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STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals
(Riordan, PJ, and Boonstra and Gadola, JJ)

SPINE SPECIALISTS OF MICHIGAN, PC,

Plaintiff-Appellant,

v

MEMBERSELECT INSURANCE COMPANY,

Defendant/Appellee.

Supreme Court Case No. 165445

Court of Appeals Case No. 358296

Macomb County Circuit Court
Case No. 2020-003355-NF
Hon. Edward Servitto, Jr. (P27600)

Gerald K. Paulovich (P77535)
Anthony, Paulovich & Worrall, PLLC
Attorneys for Plaintiff-Appellant
835 Mason Court, Suite C220
Dearborn, MI 48124
(313) 406-9722
gp@anthonylitigation.com

Steven A. Hicks (P49966)
Co-Counsel for Plaintiff/Appellant
216 North Chestnut Street
Lansing, MI 48933
(517) 881-5564
shicks@chair2consulting.com

Daniel S. Saylor (P37942)
GARAN LUCOW MILLER PC
Attorneys for Defendant/Appellee
MemberSelect Insurance Company
1155 Brewery Park Blvd., Ste. 200
Detroit, MI 48207-2641
(313) 446-5520
dsaylor@garanlucow.com

PLAINTIFF/APPELLANT SPINE SPECIALIST OF MICHIGAN, PC'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF ITS LEAVE APPLICATION

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The one year back rule precludes recovery of PIP benefits for losses incurred more than one year before the PIP action was commenced. But, when that PIP claim accrued, i.e., when the loss was incurred, does not determine whether statutory tolling is applied.

Unlike the one year back rule, the new statutory tolling provision for PIP claims under MCL 500.3145(3) is not calculated based on when the PIP claim accrued. Statutory tolling under MCL 500.3145(3) is applied whenever "a specific claim for PIP benefits" is made (and pursued with reasonable diligence) and no formal denial is issued on that claim.

Moreover, the substance of the one year back rule provision was not modified when the No-Fault Act was amended. Consequently, the one year back rule provision is not instructive when determining how the Legislature intended MCL 500.3145(3) be applied.

This Court should apply the new statutory tolling provision under MCL 500.3145(3) to services that Spine Specialists provided on behalf of Jeremy Woods before the No-Fault Act was amended because it is merely a procedural provision that affects no vested rights.

Even if the one year back rule is viewed as a substantive provision, which it is not, the question here is whether statutory tolling should be applied so that recovery of PIP benefits is not precluded on claims that accrued before the No-Fault Act was amended.

As a mere procedural provision, MCL 500.3145(3) should be applied in all PIP actions "commenced" after the No-Fault Act was amended regardless of when the PIP claims accrued. Any other result would negate the Legislature's intent as a caveat was added to the one year back rule so that it is now "subject to" the statutory tolling provision.

While there may be some intuitive appeal in refusing to apply all new provisions under the amended No-Fault Act "retroactively" based on this Court's previous holding in

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Andary v USAA Cas Ins Co, 512 Mich 207, 1NW3d 386 (2023), such a result would clearly be misguided as not all new statutory provisions are the same and not all of them affect a parties' substantive rights. A statutory tolling provision is a perfect example of a procedural provision that does not affect vested rights of the parties. Accordingly, it should be enforced as written in all PIP cases commenced after the No-Fault Act was amended.

ARGUMENT

I. WHEN THE PIP CLAIMS ACCRUED IS NOT THE OPERATIVE TOUCHSTONE FOR DETERMINING WHETHER STATUTORY TOLLING SHOULD BE APPLIED.

In granting oral argument on the leave application filed by Spine Specialists, this Court asked the parties to address whether the new statutory tolling provision, MCL 500.3145(3), applies to PIP claims that accrued before the No-Fault Act was amended.

In short, this Court recognized that the one-year-back rule – now found at MCL 500.3145(2) – did not change when the Legislature modified the No-Fault Act in 2019. It states – as it always did – that "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.

What changed was that the Legislature added a new statutory tolling provision, MCL 500.3145(3). And, in doing so, the Legislature mandated that the one year back rule's application to limit recovery of PIP benefits would be "subject to" that new tolling provision.

Application of the one year back rule still hinges, as it always did, on when the PIP action "commenced." Accordingly, it is that date that should determine whether the new statutory tolling provision should be applied and not the date when the PIP claims accrued.

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II. TOLLING PROVISIONS ARE PROCEDURAL NOT SUBSTANTIVE PROVISIONS.

The Court of Appeals erred when it concluded that the one year back rule precluded recovery of PIP benefits in this PIP action and that no statutory tolling should be applied. In its published opinion, the Court of Appeals observed that "the substantive rights and liabilities of all parties are determined according to the law at the time that the claims accrued." Id at 3, citing *Jones v Williams*, 172 Mich App 167, 171, 431 NW2d 219 (1988).

But, in *Jones*, supra, the interim change in the law clearly affected substantive rights because it changed existing common law rules of sovereign immunity in Michigan. It is hard to envision a more substantive change than modifying sovereign immunity rules. As such, there is simply no comparison between that case and adopting a statutory tolling provision.

MemberSelect also relies on that same proposition to support its claim that the new statutory tolling provision under MCL 500.3145(3) cannot be applied to PIP claims that accrued before the No-Fault Act was amended. Again, however, none of the cases cited for that proposition involved a purely procedural provision even remotely similar to tolling.

In fact, in *Husted v Consumers Power Co*, 376 Mich 41, 47, 135 NW2d 370 (1965), this Court affirmed that a court rule provision permitting a party to file a third-party complaint did not establish substantive rights to bring a claim because there must also be a valid underlying claim to support filing that third-party complaint. In other words, like tolling, filing a third-party complaint is a procedural provision, not a substantive provision.

MemberSelect is clearly trying to shift focus away from the new statutory tolling provision under MCL 500.3145(3) to the one year back rule provision to support its claim that "substantive rights and liabilities" are affected. As previously stated in its supplemental

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briefing, Spine Specialists disagrees that a damages-limiting provision like the one year back rule should be viewed as a substantive provision. A damages limiting provision is not substantive in the same sense as a statute of limitations provision and most courts have held that statute of limitations provision do not involve substantive rights that are vested.

While MemberSelect is correct that damages caps in Michigan have been seen as substantive provisions (albeit legislation that also raises serious constitutional questions), a statutory tolling provision simply is not the same thing as a statutory cap on damages. Tolling is applied based on when harm was discovered or how that harm was addressed. It is not a legislative mandate that recovering more than a specified sum of damages in a particular type of tort action will not be permitted. As such, tolling is merely a procedural mechanism that limits recovery of damages, in this case, PIP benefits. Damages caps, in contrast, represent a substantive provision that forbids recovery of damages exceeding a specific sum for a particular form of damages, i.e., non-economic loss, in some tort cases.

III. WHETHER STATUTORY TOLLING APPLIES TO PIP CLAIMS THAT ACCRUED BEFORE THE NO-FAULT ACT WAS AMENDED SHOULD BE DETERMINED BY READING MCL 500.3145(3) AND NOT THE ONE YEAR BACK RULE UNDER MCL 500.3145(2) AS THE SUBSTANCE OF THAT RULE WAS NOT CHANGED.

Simply put, the new statutory tolling provision under MCL 500.3145(3) is separate and distinct from the one year back rule provision – now found at MCL 500.3145(2). In fact, MCL 500.3145(2) expressly states that its application is subject to MCL 500.3145(3).

Oddly, MemberSelect spends most of its time arguing about whether the one year back rule is a substantive provision that affects vested rights. But, that argument misses the mark because this case concerns the new statutory tolling provision and how it should be applied. It is not about the substance of the unchanged one year back rule provision.

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The correct question, as this Court understood, is whether the new statutory tolling provision applies to PIP claims that accrued before the No-Fault Act was amended. It is that provision that must be assessed, not the long-standing one year back rule provision. So MemberSelect's lengthy discussion of the one year back rule provision is misplaced.

The focus here should be on the new statutory tolling provision. Understandably, MemberSelect seeks to shift the focus in this case to when the PIP claims accrued so it can use the wording of the one year back rule provision to support its position that statutory tolling should not apply to PIP claims that accrued before the No-Fault Act was amended.

But, the date when the PIP claims accrued is not relevant in determining whether statutory tolling should be applied. Statutory tolling clearly applies to all PIP lawsuits filed after the No-Fault Act was amended. When the PIP claims accrued is no longer a relevant inquiry in applying the one year back rule unless no claim for PIP benefits was submitted.

The one year back rule was not modified when the No-Fault Act was amended. MCL 500.3145(3) does not change the substance of the one year back rule provision. It simply allows for tolling when a specific claim was made and no formal denial was ever issued.

In sum, adding statutory tolling does not negate the one year back rule provision. The one year back rule remains effective whenever no specific claim for PIP benefits was made or that claim was not pursued with reasonable diligence. Similarly, statutory tolling can be easily avoided by simply issuing a formal denial of a specific claim for PIP benefits.

Reversing the Court of Appeals' holding and applying statutory tolling will simply mean that the one year back rule will not preclude recovery of PIP benefits in the few remaining cases where PIP claims accrued before the No-Fault Act was amended in 2019. That is clearly what the Legislature intended when it restored tolling as a way to avoid the harsh effects of applying the one year back rule to cases where the claim was not denied.

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IV. WHEN PIP CLAIMS ACCRUED IS AN ANTECEDENT EVENT THAT IS NOT RELEVANT WHERE A SPECIFIC CLAIM FOR PIP BENEFITS HAS BEEN MADE BECAUSE IT DOES AFFECT WHETHER STATUTORY TOLLING IS APPLIED.

When PIP claims accrued is an antecedent event that should be considered only when there was "no specific claim for payment of benefits" or "the person claiming the benefits fails to pursue the claim with reasonable diligence." See MCL 500.3145(3). It otherwise has no bearing on whether the new statutory tolling provision should be applied.

The relevant inquiries under MCL 500.3145(3) address only the date when the specific claim for PIP benefits was made and the date when a formal denial was issued. When the PIP claims accrued is relevant only if no claim for PIP benefits was submitted. Here, there is no dispute that a specific claim for payment of PIP benefits was made based on services Spine Specialists provided for Woods before the No-Fault Act was amended.

In discussing the so-called retroactive application of new statutory provisions, Justice Viviano in *Buhl v City of Oak Park*, 507 Mich 236, 253, 968 NW2d 348 (2021), observed how the U.S. Supreme Court had previously described the pertinent analysis of such "retroactivity" questions. Specifically, he quoted its decision in *Landgraf v USI Film Prods*, 511 US 244, 269; 114 S Ct 1483; 128 L Ed 2d 229 (1994), by stating the following:

> . . . the United States Supreme Court has stated that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Instead, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." Id. at 269-270.

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Here, no "new legal consequences" attached to the date when the PIP claims accrued by adopting the new statutory tolling provision. The relevant dates under MCL 500.3145(3) are when the specific claim for PIP benefits was made and when it was formally denied.

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In its published opinion, the Court of Appeals cited the *Andary* and *Buhl* cases to support its holding that the new statutory tolling provision under MCL 500.3145(3) could not be applied "retroactively" to PIP claims that accrued before the No-Fault Act was amended. As previously discussed in supplemental briefing, the Court of Appeals did not address the factors outlined by this Court in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 852 NW2d 78 (2014) or how those factors were applied in the *Andary* case.

MemberSelect now tries valiantly to correct that defect in its supplemental briefing for this Court. But, its belated efforts to justify the Court of Appeals' published ruling are unavailing as the *LaFontaine* factors provide almost no support for its contention that the new statutory tolling provision under MCL 500.3145(3) should not be applied retroactively.

Of the four *Lafontaine* factors, MemberSelect's strongest observation is presumably that the amended No-Fault Act did not express state how it should be applied. It did not say that newly added or amended provisions should be applied retroactively. It also did not say otherwise. It simply did not say. And it is presumed that statutes apply prospectively. *Buhl*, supra at 244, citing *Johnson v Pastoriza*, 491 Mich 417, 429, 815 NW2d 279 (2012). But, if that first factor alone was dispositive on the issue of retroactive application, this

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Court would not have bothered to do the detailed legal analysis that it did in *LaFontaine*, *Buhl*, *Andary*, and countless other cases concerning how new statutes should be applied.

As to the second *LaFontaine* factor, MemberSelect disregards the fact that when the PIP claims accrued is merely an antecedent event whereas the date when the PIP action was commenced is the operative touchstone for applying the one year back rule. As Justice Viviano noted in *Buhl*, supra, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment", specifically, when the PIP claims accrued. Clearly, MCL 500.3145(3) does not attach any new legal consequences to the date when the PIP claims accrued. Instead, it focuses squarely on when the specific PIP claim was made and also when a formal denial, if any, was issued.

Moreover, MemberSelect's contention that a new duty was created because it must now formally deny a PIP claim to use the one year back rule to limit the damages owed is misplaced. That is not a new duty imposed on MemberSelect as PIP benefits have always been considered overdue under MCL 500.3142 when payment is not made within 30 days of when reasonable proof of loss is provided. Further, it has always been best practice for nsurers to either pay PIP benefits or issue formal denials so as to provide a strong defense to any subsequent claim that attorney fees are owed as a penalty under MCL 500.3148.

Where MemberSelect's analysis falls apart is when it comes to the third and fourth *LaFontaine* factors. In *Andary*, the third and fourth factors were central to this Court's holding that the new statutory fee caps could not be applied retroactively. Here, the third and fourth factors again are the key to determining how the new statutory tolling provision should be applied. But, now, those factors clearly support the conclusion that statutory tolling should be applied to PIP claims that accrued before the No-Fault Act was amended.

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The third *Lafontaine* factor clearly favors Spine Specialist's position in this case because applying a mere tolling provision retroactively does not impair any vested rights. It simply encourages MemberSelect to do what it should have done in the first place, i.e., issued a formal denial of specific claims for payment of PIP benefits. When MemberSelect finally did so, a PIP action was promptly filed to contest its decision to deny payment of the PIP benefits claimed. That is how the system should work! PIP insurers do not have a vested right in delaying so that the one year back rule can be used to limit what is owed.

The fourth *LaFontaine* factor also clearly supports Spine Specialist's position. As previously discussed, a statutory tolling provision is merely a procedural provision. It is not a substantive provision. Accordingly, it may be retroactively applied to PIP claims that accrued before the No-Fault Act was amended. Again, MemberSelect seeks to bolster its claim by focusing on the policy reasons for the one year back rule provision. But, in so arguing, MemberSelect again loses sight of the fact that it is the statutory tolling provision that is at issue in this case. The one year back rule provision was not changed when the Legislature amended the No-Fault Act in 2019. It says precisely what it has always said.

In sum, the *LaFontaine* factors, and the discussion of them in *Andary* (and *Buhl*) support Spine Specialists' position that the new statutory tolling provision should be applied in this case even though the PIP claims accrued before the No-Fault Act was amended.

CONCLUSION

MemberSelect attempts to avoid discussion of the new statutory tolling provision under MCL 500.3145(3). It instead centers its argument on application of the one year back rule even though it was not modified when the Legislature amended the No-Fault Act

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in 2019. But, this Court asked whether MCL 500.3145(3) should be applied to PIP claims that accrued before the No-Fault Act was amended. It did not ask whether the one year back rule should be applied in this case because the one year back rule was not changed. The fact that the one year back rule's application depends on when the PIP claims accrued does not mean that the Legislature did not intend for the new statutory tolling provision to be applied in this case. If anything, the continued focus on when the PIP action commenced demonstrates that both the one year back rule and the new statutory tolling provision apply based on when the PIP action commenced, not when the claims accrued.

RELIEF REQUESTED

Plaintiff/Appellant, Spine Specialists of Michigan, PLLC, respectfully requests that this Honorable Court reverse the Court of Appeals' published decision to affirm the trial court's ruling that summarily dismissed its PIP claims based on the one year back rule as the Court erred by holding that the new statutory tolling provision under MCL 500.3145(3) did not apply to PIP claims that accrued before the No-Fault Act was amended in 2019.

Respectfully submitted:

Dated: May 22, 2024

/s/ Steven A. Hicks
Steven A. Hicks (P49966)
Co-Counsel for Plaintiff/Appellant
216 North Chestnut Street
Lansing MI 48933
(517) 881-5564
steve@chair2consulting.com

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CERTIFICATE OF COMPLIANCE

I, Steven A. Hicks, certify that Plaintiff/Appellant Spine Specialists' Supplemental Reply Briefing complies with the type-volume limitation under the appellate court rules. I am relying on the word count of the word-processing software used to produce the briefing. It used a 12 point proportional font and the word count is calculated as being 3,087 words.

Dated: May 22, 2024

/s/ Steven A. Hicks
Steven A. Hicks (P49966)