unlawfully took her friend's motor vehicle on October 27, 2020, the trial court properly held that a genuine issue of material fact exists as to

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whether Ms. Swoope "knew or should have known" that she unlawfully took her friend's vehicle.

Based upon the 2014 amendment to §3113(a), the *Ahmed* case represents the first published Court of Appeals decision that has addressed the "knew or should have known" language added to that provision. In its analysis of this issue, the *Ahmed* Court concluded that the amendment of §3113(a), through 2014 PA 489, "modified the scienter requirement under that statute if a violation of MCL 750.414 is at issue." *Id*., at 24. The Court of Appeals held that when disqualification for PIP benefits under §3113(a) is at issue, a person acts unlawfully under MCL 750.414 if the person "takes a motor vehicle or motorcycle knowing that the owner has prohibited the taking," or if the person "takes a motor vehicle or motorcycle and 'should have known' that the owner prohibited the taking." *Id*., at 25-26. The *Ahmed* Court ultimately held that, because plaintiff testified that he was unaware of the terms of the rental agreement, which prohibited him from driving the vehicle, he therefore lacked *actual knowledge* that an unlicensed driver was prohibited by the rental agreement from taking the car. *Id*., at 26. The Court concluded, however, that under the "should have known"

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standard, plaintiff "was obligated to determine the scope of the authorization" that the owner of the vehicle had set under the rental agreement. *Id*., at 26. The Court held that plaintiff "should have known" the terms of the rental agreement "because a person may not simply take what he knows to be another's property without taking any steps to determine if the owner authorized the taking," and that the "mere assumption or supposition that it must be permissible to take a third party's property, without more, does not satisfy the 'should have known' standard of MCL 500.3113(a)." *Id*., at 27.

Here, Defendant Citizens does not argue that Ms. Swoope took her friend's motor vehicle despite "knowing" that her friend had prohibited the taking. *Ahmed* at 25. Again, there is no evidence that Ms. Swoope "knowingly" took the vehicle in violation of an express contractual prohibition against him using the vehicle, as in *Ahmed*. Additionally, as set forth above, unlike the two claimants in *Spectrum Health*, there is no evidence that Ms. Swoope "knowingly" took her friend's vehicle contrary to her *express prohibition*. No testimony was offered that Ms. Valentine ever prohibited Ms. Swoope from using her vehicle, either on the day of the

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motor vehicle accident or at any time prior. Unlike in *Spectrum Health* and *Ahmed*, there is no evidence that Ms. Swoope's use of the motor vehicle on October 27 was expressly "unauthorized," or that Ms. Swoope took the vehicle "knowing that the owner has prohibited the taking." *Spectrum Health* at 510; *Ahmed* at 25.

Defendant's argument, supported by the Court of Appeals, is that Ms. Swoope "should have known" that she did not have Ms. Valentine's authority to use her vehicle on the date of the motor vehicle accident because she knew (or should have known) that she needed to obtain her friend's "express permission" to take the vehicle. According to Defendant Citizens, its motion for summary disposition should have been granted by the trial court because Ms. Swoope failed to obtain express permission on the date of the accident in the midst of her mother's medical emergency, and instead merely assumed that she had permission to take the vehicle on the date of the accident. This argument was adopted by the Court of Appeals. In so holding, the Court of Appeals relies upon the language in *Ahmed* that the "mere assumption or supposition that it must be permissible to take a third party's property, without more, does not satisfy

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the 'should have known' standard of MCL 500.3113(a)." *Ahmed* at 27. Contrary to the Court of Appeals' holding, and as properly held by the trial court, there is a genuine issue of material fact as to whether Ms. Swoope "should have known" that her friend prohibited the taking under these circumstances. *Ahmed* at 25-26.

Ms. Swoope testified that on October 27, 2020, she was sleeping over at her friend of four years, Kandice Valentine's house and that the following morning she woke up to a notification that her mother was having a medical emergency. (**Ex 2**, pp. 9, 33) Ms. Swoope testified that her mother was caring for Ms. Swoope's children while the emergency was ocurring. (**Ex. 2,** p. 37). Taking the evidence in the light most favorable to the plaintiff, a genuine issue of material fact exists as to whether Ms. Swoope "should have known" that she had taken her friend's vehicle without authority on October 27, 2020.

Unlike *Ahmed*, the evidence therefore creates a question of fact as to whether Ms. Swoope either knew or should have known that when she took her friend's vehicle on the night of the accident, she was doing so unlawfully. *Ahmed*, at 25-26. Contrary to defendant's arguments on appeal,

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the evidence here does not establish that Ms. Swoope took her good friend's vehicle on the date of the accident based upon nothing more than a "mere assumption or supposition" that she had the owner's permission to do so, as in *Ahmed*. The evidence instead supports the trial court's conclusion that a genuine issue of material fact exists as to whether Ms. Swoope took her friend's motor vehicle when she "should have known" that her friend "prohibited the taking" *Ahmed*, at 25-26.

As the trial court properly held, a question of fact exists as to whether Ms. Swoope "should have known" that she did not have the authority to use her friend's vehicle in the face of her mother's medical emergency and believed that she had permission to use her friend's vehicle on the date of the accident. The trial court properly denied summary disposition on this basis as well.

C. The Court of Appeals' Argument Regarding Ms. Swoope's Drivers' License Should be Rejected.

The Court of Appeals holding that Ms. Swoope took the vehicle unlawfully, and is precluded from recovering PIP benefits under §3113(a) because she did not have a valid driver's license at the time of the motor

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vehicle accident was error. Defendant and the Court of Appeals contend that §3113(a)'s disqualification from recovering PIP benefits is triggered by proof that the plaintiff was unlawfully using the vehicle at the time of the accident. These arguments must be rejected. The Court of Appeals in *Monaco*, *supra*, explicitly rejected this same argument, holding that the phrase "taken unlawfully" in §3113(a) "does not encompass the unlawful use or operation of a motor vehicle, just the unlawful taking of a vehicle." *Monaco*, 317 Mich App, at 741 (emphasis in original). In *Monaco*, the plaintiff's 15-year-old daughter was involved in a motor vehicle accident while operating plaintiff's vehicle. Plaintiff's daughter was not legally authorized to drive by herself due to the restrictions on her driver's permit, since she was not accompanied by an adult at the time of the accident. The deposition testimony in the case established, however, that the daughter had permission from her mother to take and drive the car on her own at the time of the accident.

The defendant insurer argued, much like defendant here, that plaintiff's daughter had taken the vehicle unlawfully, regardless of any possible parental permission, because plaintiff had violated the law by

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authorizing her daughter's unaccompanied use of the vehicle, given her daughter's age and the restrictions on her daughter's driver's permit.

The Court of Appeals in *Monaco* rejected defendant's argument, stressing the language of §3113(a) that speaks to the unlawful *taking* of a vehicle, not the unlawful *use* of a vehicle. The Court of Appeals held in *Monaco* that, although it may have been unlawful for plaintiff, as the owner of the vehicle, to authorize her daughter to drive the vehicle in violation of the law, "it had no bearing on, nor did it negate, the authorization and permission given by plaintiff for [her daughter] *to take the vehicle*." *Monaco*, at 750 (emphasis added). The Court noted that, while plaintiff's actions in granting her daughter permission to drive her vehicle "might have subjected her to prosecution," plaintiff's actions "did not turn an authorized or permitted taking into an unlawful taking." *Id*.

In so holding, the *Monaco* Court relied upon the Supreme Court's holdings in both *Spectrum Health* and *Rambin*, which addressed the meaning of the phrase "unlawful taking" in §3113(a) – language, the Court noted, that was not amended by 2014 PA 489 – as the basis for its conclusion that there is a distinction between unlawfully "taking" a motor

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vehicle and unlawfully "using" a vehicle. Monaco, at 747-750. As set forth above, and as reiterated in *Monaco*, the Supreme Court in *Spectrum Health* held that the phrase "taken unlawfully" in MCL 500.3113(a) "embraces a situation in which an individual *gains possession* of a vehicle contrary to Michigan law." *Spectrum Health*, at 516-517 (emphasis added); *Monaco*, at 750. The Court in *Spectrum Health* therefore looked to statutes within the Michigan Penal Code that prohibit "takings," including two statutes that prohibit joyriding. *Id*., at 517. As recognized by the Court of Appeals in *Monaco*, under *Spectrum Health*, the purported violation of law must be related to the unlawful possession or "taking" of the vehicle, rather than the unlawful "use" or "operation" of a motor vehicle. *Monaco*, at 750, citing *Spectrum Health*, at 517.[5]

Under the holdings in *Spectrum Health* and *Monaco*, there is no basis for the argument that the violation of any law renders the use of the motor vehicle an "unlawful taking" for purposes of §3113(a). The Court of

5 What is also of significance on this point is that the injured driver in *Spectrum Health*, Craig Smith, Jr., was unlicensed. 492 Mich at 512. Thus, if the defendant was correct in its argument in this case, there would have been no reason for this Court in *Spectrum Health* to explore the entire question of whether plaintiff's taking of the vehicle was in violation of the joyriding statute, MCL 750.414. The fact that this Court in *Spectrum Health* needed to discuss the joyriding statute clearly demonstrates that the defendant's arguments associated with any claimed unlawful use of the vehicle (and the *Ahmed* Court's dictum supporting that argument) is wrong.

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Appeals and Defendant's reliance upon violations of the Michigan Penal Code and/or the Michigan Vehicle Code that have no relevance to the unlawful "taking" of a vehicle –including MCL 257.301 (driving without a license) – are irrelevant to the issue of the unlawful taking of the vehicle. Therefore, under *Spectrum Health* and *Monaco*, whether Ms. Valentine authorized Ms. Swoope to drive her vehicle despite the fact that she did not have a valid driver's license does not turn an authorized or permitted taking into an "unlawful" taking, and thus is irrelevant with respect to examining the "taken unlawfully" phrase in MCL 500.3113(a). *Monaco*, at 741, 748-749. Any argument to the contrary is inconsistent with the holdings in *Spectrum Health* and *Monaco*.

Any contention that the Court of Appeals' holding in *Monaco* was undermined by the subsequent opinion in *Ahmed* is incorrect, as the criticism of *Monaco* is mere dicta, for reasons stated below. The *Ahmed* panel expressed its view that the *Monaco* panel had "incorrectly analyzed the case," 337 Mich App at 19-20 n 8, as it announced its own ruling that a person who does not have a valid driver's license and drives a vehicle has engaged in an unlawful taking of a vehicle.

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There are two quite sizeable errors in the *Ahmed* Court's analysis of this issue. First, as already explained above in footnote 4 of this brief, the *Ahmed* Court's detour into a discussion of *Monaco* and its holding was completely unnecessary to its determination that the plaintiff in that case had "unlawfully taken" the vehicle. Prior to the criticism that the *Ahmed* Court leveled at the Court of Appeals' prior opinion in *Monaco*, the *Ahmed* Court had already decided that the acts of the plaintiff in operating the vehicle against the express dictates of the rental agreement "constituted an 'unlawful taking' of the car because they constituted possession of it contrary to the owner's authorization." *Id.*, at 15. The *Ahmed* panel's entire discussion of *Monaco* and its purported analytical errors was, therefore, patent dictum.

But there is a second serious error in *Ahmed*'s unnecessary critique of the prior ruling in *Monaco.* A panel of the Court of Appeals does not have the authority to announce, as the Court did in *Ahmed*, that a prior published decision of the court "incorrectly analyzed the case" and, on that basis, "overrule" that published precedent. Rather, the *Ahmed* panel had to follow the dictates of MCR 7.215(C)(2) and MCR 7.215(J)(1) and recognize

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that *Monaco* was precedentially binding. If the *Ahmed* panel was of the view that *Monaco* was wrongly decided, it had to follow the dictates of MCR 7.215(J), declare its disagreement with the holding in Monaco and request a vote of the entire Court on the impaneling of a special panel of the court to resolve this conflict.[6]

This is how conflicts within panels of the Court of Appeals are to be resolved. They are not to be resolved by a later panel engaging in an gratuitous criticism of a prior published decision of the Court of Appeals, presumably in the hope that future panels will heed this pointless criticism. Under the court rules, the Court of Appeals was compelled to follow the "first-out" rule of MCR 7.215(J)(1) and give precedential effect to the Court's *Monaco*, the first published decision on this subject. See *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 20-21; 762 NW2d 911 (2009).

As recognized by the trial court, the evidence in this case establishes that there was a genuine issue of material fact as to whether Ms. Swoope had permission to use the vehicle. There is, therefore, no basis for the

6 Had such a request for a special panel been made by the panel in *Ahmed*, it would have been categorically rejected for a very simple reason. A special panel may only be convened where the disagreement that gives rise to the conflict is "outcome determinative." MCR 7.215(J)(3)(a). Obviously, the criticism of *Monaco* that somehow found its way into the decision in *Ahmed* was impossible to characterize as "outcome determinative" since that criticism was complete dictum.

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argument that the fact that Ms. Swoope did not have a valid driver's license rendered her taking of Ms. Valentine's vehicle "unlawful." See *Morris v Progressive Michigan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 11, 2020 (Docket No. 350214) (holding that *Monaco* foreclosed defendant's argument that Morris knowingly lacked authority to take the vehicle, and therefore violated MCL 750.414, because he knew that he could not legally drive the vehicle, given the fact that he did not have a valid driver's license and the fact that he was intoxicated when he drove the vehicle). (**Ex. 9**).

Nor is there any basis under the plain language of the current version of §3113(a) that an unlawful "use" of the vehicle would bar a claimant from PIP benefits. While prior courts have inferred that an unlawful "use" of a vehicle may be relevant to the inquiry under §3113(a), these statements were made in reference to the language contained in the prior version of §3113(a). Notably, the statute's former language did include the word "use." The former version of the statute specified that a person who took a vehicle unlawfully would be unable to claim benefits "unless the person reasonably believed that he or she was entitled to take *or use* the vehicle."

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(Emphasis added).

Thus, in *Spectrum Health*, this Court noted that "driving while legally unable may have implications under MCL 500.3113(a) for a person who has taken a vehicle unlawfully because 'as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the person knows that he or she is unable to legally operate the vehicle.'" *Spectrum Health*, 492 Mich at 518 n 25. The Court of Appeals in *Monaco* expanded on this language from *Spectrum Health*, finding that note 25 in *Spectrum Health* "indicates that the unlawful operation or use of a motor vehicle is only relevant" when a claimant had unlawfully taken the vehicle "and was attempting to invoke the language in §3113(a) allowing recovery when 'the person reasonably believed that he or she was entitled to take and use the vehicle,' despite the unlawful taking." *Monaco*, 317 Mich App at 749. What is clear from these decisions, though, is that the Courts were relying upon the language contained within the prior version of §3113(a). Therefore, under the prior version of §3113(a), the person's entitlement to "use" the motor vehicle was relevant to that person's entitlement to PIP benefits.

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The current language of §3113(a), however, has entirely removed the language relied upon by the Courts in *Spectrum Health* and *Monaco* – whether a person "reasonably believed that he or she was entitled to take *and use* the vehicle" – and replaced it with whether the person "knew or should have known that the motor vehicle or motorcycle *was taken unlawfully*." The plain language of the current statute removes any reference to a person's entitlement to use the motor vehicle. The Court of Appeals' opinion essentially attempts to rewrite the statute to re-introduce this concept of "entitlement to use" the vehicle that no longer is contained in the statute. This argument should be rejected.

The legislative intent behind the Legislature's amendment of §3113(a)[7] clearly indicates that the goal was not to punish people for acting in an emergency, but rather to make sure that those who willingly used stolen vehicles were not protected by no-fault. As set forth in the legislative analysis, the Legislature passed the amended version of §3113(a) to "ensure that a person who willingly uses a stolen vehicle at the time of a car accident and injury is not protected by no-fault." Senate Legislative

7 In order to determine legislative intent, Courts "may examine the legislative history of an act to ascertain the reason for the act and the meaning of its provisions." *Swan v Wedgewood Christian Youth & Family Servs Inc*, 230 Mich App 190, 197; 583 NW2d 719 (1998).

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Analysis, SB 1140, **Ex. 8**. The Legislature's intent in amending §3113(a) was not to ensure that a person who takes a long time friend's vehicle to respond to a family emergency is not protected by no-fault. The trial court's decision should be affirmed.

Finally, this case is most similar to the case of *Amos v Progressive*, unpublished opinion per curiam of the Court of Appeals, issued July 13, 2023 (Docket No. 360091) **(Ex.** 10). In *Amos*, the Court of Appeals held that when Mr. Amos visited his mother's house while she was asleep, and took the keys to his mother's vehicle without permission, drove while intoxicated and without a valid license and got into an accident, that there was still a genuine issue of material fact as to whether Mr. Amos had unlawfully taken his mother's vehicle, rendering him ineligible for PIP benefits under MCL 500.3113(a). The *Amos* Court expressly held:

> Applying *Monaco* to the instant case, that Omar had a suspended license and was intoxicated is not relevant to whether the taking of the vehicle was unlawful. While Omar's use of the vehicle may have been unlawful, that is distinct from an unlawful taking. Accordingly, Progressive and USAA's argument that Omar's violations of the MVC render the taking of the vehicle per se unlawful is without merit. ... In *Spectrum Health*, the

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> Supreme Court stated that "the term 'unlawful' can only refer to the Michigan Penal Code[.]" *Spectrum Health*, 492 Mich at 517 n 22. The Supreme Court further explained that a vehicle is taken unlawfully "if it is taken without the authority of its owner." *Id*. at 518 n 25. Accordingly, this Court's holding in *Monaco* that the unlawful use or operation of a vehicle under the MVC has no bearing on the phrase "taken unlawfully" as used in MCL 500.3113(a) appears to be a straightforward application of the Supreme Court's statements in *Spectrum*. *Amos*, p. 7-8, **Ex. 10.**

The question is not whether Ms. Valentine's vehicle was *used* unlawfully by Ms. Swoope, but rather whether the vehicle was *taken* unlawfully by Ms. Swoope, and given the facts and circumstances of Ms. Swoope's family medical emergency, a genuine question for the jury to determine still remains. The trial court was correct, and the Court of Appeals was incorrect and ought to be reversed.

RELIEF REQUESTED

For the foregoing reasons, the Plaintiff/Appellee, Carlonda Naishe Swoope, respectfully requests that this Honorable Court GRANT her Application for Leave to Appeal, for the reasons stated above.

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Respectfully Submitted,

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CERTIFICATION PURSUANT TO MCR 7.212(B)(1)

Daniel Makled, attorney for plaintiff-appellant, hereby certifies pursuant to MCR 7.212(B)(1) that this brief was typed using the OpenOffice word processing program. That program has a function which can calculate the total number of words contained in a document. According to that program function, there are **6,568** words in this brief.

Signed,

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