STATE OF MICHIGAN

IN THE SUPREME COURT

ENCOMPASS HEALTHCARE, PLLC Re: Ronald Mannor,	Supreme Court No. 165321
Plaintiff-Appellee,	COA No. 357225
v	Oakland County Circuit Court
CITIZENS INSURANCE COMPANY,	Case No: 2019-177749-CZ
Defendant-Appellant.	Hon. Nanci Grant

DEFENDANT-APPELLANT'S REPLY TO PLAINTIFF'S SUPPLEMENTAL BRIEF PURSUANT TO THIS COURT'S NOVEMBER 22, 2023 ORDER

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INTRODUCTION

Defendant-Appellant is addressing the arguments raised by Plaintiff-Appellee in its supplemental brief pursuant to the November 22, 2023 Order. Specifically, Defendant-Appellant did not waive its challenge to the retroactive application of MCL 500.3145(3); the Court of Appeals did not correctly apply the tolling provision of MCL 500.3145 to the facts of this case; the Court of Appeals contradicted this Court's decision in *Andary vs USAA Cas Ins* Co, 512 Mich 207; 1 NW3d 186 (2023); and the Court of Appeals did not adopt the correct standard for determining whether an insurer "formally denies" a claim for the purposes of tolling the one-year-back period in § 3145(3). Defendant-Appellant Citizens requests that this Court reverse the decision of the Court of Appeals.

Despite the many distractions in Plaintiff's brief, this Court has already determined that post-reform § 3145(3) cannot apply to the claims in this case that accrued prior to the enactment of No-Fault Reform in 2019. This Court stated in *Andary vs USAA Casualty Insurance Company*, "the law in place at the time of the parties' rights and obligations vested under a contract control absent a clear retrospective modification." 512 Mich 207, 244; 1 NW3d 186 (2023). Along with this clear departure from precedent set by this Court, the Court of Appeals decision also conflicts with the Opinion issued on the same day in *Spine Specialists of Michigan PC v Memberselect Ins Co*, 345 Mich App 405 (2022). Both opinions were issued the same day by different panels of the Court of Appeals and came to vastly different conclusions about how No-Fault Reform should be applied.

Without guidance from this Court, the inconsistencies in the recent opinions will only cause further confusion among lower courts, insureds, and insurers in handling the provisions of the No-Fault Act. As will be more fully outlined herein, this Court has jurisdiction to address the retroactive application of MCL 500.3145(3); the Court of Appeals did not correctly apply the tolling provision of the One-Year-Back rule MCL 500.3145(3) to claims accrued before the amendment to § 3145 took place and directly conflicts with binding case law from the Court of Appeals; and the Court of Appeals did not adopt the correct standard for determining whether an insurer "formally denies" a claim for the purposes of tolling the one-year-back period in § 3145(3).

I. Defendant-Appellant Did Not Waive Its Challenge to the Retroactive Application of MCL 500.3145(3) to Plaintiff's Claims and this Court has Jurisdiction to Consider the Present Appeal.

Defendant-Appellant did not waive its challenge to the retroactive application of MCL 500.3145(3) to Plaintiff's claims. It has been Defendant's position from the outset[1] that Plaintiff's claims "are forever barred pursuant to MCL 500.3145(2)." (Defendant's Exh F, Appx 27). Despite Defendant's ongoing pursuit of this issue in the trial court, Court of Appeals, and now Michigan Supreme Court, Plaintiff asserts that Defendant has waived its challenge to the retroactive application of MCL 500.3145(3). As previously stated in Defendant-Appellant's supplemental brief, this issue has been preserved for appellate review by this Court. If Plaintiff's assertions are true and it was so apparent that Defendant-Appellant waived this issue, why did Plaintiff fail to raise this issue of

[1] Defendant first asserted that Plaintiff's claims are barred by § 3145 in its Answer to Plaintiff's Complaint and Affirmative Defenses.

waiver in its Brief on Appeal in the Court of Appeals or its Answer to Defendant-Appellant's Application for Leave to Appeal to this Court? Plaintiff raises several alleged instances of waiver in its supplemental brief, none of which amount to a waiver of this issue.

On April 2, 2020, Defendant filed its Motion for Summary Disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The crux of Plaintiff's first argument is that Defendant did not rely on pre-reform § 3145 in its initial Motion for Summary Disposition. This argument is entirely meritless upon reading the entire Motion, which does not rely on the amended portion of § 3145. Plaintiff, for some inexplicable reason, only focuses on a portion of the Motion for Summary Disposition that provides the text of § 3145 as amended but then fails to read the paragraph that immediately follows, which states: "MCL 500.3145 was amended to add Section 3 and became effective on June 11, 2019. The pre-amendment case law interpreting MCL 500.3145 has not been overruled, and is still good case law and applies to the present case. Since the Amendment, the Michigan Supreme Court and the Court of Appeals have not issued a decision interpreting Section 3 of the Amended Statute." (Defendant's Exh F, Appx 27, p.10). Defendant was never seeking to apply MCL 500.3145(3) to the facts of the case because "Any portion of the loss incurred before November 8, 2018 are forever barred pursuant to MCL 500.3145(2)." (Defendant's Exh F, Appx 27).

Plaintiff's interpretation of this to mean that Defendant was relying on the amended portion of § 3145 to support its Motion is misguided. Defendant cited the Act and explained that section (3) was not effective until June 11, 2019, the case law

interpreting the pre-amended version of the act remained good law, and that Plaintiff's claims were barred by section (2). Plaintiff's focus on one portion of Defendant's Motion for Summary Disposition without reading the rest of the Motion only serves to mislead this Court.

The same can be said of Plaintiff's analysis of oral argument on Defendant's Motion for Summary Disposition, which was held on May 20, 2020. It is clear from examining the entirety of Defense Counsel's argument that Defendant did not waive its challenge to retroactive application, Defendant did not rely on § 3145(3), nor did Defense Counsel agree that MCL 500.3145(3) applies from one year from the denial rather than when the claim was incurred:

> Ms. Battle: Because, your Honor, the statute requires them to file one year from incurring the expense, which would be the last date of treatment, which was October 2018.
>
> So the plaintiff incurred the expense in October 2018 and they would have one year from that time to file the – under the correct statute of limitations. (Plaintiff's Appx A).

The entirety of Defendant's argument for Summary Disposition against Plaintiff was that Plaintiff's claims that were incurred before November 4, 2018, are forever barred by MCL 500.3145(2), and that section (3) is not even implicated. In the Order granting Defendant's Motion, even the trial court agreed that section (2) was the subject of Defendant's argument, stating "Pursuant to MCL 500.3145(2), '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.' Plaintiff's Complaint was filed on November 4, 2019. Therefore, Defendant argues that pursuant to the 'one-year-back rule,' as set forth in MCL

500.3145(2), supra, any portion of the loss incurred by Plaintiff before November 4, 2018 is not recoverable. (Defendant's Exh C, Appx 16).

Even if this Court were to find that Defendant-Appellant somehow waived this issue, this Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available. *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513; 773 Nw2d 758 (2009) *See also Brown v Loveman*, 260 Mich App 576; 680 NW2d 432 (2004). Additionally, appellate courts may review issues not raised in the trial court if "a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case. *Providence Hospital v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-95; 412 NW2d 690 (1987). In this case, this Court has all of the law and the facts necessary to resolve this issue of major significance to this State's jurisprudence.

II. The Court of Appeals Did Not Correctly Apply the Tolling Provision of the One-Year-Back Rule to Plaintiff's Claims that Accrued Before the Amendment to § 3145 Took Effect on June 11, 2019, and its Decision Directly Contracts Binding Precedent from this Court and the Court of Appeals.

This Court has already answered the question of whether MCL 500.3145(3) has retroactive effect—and it has answered that it does not. The ruling from the Court of Appeals is directly contradicted by this Court's recent decision in *Andary v USAA Cas Ins Co*, 512 Mich 207 (2023) and a number of other decisions both published and unpublished by the Court of Appeals, which will be discussed in further detail below.

Plaintiff's assertion that § 3145(3) should be given retroactive effect completely ignores the principles within this Court's landmark decision in *Andary v USAA Casualty*

Ins Co, *supra*, which provides that the 2019 amendments to the No-Fault Act generally do not have any retroactive effect. Further, "this Court generally has not found a sufficiently clear statement of retrospective intent in the absence of a clear and express statement." *Andary v USAA Cas Ins Co*, 512 Mich 207, n.23; *see also Buhl*, 507 Mich at 245. This is the exact same principle that was applied in *Spine Specialists*, stating that "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."

In *Andary v USAA Cas Ins Co*, 512 Mich 207 (2023), this Court held that MCL 500.3157(7) and (10) could not be applied to claims for individuals involved in a motor vehicle accident prior to June 11, 2019. A reading of this Court's opinion in *Andary* makes clear that none of the amended provisions of the No-Fault Act can be applied to claims for individuals prior to June 11, 2019.

Specifically, this Court held that Andary's and Krueger's pre-existing right to receive uncapped PIP benefits was both statutory and contractual. *Andary*, 512 Mich at 242. This Court recognized the long-standing rule that for insurance purposes, "[t]he rights and obligations of the parties vest[] at the time of the accident. *Id.* at 238, citing *Clevenger v Allstate Ins Co*, 443 Mich 646, 656 (1993). The Court held "this clear statement of law means that neither the insured nor the insurer can unilaterally change the terms of a policy after a covered accident occurs." *Id.* Thus, Andary's and Krueger's rights vested at the time that the injuries occurred, which was when the "insurer's legal obligation to pay PIP benefits for all reasonable and necessary medical expenses at the

statutorily mandated minimum level, as incorporated into the insurance contract, was triggered." *Id.* at 241-242.

This Court also found that vested contractual rights to continuation of benefits at pre-amendment levels could not be stripped away or diminished when the Legislature failed to clearly state its intent to do so. *Id.* at 215. The language of MCL 500.3145 is not different than the language of MCL 500.3157(7) and (10) as analyzed by this Court in *Andary*, because that language does not expressly state and intent to alter pre-existing, vested rights of persons injured in accidents prior to the enactment of No-Fault reform.

The reasoning of this Court in *Andary* applies equally to Plaintiff's claims in this matter: Plaintiff's and Defendant's rights vested at the time the plaintiff was injured on December 27, 2017. At that time, MCL 500.3145(3) was not in existence, as it was not enacted until June 11, 2019 (as stated in Defendant's Motion for Summary Disposition). Thus, as was held by this Court in *Andary*, *supra*, "insurance policies and the disputed portion of the no-fault statutes that existed when [plaintiff] was injured controls [his] entitlement to PIP benefits, not the amended provisions enacted by 2019 PA 21 and 2019 PA 22." *Id.* at 256-257.

The Court of Appeals continues to apply these principles to cases involving rights that were vested prior to the enactment of No-Fault Reform.[2] *Matti v Tahnun*, ____ Mich

[2] Prior to this Court's decision in *Andary v USAA Cas Ins Co*, Defendant-Appellant had cited numerous other cases holding that post-reform § 3145 only applied to claims incurred after the enactment of the statute, including *Mobile MRI Staffing, LLC v Meemic Ins Co*, unpublished per curiam opinion of the Court of Appeals, decided January 20, 2022 (Docket No. 355162); *Cherry v Progressive Marathon*, unpublished per curiam opinion of the Court of Appeals, decided June 16, 2022 (Docket No. 357722); *Jones v Esurance Ins Co (After Remand)*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2021 (Docket No. 351772).

App ____, unpublished per curiam, docket nos. 364473, 364975, slip op at 7 (Feb 22, 2024), attached as **Exhibit A**, reaffirmed the principle that "statutory law in effect at the time the parties enter into a contract is incorporated into the contract," and "the scope of available PIP benefits under and insurance policy vests at the time of injury." In *Matti*, since the plaintiff's policy was issued and plaintiff was injured after June 11, 2019, the fee schedule of the amended MCL 500.3157 applied to her.

Along with *Matti*, the Court of Appeals issued its decision in *Demske v Fick*, ____ Mich App ____; ____ NW2d ____ (2024), the Court reaffirmed the principles outlined above, that the contract and statutes in effect at the time of injury control a claim for PIP benefits. *Id.* slip op at 7. The Court held that the amendments to the No-Fault Act applied at the earliest "to those individuals who were injured while covered by an insured policy on or after June 11, 2019." *Id.* slip op at 10.

Plaintiff seeks to cherry-pick which portions of the comprehensive No-Fault scheme have retroactive effect, without any consideration for this Court's precedent and the language within the statute, or lack thereof. Plaintiff's lengthy analysis of the *Buhl* and *LaFontaine* factors is futile given this Court's determination that there is no retroactive application of these provisions.

III. The Court of Appeals Did Not Adopt the Correct Standard for Determining Whether an Insurer "Formally Denies" a Claim for the Purposes of Tolling the One-Year-Back Period in MCL 500.3145(3) and the Court of Appeals Erred in Concluding that Post-Reform § 3145 Resurrected Pre-*Devillers* Judicial Tolling Standards.

A. The Court of Appeals Definition of "Formal Denial" is at odds with the language of § 3145(3).

First, as Defendant-Appellant argued in its Application for Leave to Appeal, the analysis of what constitutes a "formal denial" was included in the event that the Court of Appeals determined that post-reform § 3145 is applicable to this case; however, post-reform § 3145 should not be applied to this case. The Court stated "Citizens' EORs did not provide the explicit and unequivocal expression of finality required to constitute formal denials under our pre-*Devillers* jurisprudence . . . the EORs included no language clearly stating that the claims were denied, at least not with the finality and clarity required to end the tolling period. The EORs essentially stated on the amount of each claim that was '[a]llowed' versus '[r]educed,' with little additional detail.'" *Encompass Healthcare PLLC v Citizens Ins Co*, ____ Mich App ____; ____ NW2d ____ (2022).

Plaintiff failed to demonstrate how the Court of Appeals' decision was consistent with the plain language of the Michigan No-Fault Act. Rather, the effect of Plaintiff's argument and the Court of Appeals' decision is a strict standard that is at odds with language of the Act and the reality of how insurers handle claims and inform insureds of what claims are paid, denied in part, or denied in their entirety. The language of the statute clearly demonstrates that the Legislature granted a certain level of discretion in how insurers communicate the denial of a claim.[3] Section (3) states:

> (3) A period of limitations applicable under subsection (2) to the commencement of an action and the recovery of benefits is tolled from the date of a specific claim for payment of the benefits until the date the insurer

[3] Plaintiff mistakenly interprets the term "flexible" to mean "vague" or "enigmatic." Flexible is defined as "characterized by a ready capability to adapt to a new, different, or changing requirements," whereas vague is defined as "not clearly defined, grasped, or understood." *Merriam-Webster Dictionary*.

> formally denies the claim. This subsection does not apply if the person claiming the benefits fails to pursue the claim with reasonable diligence.

Once again, the Legislature did not include the language in the statute that Plaintiff alleges it did. The effect of the Court of Appeals decision is that unless the word "denied" or "denial" is used in an EOR, it cannot be understood to be a formal denial of a claim. The Legislature did not define "formal denial" consistent with pre-*Devillers* standards in its amendments to § 3145; instead, it specifically chose not to define this term.

B. Post-Reform § 3145 is not curative legislation the Court of Appeals erred in concluding that it resurrected pre-Devillers judicial tolling standards.

While Plaintiff states that there is "no durational limit for when legislation may be curative," the fact of the matter is that each of the examples cited by Defendant to illustrate that the No-Fault Act as amended was not curative legislation, did not take fourteen years to be enacted. Each of the examples provided by Defendant in its Application for Leave to Appeal to this Court illustrates that actual curative legislation took place promptly to address a judicial misinterpretation of their intent. The Court of Appeals erred in determining that the Legislature was resurrecting pre-*Devillers* equitable tolling when it enacted MCL 500.3145(3). Specifically, the Court of Appeals stated "Relevant here, Michigan courts have recognized that statutory amendments directed at a particular judicial decision can be remedial in nature by 'reinstat[ing] the state of the law as it existed prior to the judicial decision."

The Legislature did not "supersede our Supreme Court's ruling in *Devillers* and return the state of the law to that provided in *Lewis* and its progeny." Instead, after

allowing *Devillers* to govern the rights of No-Fault claimants for 14 years unimpeded, the Legislature went in another direction and those amendments are part of a comprehensive, expansive overhaul of the entire No-Fault Act. The amendments to the No-Fault Act across multiple statutes was not done to correct a judicial misinterpretation of the legislature's intent.

Respectfully submitted,

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WORD COUNT CERTIFICATION PURSUANT TO MCR 7.212(B)(3)

Pursuant to MCR 7.212(B)(3), the undersigned certifies that the number of countable words contained in this document is 3,174 words.

/s/ Donald C. Brownell
Donald C. Brownell (P48848)

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was filed with the Michigan Supreme Court and was served upon the attorneys of record of all parties to the above cause by the MiFile e-filing system on **May 20, 2024.** I declare under penalty of perjury that the statement above is true to the best of my information, knowledge, and belief.

*/s/ Andrew P. Malec*_____
Andrew P. Malec (P85420)