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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CARLONDA NAISHE SWOOPE

Supreme Court No.: 166790
Court of Appeals No: 362924

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 REPLY TO DEFENDANT'S ANSWER TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

_____/

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_____/

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

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Exhibit 2, Deposition of Carolonda Naishe Swoope

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Exhibit 10, *Amos v Progressive*, unpublished decision rel'd July 13, 2023 (Docket No. 360091).

Exhibit 11, *VHS of Michigan, Inc v State Farm Mutual Automobile Insurance Company*, unpublished decision rel'd June 20, 2024 (Docket No. 365479).

N.B. Exhibit 11 is in this Reply, only.

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PLAINTIFF'S REPLY TO DEFENDANT'S ANSWER TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

The Court of Appeals' holding in *Swoope v Citizens Insurance Company of the Midwest*, ___ Mich App ___ (2024) erroneously combines the elements to be considered in evaluating whether a no-fault claimant is barred from recovery under MCL 500.3113(a). This Court should grant leave to hear the appeal, or in the alternative remand the case for further proceedings consistent with Michigan law.

The Court of Appeals' holding in *Swoope* focuses on the question of whether Plaintiff lacking a valid driver's license at the time of the accident meant that her taking the vehicle was unlawful, 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.

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The Court of Appeals' holding in *Swoope* was as follows:

> Defendant's motion for summary disposition focused on the second and third prong of the *Ahmed* test. It moved for summary disposition, in part, because plaintiff admitted she did not have a valid driver's license at the time of the accident. ...This information satisfied the second prong because operating a vehicle without a valid license is unlawful for purposes of MCL 500.3113(a).
>
> This evidence also satisfied the third prong, whether plaintiff knew or should have known the motor vehicle was taken unlawfully. …
>
> The burden then shifted to plaintiff to demonstrate a genuine question of material fact to be resolved at trial. Although plaintiff presented some documentary evidence in support of her response to the motion for summary disposition, none of this evidence showed she had a valid driver's license at the time of the accident. Moreover, she offered no evidence showing the vehicle's owner authorized her use of the vehicle. She, therefore, failed to meet her burden as the nonmoving party. *Quinto*, 451 Mich at 362-363. Summary disposition should have been granted on this basis, and the trial court erred when it concluded otherwise. *Swoope*, slip op at 3-4.

The Court of Appeals' decision focusing on whether Ms Swoope had a valid driver's license conflates 'taking' with 'use', and is not in accord with Michigan law. In a recent published opinion, *Bradley v Westfield Insurance*

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Co, ___ Mich App ___ (July 11, 2024) , the Court of Appeals expressly criticized the holding reached in *Swoope*, and relied upon *Monaco v Home-Owners Ins Co*, 317 Mich App 738 (2016) and the "first decided" principle of MCR 7.215(J)(1) to reach the conclusion that the Plaintiff in *Bradley* lawfully took the vehicle, and was not barred from recovery under MCL 500.3113.

This Court should adopt the reasoning and argument of the Court of Appeals in *Bradley*. According to the Court of Appeals in *Bradley*, the Court of Appeals in *Swoope* "purported to overturn eight years of binding precedent by overlooking *Monaco* and misapplying *Ahmed*." *Bradley*, slip op, p. 12. The Court of Appeals in *Bradley* went on to say that *Swoope* "ignored the plain language of the statute by replacing the phrase 'taken unlawfully' with the phrase 'operated unlawfully.'" *Id*.

The Court of Appeals in *Bradley* pointed out that "In *Swoope*, the panel eliminated the distinction between taking and operating; the entire analysis was under a heading titled "UNLAWFUL OPERATION." *Swoope*, ___ Mich App at ___; slip op at 2. However, the statute clearly directs courts to focus on operation or use following an unlawful taking. See MCL 500.3113(a)."

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While the Court of Appeals released *Swoope* while the matter was pending on appeal in *Bradley*, the *Bradley* panel did not ignore the analysis in *Swoope,* while reaching a different conclusion mandated by Michigan law. The *Bradley* panel correctly noted that: "[t]he Court [in *Swoope*] relied entirely on *Ahmed*'s articulation of "a three-prong test" for analyzing MCL 500.3113..." *Bradley,* slip op at 12. The Court then quoted the statement in *Ahmed* that:

> [a]ny violation of the criminal law *that leads to a taking of a motor vehicle* will constitute an 'unlawful taking' for purposes of MCL 500.3113(a). *Id*. (quotation marks and citation omitted; emphasis added). While this was an accurate statement of the law, the panel overlooked the need to show that the violation of criminal law "leads" to a taking. *Id*. *Bradley*, slip op at 12.

The *Bradley* panel gets at the heart of the logical failure behind the decision in *Swoope*: while operating a vehicle without a driver's license might be a violation of criminal law, the key concept in *Ahmed* is that the violation of criminal law must **lead** to the taking. *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1 (2021). As in *Bradley*, the 'violation of criminal law' here (driving without a valid license) did not lead to the taking,

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and thus did not satisfy the requirements of *Ahmed*.

The panel in *Swoope* completely ignored *Monaco v Home-Owners Ins Co*, 317 Mich App 738 (2016), which was directly applicable to the instant case. 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 – to drive the vehicle at the time of the accident. *Id*. Based upon the jury's conclusion, the Court of Appeals held that the driver did not unlawfully take the vehicle within the meaning of §3113(a). *Id*., at 748-749. In so ruling, the Court of Appeals 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.

If this Court adopts the argument put forth by Defendant in its Answer and the Court of Appeals below, then this Court will have effectively overrulled *Monaco*. Defendant's Answer argues: "The court below found the fact that Plaintiff lacked a license was particularly relevant to its finding that she should have known the taking was unlawful..." (Defendant's Answer, p.

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31). The opinion of the panel in *Swoope* necessarily conflicts with *Monaco*- the driver in *Monaco* was only 15, and could never have driven legally on her own. However, because she had obtained permission from her mother, she could lawfully *take* the vehicle, even though she could not lawfully *use* the vehicle. Likewise, here, Ms. Swoope did not have a valid license at the time she drove. She was admittedly *using* the vehicle unlawfully. However, as the trial court held, a genuine issue of material fact remains as to whether she *took* the vehicle unlawfully, without the express permission of her friend Ms. Valentine (at whose house Ms. Swoope was spending the night). The record is unclear as to whether Ms. Valentine observed Ms. Swoope take the vehicle, or objected in any way to Ms. Swoope taking the vehicle. But that is a question for the trier of fact to determine.

While not binding, in a 2023 unpublished opinion the Court of Appeals relied upon *Monaco* to conclude that the plaintiff, who was driving drunk and with a suspended license, had not effected an unlawful taking as the term is used in MCL 500.3113(a). *Amos v Progressive Marathon Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued July 13, 2023 (Docket Nos. 360091 and 360098), pp 7-8. (**Ex. 10**). Just as the plaintiff

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in *Amos* did not effect an unlawful taking under MCL 500.3113(a), Ms. Swoope did not effect an unlawful taking under the facts of the instant case.

In another recent unpublished opinion of the Court of Appeals, *VHS of Michigan, Inc v State Farm Mutual Automobile Insurance Company*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2024 (Docket Nos. 365479), (**Ex. 11**), the Court of Appeals held that the driver who did not have a valid driver's license and who had a blood alcohol level of .133 committed an unlawful *use* of the vehicle, but did not unlawfully *take* the vehicle.

As the *Bradley* panel correctly puts it:

> The facts of *Swoope* cannot be meaningfully distinguished from the facts of *Monaco*. ...Because *Monaco* was decided and published first, this Court was required to follow it when deciding *Swoope*. See MCR 7.215(J)(1). If the panel did not agree with *Monaco*, then the proper procedure was to declare a conflict; instead, the panel simply made no mention of it." *Id,* slip op. p. 12.

The Court of Appeals erred in reaching the holding of *Swoope*, and that case was wrongly decided. This Court should grant Plaintiff leave to appeal,

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and correct the error in law created by the Court of Appeals in *Swoope*.

CONCLUSION

Given the inherent conflict between *Swoope* and *Monaco* (and other recent cases of the Court of Appeals), this Court should grant Plaintiff-Appellant's Application for Leave to Appeal, or in the alternative reverse the opinion of the Court of Appeals and remand the matter to the trial court for further proceedings.

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.

Respectfully Submitted,

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Dated: August 6, 2024

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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 **1,587** words in this brief.

Signed,

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