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STATE OF MICHIGAN

IN THE SUPREME COURT

SPINE SPECIALISTS OF MICHIGAN, P.C.,
As assignee of Jeremy Woods,

Plaintiff-Appellant,

v

MEMBERSELECT INSURANCE COMPANY,

Defendant-Appellee.
_____/

Supreme Court No. 165445

Court of Appeals No. 358296

Macomb County Circuit Court
No. 2020-003355-NF

CORRECTED PRINTING OF
DEFENDANT-APPELLEE MEMBERSELECT INSURANCE COMPANY'S SUPPLEMENTAL BRIEF (MOAA) IN SUPPORT OF ITS ANSWER TO PLAINTIFF SPINE SPECIALISTS' APPLICATION FOR LEAVE TO APPEAL

*** * * Oral Argument Requested * * ***

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Where Plaintiff filed this case on September 18, 2020, seeking PIP reimbursement of expenses incurred in April and May 2019 – i.e., more than a year prior to the commencement of the action, was the Court of Appeals correct in holding that the pre-amendment, no-tolling version of the no-fault act's one-year back rule applied to preclude Plaintiff's recovery since it was the version of the statute in place when the claim accrued?

Defendant-Appellee MemberSelect answers, "Yes."

Plaintiff-Appellant Spine Specialists would answer, "No."

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INTRODUCTION

This case involves a claim for payment of no-fault personal protection insurance ("PIP") benefits for medical services rendered by Plaintiff-Appellant, Spine Specialists of Michigan, PC, on April 15, 2019, April 20, 2019, and May 6, 2019. Under the version of the controlling statute in place at the time, benefits for those services would not be recoverable in any action commenced more than one year after the respective service dates. In pertinent part, MCL 500.3145(1) plainly stated: "In an action for recovery of [PIP] benefits payable under this chapter ... the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." *Id*. Plaintiff did eventually pursue recovery of benefits for its services rendered, but did not initiate an action until September 21, 2020–well beyond the one-year anniversary of those dates of service.

Based on this one-year-back rule, Defendant moved for summary disposition with respect to PIP benefits for the expenses incurred on these three service dates. In opposition to the motion, Plaintiff sought to invoke the benefit of a subsequent change to §3145 – 2019 PA 21. Under the amendment, which went into immediate effect on June 11, 2019, a provision was added under which the period of limitations applicable "to 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." MCL 500.3145(3) (as amended). Spine Specialists, relying on the proposition that it had promptly submitted a specific claim for payment following its April-May 2019 dates of service, but that the insurer had not "formally denie[d]" the claims, maintained that it enjoyed never-ending tolling of the one-year limitation on its recovery of benefits when it filed suit in September 2020.

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The trial court granted summary disposition in favor of the defendant insurer. In affirming the trial court's ruling, the Court of Appeals cited the rule that the version of a statute applicable in a given case generally depends on the date on which the plaintiff's claim accrued, *Spine Specialists of Mich v MemberSelect Ins Co*, 345 Mich App 405, 412; __ NW3d __ (2023); and here, citing MCL 500.3110(4), the Court held that the claims accrued in April-May 2019, when services were rendered and expenses thus were incurred. *Id*., 345 Mich app at 414. The Court concluded, therefore, that the amended version of the statute, with its new tolling provision, does not apply:

> The law in effect at the time the claims accrued was the pre-amendment version of MCL 500.3145; the amended version of the statute did not take effect until June 11, 2019, and does not apply retroactively. ... The trial court therefore did not err by applying the pre-amendment version of MCL 500.3145 to plaintiff's April-May 2019 claims and granting defendant summary disposition of those claims.

Id., 345 Mich App at 414.

Although the Court of Appeals did not engage in an exhaustive factor-by-factor analysis of when a newly enacted statute might be given retroactive effect, as detailed in *Buhl v City of Oak Park*, 507 Mich 236; 968 NW2d 348 (2021), and *LaFontaine Saline, Inc v Chrysler Group, LLC*, 498 Mich 26; 852 NW2d 78 (2014), it relied on *Buhl* and *Andary v USAA Cas Ins Co*, 343 Mich App 1; 996 NW2d 784 (2022), *aff'd in pert part*, 512 Mich 207; 1 NW3d 186 (2023), which likewise relied on both *Buhl* and *LaFonatine*, then concluded as follows:

> In the absence of any Legislative statement of retroactive application, and in light of the presumption against retroactive application of a statutory amendment, the trial court in this case

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correctly determined that the amendment to MCL 500.3145 does not apply retroactively.

Spine Specialists, 345 Mich App at 412. The discussion presented below demonstrates that the decision of the Court of Appeals is in full accord with consideration of the four factors laid out in *Buhl* and *LaFontaine* for assessing retroactive application of a statute.

In its Order calling for scheduling of oral arguments and the submission of supplemental briefs in this matter, the Court directed that the parties address "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." (Order, Case No. 165445. 11/22/2023). For the reasons that follow, together with those presented in Defendant's principal brief in opposition to the application for leave to appeal, the answer to the question presented is, "Yes."

ARGUMENT

Where Plaintiff filed this case on September 18, 2020, seeking PIP reimbursement of expenses incurred in April and May 2019 – i.e., more than a year prior to the commencement of the action, the Court of Appeals was correct in holding that the pre-amendment, no-tolling version of the no-fault act's one-year back rule applied to preclude Plaintiff's recovery since it was the version of the statute in place when the claim accrued.

Under the version of MCL 500.3145 in place up until June 11, 2019, the one-year-back rule was straightforward and unqualified: one-year-back meant one-year-back. Only if the medical expenses in dispute were incurred within the one year period preceding the date on

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which the action was filed would benefits for those expenses be potentially recoverable. If the action was filed more than a year after the services were rendered (and the expense thus incurred), benefits for those expenses were not recoverable.

Now, under the amended version of the statute, the one-year-back rule is subject to a tolling provision. The one-year period preceding the filing of an action now may be expanded by the length of time between the date on which a "specific claim for payment" is made and the date on which the insurer "formally denies" the claim." MCL 500.3145(3) (as amended, effective).

In this case, where the services at issue were rendered *before* the statute was amended, but the action was filed *after* the effective date of the amendment, the Court of Appeals was called upon to decide which version of the statute applies – the pre-amendment version under which "one-year-back" means "one-year-back," or the post-amendment "tolling" version of the statute. The decision rendered by the Court, succinctly put, was that the *pre-amendment* version of the statute is the one that applies, since it is the date on which expenses are incurred that dictates when a right to recover PIP benefits accrues, and the date on which a right of recovery accrues is what dictates which version of a statute applies. *Spine Specialists of Mich, PLLC*, 345 Mich App at 412, citing MCL 500.3110(4) and *Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 513-514; 525 NW2d 905 (1994); *accord*, *Buhl*, 507 Mich at 243; *Husted v Consumers Power Co*, 376 Mich 41, 47; 135 NW2d 370 (1965).

As recognized in *Buhl*, a new statutory provision that went into effect after one's cause of action accrued could potentially apply retroactively to that pre-amendment date, but this would be a clear exception to the general rule. "'Statutes are presumed to apply prospectively

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unless the Legislature clearly manifests the intent for retroactive application.'" *Buhl*, 507 Mich at 244, *quoting Johnson v Pastoriza*. 491 Mich 417, 429; 818 NW2d 279 (2012); also *see*, *Davis v Stone Employees' Retirement Bd*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006) ("[t]he Legislature's expression of an intent to have a statute apply retroactively must be clear, direct and unequivocal as appears from the context of the statute itself"). On this question, the overriding, guiding principle is that the legislative intent governs; all other rules of construction and operation are subservient to this principle. *Buhl*, 507 Mich at 243-244.

As a tool for discerning the Legislative intent as to whether a statute has retroactive effect, the Court in *LaFontaine* said, "we keep four principles in mind." *Id*., 496 Mich at 38. In this case, Plaintiff has been unable to identify any statutory evidence of Legislative intent that the amendatory version of §3145 was to be applied retroactively; and consideration of the four factors cited and discussed in *LaFontaine*, 496 Mich at 39-42, and *Buhl*, 507 Mich at 244-247, only reinforces this conclusion.

The first factor for the Court to consider is whether there is specific language for retroactive application. 507 Mich at 244. Here, Plaintiff does not attempt to identify any such language. Rather, Plaintiff asks whether there is language affirmatively suggesting that the amendment is limited to prospective application – as if the overriding presumption is that statutes generally apply retroactively. *See*, Plaintiff's Supplemental Briefing In Support of Its Leave Application, 2/21/2024, p. 17. The opposite, of course, is true. *Johnson v Pastoriza*, *supra*. In fact, there is nothing in the amended statute evincing an intent that §3145 as amended be given retroactive effect. On the contrary, where the Legislature did speak to this issue, it directed that the amendatory statute was to take effect on June 11, 2019

– "immediate[ly]," *not* retroactively. (*See*, Defendant-Appellee's Answer to the Application for Leave to Appeal, 6/24/2023, pp. 7-8, discussing *Johnson v Pastoriza*, *supra*.) This fact "only confirms [the statute's] prospectivity." *LaFontaine*, 496 Mich at 40; *Buhl*, 507 Mich at 245 ("nothing in the plain language of the statute suggests [it] was intended to apply retroactively. *To the contrary*, the amendment was given immediate effect without further elaboration") (emphasis added).

The second factor requires consideration of the fact that, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. *Buhl*, 508 Mich at 244. In one sense this factor appears not to apply to the analysis in this case, just as it was inapplicable in *Buhl* since the statute in question "does not pertain to a specific antecedent event" (*see*, *id.* at 244). Yet it must be acknowledged that in some *other* situations, a statute *will* be operating retroactively where it directly impacts the parties by its "relat[ion] to an antecedent event." Here, Plaintiff affirmatively acknowledges that the amendatory provision of §3145 would impact the antecedent event of Plaintiff's rendering of treatment to Defendant's insured–i.e., when expenses were incurred giving rise to the claim for PIP benefits. Yet Plaintiff downplays that event suggesting that "the operative question ... is when the legal proceedings were started." (Plaintiff's Supplemental Briefing, p. 17). But, as noted above, the operative moment in determining which law applies to a party's claim is the date on which the claim accrued.

And, notably, in terms of antecedent events, *if the tolling provision had existed* in April-May 2019, a period of tolling would have been triggered by Plaintiff's request for payment mere days after its service dates, with said tolling period being promptly terminated

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by the insurer's clear "formal denial" – *if* such a denial had been issued. But since there was at that time *no such tolling statute*, there was at that time no legal significance to the particular manner in which the insurer rejected a claim or how "formal" a denial might need to be to terminate a tolling period. No tolling had begun! The insurer was under no obligation to take any particular affirmative steps to secure its protection of the one-year-back limitation on benefits. To apply the amendatory provision retroactively to alter history and impose new, detrimental legal significance to the insurer's so-called "failure" to issue a "formal denial" cannot pass muster under any of the *Buhl*/*LaFontaine* factors.

The third factor to be considered in determining retroactivity is to recognize that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties "or attaches a new disability with respect to transactions or considerations already past." *Buhl*, 507 Mich at 244; *see*, *In Re Certified Questions*, 416 Mich 558, 571; 331 NW2d 456 (1982). The preceding discussion concerning the insurer's reasonable expectation of, and reliance on, a clear one-year-back rule is such a vested right that would be unfairly impaired by retroactive application of the amendatory tolling provision since it would attach new, detrimental legal significance to the claims adjustor's failure to issue a "formal denial" when rejecting a submitted claim–without any notice that such constituted any type of "failure" at all.

The fourth factor identified in *LaFontaine* and *Buhl* is 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. 496 Mich at 39, 41; 507 Mich at 247. This factor likewise cannot permit retroactive application of the amended version of the one-year-back

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rule because, despite Plaintiff's assertions to the contrary, the one-year-back rule is substantive in nature, not a mere procedural device. A statute is procedural when there is "'no clear legislative policy reflecting considerations other than judicial dispatch of litigation.'" *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999), quoting *Kirby v Larson*, 400 Mich 585, 598; 256 NW2d 400 (1977). But when a statutory provision is grounded on policy considerations other than regulating the procedural operations of the judiciary, it is considered substantive law. *Zdrojewski v Murphy*, 254 Mich App 50, 81-82; 657 NW2d 721 (2002).

Under the detailed analyses of *Joseph v Auto Club Ins Assoc*, 491 Mich 200; 815 NW2d 412 (2012), *Cameron v Auto Club Ins Assoc*, 476 Mich 55; 718 NW2d 784 (2006), and *DeVillers v Auto Club Ins Assoc*, 473 Mich 562; 702 NW2d 539 (2005), there can be no dispute that the damages-limiting function of the no-fault act's one-year-back rule is substantive in nature and grounded in public policy. It is a provision concerned not with when or how an action may be brought but with placing a defined limit on the amount of PIP benefits a claimant may recover. And likewise, as was made particularly clear in *DeVillers*, *supra*, any tolling of that one-year-back period that operates to alter the one-year-back limitation necessarily impairs that substantive rule of public policy. *See*, Defendant's Answer to the Application for Leave to Appeal, pp. 5-6.

Nor can the amended version of §3145 be characterized as "merely remedial" in the sense that, according to some, it purportedly would reinstate the previous state of the law. To be sure, the case of *Lewis v DAIIE*, 426 Mich 83; 393 NW2d 167 (1986), did issue a holding that the §3145(1) one-year-back rule was subject to a tolling period of the sort created

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by the 2019 amendment; but that holding in *Lewis* does *not* constitute any "previous state of the law" since it was held to be unconstitutional policy-making by the judicial branch of government:

> *Lewis* [did] not reflect a simple "misunderstanding" of the statute at issue; the *Lewis* decision demonstrate[d] an act of judicial *defiance* in which [the] Court substituted its own judgment concerning 'fairness' for the plainly expressed will of the Legislature. Such an act of judicial usurpation of the legislative function should not be permitted to stand.

DeVillers v Auto Club Ins Assoc, 473 Mich at 585 (emphasis in original).

The Court in *DeVillers* thus overruled *Lewis* for the very reason that the statute unequivocally contained no such tolling provision. The state of the law, by the plain and unambiguous terms of the statute, was that one-year-back means one-year-back. So held the Supreme Court in *DeVillers*, and in accord with the general rule of Supreme Court holdings, it was given retroactive effect (i.e., it did not change the law; it clarified the already existing law). 473 Mich at 587.

Thus where one might assert that the *Lewis*-tolling rule constituted the previous state of the law, it implicitly marginalizes *DeVillers* (i.e., a no-tolling, one-year-back means one-year-back rule) as a *new* rule, and characterizes the statutory tolling provision of the 2019 amendment as a reinstatement of the previous state of the law. But this is clearly incorrect. The Court in *DeVillers* expressly held that "our decision here is *not* a declaration of a new rule but a return to an earlier rule and a vindication of controlling legal authority – here, the 'one-year-back' limitation of MCL 500.3145(1)." *DeVillers*, 473 Mich at 587 (emphasis

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added). The subject amendment, therefore, cannot be regarded as remedial, and must be held to operate prospectively only.

In these proceedings, the Court will consider whether to render a decision on the merits or simply to deny the application for leave to appeal and thus leave the published opinion of the Court of Appeals standing as the binding rule on the lower courts. In this regard, the Court should take particular notice of the fact that *every* panel of the Court of Appeals that has considered the specific issue here presented, and there have been at least seven including the case at bar, has decided the issue the same way.[1] *None* has reached a contrary result.[2] The Court may well decide that this case fails to warrant Supreme Court review under MCR 7.305(B).

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[1] *See*, *Mobile MRI Staffing, LLC v Meemic Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2022 (Docket No. 355162) (predating *Spine Specialists of Mich*); *Cherry v Progressive Marathon Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2022 (Docket No. 357722) (predating *Spine Specialists of Mich*); *Health Partners, Inc v Progressive Mich Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2023 (Docket No. 359096); *Reid v Progressive Mich Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2023 (Docket No. 355162) (without citing *Spine Specialists of Mich*); *Hauanio v Farmers Ins Exchange*, unpublished opinion per curiam of the Court of Appeals, issued September 14, 2023 (Docket No. 362363); and *Giramonte v Liberty Mutual Ins Co*, __ Mich App __; __ NW2d __ (2023) (Docket No. 362128).

[2] *Encompass Healthcare, PLLC v Citizens Ins Co*, __ Mich App __; __ NW2d __ (2022) (Docket No. 357225), is not such a case. *See*, Defendant-Appellee's Answer to the Application for Leave to Appeal, pp. 12-14.

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RELIEF REQUESTED

For all the foregoing reasons, and those detailed in its principal application response brief, Defendant-Appellant, MEMBERSELECT INSURANCE COMPANY, respectfully requests that the Court either DENY the application for leave to appeal or otherwise AFFIRM the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Defendant-Appellee, MemberSelect Insurance Company, certifies pursuant to MCR 7.312(A) and MCR 7.212(B) that this supplemental appellee's brief contains 3,098 words, including headings, footnotes and quotations, but excluding caption, tables and signature.

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May 1, 2024