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STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS, as Conservator for JUSTIN CHILDERS, a legally incapacitated person,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY, a Property and Casualty Insurer

Defendant-Appellant.

/

Supreme Court Nos. 164953 and 164954

Court of Appeals Nos: 356914 and 356915

Genesee County Circuit Court
No: 13-101626-NF

PLAINTIFF-APPELLEE, SUSAN CHILDERS AS CONSERVATOR FOR JUSTIN CHILDERS' ANSWER IN OPPOSITION TO DEFENDANT- APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

COUNTER-STATEMENT OF THE BASIS OF JURISDICTION iv

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED v

SUMMARY OF THE REASONS TO DENY LEAVE TO APPEAL 1

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS 2

I. Relevant Facts 2

II. Proceedings in the Trial Court and Court of Appeals 5

STANDARD OF REVIEW 13

ARGUMENT 14

I. PMIC Has Not Established Grounds For Leave Under MCR 7.305(B)(3) 14

II. PMIC Also Fails To Establish Grounds For Leave Under MCR 7.305(B)(5)(A)

III. Because The Court Of Appeals' Decision Is Correct 16

A. The Court Of Appeals Correctly Rejected PMIC's Attempt To Characterize The MPCGA Is An Insurer 17

1. The credit provision in the MPCGA Act shifts responsibility for the payment of benefits to the next-in-line insurer given MPCGA's role of providing benefits as a "last resort" 15

2. The Court of Appeals correctly focused on the legal and logical accrual date when rejecting PMIC's argument on statute of limitations 21

3. The MPCGA is not merely subrogated to the rights of the insolvent insurer and/or a given claimant 24

4. The net result is that when there is an insolvency and other insurance is available, a claim accrues at that point and the credit provision in the MPCGA renders the other insurer first in priority 26

B. The Court of Appeals Correctly Determined That Shaina Groulx Is an Insured Under the Plain Language of The PMIC Insurance Policy. 28

1. The policy dictates that Ms. Groulx is a contractual insured. 29

2. The theoretical existence of a policy exclusion does not mean a person is not an "insured" in the first place 36

RECEIVED by MSC 11/28/2022 11:12:43 PM

INDEX OF AUTHORITIES

Cases

ACIA v Meridian Mutual Ins Co., 207 Mich App 37, 41 (1994)....20
Adanalic v Harco National Ins Co, 309 Mich App 173, 188 (2015)....20
Allen v Farm Bureau, 210 Mich App 591 (1995)....22
Felsner v McDonalds Rent-A-Car, 173 Mich App 518, 522-524 (1988)....21
Kraly v Vannewkirk, 69 Ohio St 3d 627 (1994)....27
Madden v Employers Ins of Wausau, 168 Mich App 33, 424 NW2d 21 (1988)....23
Mapes v ACIA, 208 Mich App 5 (1994),....26
Mathis v Auto-Owners Ins Co, __ Mich App __, 2021 WL 5225925, (2021) (Docket no. 354824) 20, 22, 25
Metry v MPCGA, 403 Mich 117, 119 (1978)....18
Oganov v American Family, 767 NW2d 21, 26 (Minn. 2009)....27
Rory v Continental, 473 Mich 457 (2005)....28
Sours v Titan, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2011 (Docket no. 301328)....31, 32, 33, 35, 36, 37
Titan Insurance Company/Hughes v State Farm, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2012 (Docket no. 301978)....30, 35
Titan v Farmers, 241 Mich App 258 (2000)....23
Yetzke v Fausek, 194 Mich App 414, 422 (1992)....17, 18, 20

Statutes

MCL 500.7931(3)....passim
MCL 500.3114(4)....passim
MCL 500.3145(1)....6, 7, 18
MCL 500.7901....3, 18
MCL 500.7901(2)....18
MCL 500.7911(3)....21, 24, 25, 38
MCL 500.7925....3, 18
MCL 500.7935(2)....7

Rules

MCR 7.305(B)....v, 1, 13, 14, 17, 38
MCR 7.305(B)(5)(a)....v, 14, 16
MCR 7.305(H)(1)....1

RECEIVED by MSC 11/28/2022 11:12:43 PM

COUNTER-STATEMENT OF THE BASIS OF JURISDICTION

Plaintiff-Appellee Susan Childers, as Conservator for Justin Childers, a legally incapacitated person ("Childers") does not contest Defendant-Appellant's statement of jurisdiction.

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. SHOULD LEAVE TO APPEAL BE DENIED WHEN THE DEFENDANT-APPELLANT HAS NOT SHOWN THAT THE NARROW AND FACT-SPECIFIC INSURANCE ISSUES INVOLVE "A LEGAL PRINCIPLE OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE" UNDER MCR 7.305(B)(3)?

Defendant-Appellant PMIC says "no."

Plaintiff-Appellee Childers says "yes."

II. SHOULD LEAVE TO APPEAL BE DENIED WHEN THE DEFENDANT-APPELLANT HAS NOT SHOWN THAT THE COURT OF APPEALS' DECISION WAS "CLEARLY ERRONEOUS" AND WILL CAUSE "MATERIAL INJUSTICE" UNDER MCR 7.305(B)(5)(A) WHERE THE COURT OF APPEALS CORRECTLY RELIED ON THE PLAIN LANGUAGE OF THE RESPECTIVE INSURANCE STATUTES, CONSIDERED CASE LAW REGARDING THE MPCGA'S ROLE, AND SIMPLY APPLIED THE FACTS TO THE LAW AS REQUIRED?

Defendant-Appellant PMIC says "no."

Plaintiff-Appellee Childers says "yes."

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SUMMARY OF THE REASONS TO DENY LEAVE TO APPEAL

The Court should deny Progressive Marathon Insurance Company's ("PMIC") Application for Leave to Appeal ("Application") first and foremost because this is a unique, fact-specific dispute that impacts only a select few. Perhaps seeking to avoid that reality, PMIC's Application dives right into the merits, with no analysis of why this Court should take up the case in the first instance. It does not even cite MCR 7.305(B). PMIC states only in passing that the Court of Appeals' rulings are "issue[s] of major significance to the state's insurance jurisprudence" and are "clearly erroneous." PMIC Application, p. 5. These conclusory statements are not explained or supported throughout PMIC's actual arguments.

PMIC itself recognizes that the issues here are unique such that neither this nor any other appellate court had addressed them to date. That makes sense because the paradigm here concerns the narrow and fact-specific paradigm of the timing of an insurance company insolvency, coupled with the statutory role of the Michigan Property & Casualty Guaranty Association ("MPCGA") to handle covered claims, all in relation to factual questions about whether an individual is an "insured" under a different policy given her family and residency status. Although important to the parties, nothing here presents an issue of "major significance" to the state's jurisprudence.

Moreover, the Court of Appeals' Decision was correct. The Court of Appeals reviewed the plain language of the applicable statutes, the plain language of PMIC's policy, settled case law concerning the MPCGA's role, and a list of stipulated facts. Although PMIC presents this as a new issue, the Court of Appeals did nothing novel; it merely performed its role to resolve an insurance dispute pending before it based on existing principles of statutory and contract construction. There is no reason for this Court to take up the matter on leave, but if it does, it should affirm. MCR 7.305(H)(1).

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

As the Court of Appeals noted in its Decision, the parties stipulated to the relevant facts in the trial court for purposes of resolving the legal questions before it. **Stipulated Facts – Exhibit G**. The facts in Section I below are largely taken from the parties' uncontested stipulation and also are listed in the Court of Appeals' Decision on pages 3-5. **COA Decision – Exhibit A**. A summary of the procedural posture is discussed in Section II.

I. Relevant Facts

On August 6, 2011, Justin Childers was a passenger in a 1988 Oldsmobile owned, registered and operated by non-party Shaina Lee Groulx. The 1988 Oldsmobile was uninsured at the time of the accident. Ms. Groulx was traveling on M-55, near Houghton Lake, when she rear ended a vehicle that was stopped in front of her. Plaintiff Justin Childers, who was seated in the rear seat, was thrown forward and suffered injuries to his cervical spine. As a result of the accident Justin Childers was severely injured and is now a quadriplegic.

At the time of the subject accident, Childers did not own a vehicle; however, Childers and his mother, Susan Childers, were domiciled in the same household. Since Susan Childers was, at that time, a named insured on a valid no-fault automobile insurance policy issued by American Fellowship Mutual Insurance Company (hereinafter "American Fellowship"), Childers was entitled to receive personal protection insurance ("PIP") benefits to which he was entitled from American Fellowship.

Under MCL 500.3114(1) the No-Fault Insurance Act provides:

> "(1) Except as provided in subsections (2), (3) and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident."

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For a period of time PIP benefits were paid to and for the benefit of Justin Childers (hereinafter "Childers")[1] by American Fellowship. However, on August 2, 2012, Childers filed an action in Genesee County Circuit Court, entitled *Susan Childers as Conservator for Justin Childers, a legally incapacitated person v. American Fellowship Mutual Insurance Company,* Case No. 12-98705-NF, assigned to Judge Richard B. Yuille, alleging not all appropriate PIP benefits were paid to or on behalf of Justin Childers.

On October 29, 2012, more than 14 months after the motor vehicle accident, American Fellowship was placed into Rehabilitation by Order of the 30th Judicial Circuit for the County of Ingham based on MCL 500.8112. The Rehabilitation Order also stayed the above pending action by Justin Childers against American Fellowship. Ultimately, the 30th Circuit Court entered an Order of Liquidation and Declaration of Insolvency of American Fellowship on June 10, 2013, more than 22 months after the motor vehicle accident.

Pursuant to its statutory duties under MCL 500.7901 *et seq.*, and subject to any rights and limitations set forth in the act, Intervening Plaintiff/Appellee Michigan Property & Casualty Guaranty Association (hereinafter "MPCGA") became responsible for the American Fellowship's obligations that qualify as "coverage claims" within the meaning of MCL 500.7925. Childers' claims for PIP benefits against American Fellowship qualifies as a "coverage claim" under MCL 500.7925.

MPCGA then commenced an investigation into whether or not there were any potential higher priority insurers out there which would be responsible for payment of the no-fault benefits at issue.

[1] Justin is a legally incapacitated person, and Susan Childers, his mother has been appointed the Conservator of the Estate of Justin Childers, LIP by the Honorable Jennie Barkey of the Probate Court for the County of Genesee.

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The UD-10 police report, sets forth Shaina Lee Groulx's residence as 1641 Bloomfield Place Drive, in Bloomfield Hills, Michigan. **Exhibit B - UD-10 Police Report.** The motor vehicle in which Childers was a passenger when the accident occurred, a 1988 Oldsmobile, was owned, registered and operated by Shaina Lee Groulx, only. Shaina Lee Groulx did not possess any valid automobile insurance policy in her name at the time of the accident. Her 1988 Oldsmobile was itself uninsured at the time of the accident. **Exhibit 2 - Stipulated Facts.**

Shaina Lee Groulx was deposed in connection with the tort claim that had been filed against her by Susan Childers, as Conservator of the Estate of Justin Childers. **Exhibit D - Deposition of Shaina Groulx.** In her deposition, she confirmed that she was living with her brother, Matthew M. Groulx, at 1641 Bloomfield Place Drive, Apt. 611 in Bloomfield Hills at the time of this occurrence. **Exhibit D –Deposition of Shaina Groulx, page 5-7.** She "signed documentation saying that I was living there, and that kind of thing, that I was a resident." **Exhibit D –Deposition of Shaina Groulx, page-7.** Shaina Groulx was not using any other address, other than the Bloomfield Place address, at the time of the accident. In fact, she executed a change of address form to have her mail sent to the Bloomfield Hills apartment. Ms. Groulx had moved in with her brother in October, 2010 – 10 months prior to her involvement in the subject accident. **Exhibit D –Deposition of Shaina Groulx, page-9, 18-19.**

Shaina Groulx was herself injured in the accident. The UD-10 police report indicates that she sustained a "C"-type injury, and the extent of damage to Ms. Groulx's vehicle was coded "7" -unrepairable. **Exhibit B – UD-10 Police Report.** Furthermore, in her deposition transcript, taken in conjunction with the tort claim, Ms. Groulx described her injuries as follows:

"Q: Did you suffer any injury yourself, physical injury?

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> A: Yes. I had broken ribs or fractured ribs. My ankle was, I don't know if it was sprained or what. I was in jail at the time. I never went to a hospital. It was swollen to double the size of my other ankle."

She then went on to describe the nature and extent of her injuries. **Exhibit 4B –Deposition of Shaina Groulx, page 63-64, 69.**

MPCGA's investigation revealed that at the time of the subject accident Ms. Groulx was living with her brother, Matthew Groulx, who owned a 2002 Buick Century. The 2002 Buick was insured by Progressive Marathon Insurance Company (hereinafter "PMIC") under policy number 18940781-7. Defendant/Appellant, PMIC, issued to Mr. Groulx an automobile insurance policy (policy #18940781-7). **Exhibit C – Letter dated 2/27/2015 from PMIC co-counsel with certified copy of PMIC Policy number 18940781-7.** The PMIC policy was in effect at the time of the subject accident on August 6, 2011. The only "named insured" on the policy is Matthew M. Groulx, and the only motor vehicle identified on the policy, a 2002 Buick Century, was not in any way involved in the Childers accident of August 6, 2011. The name Shaina Lee Groulx does not appear in the policy issued to Matthew M. Groulx.

On or about September 24, 2013, Defendant/Appellant PMIC for the first time received notification of the injuries suffered by Childers on August 6, 2011.

By way of correspondence dated October 29, 2013, PMIC **denied coverage** for this loss. **However, the reason given for the denial of coverage was that the claim was excluded under what is essentially Exclusion 7.c. of the Progressive policy.**

As stated by the letter from PMIC dated October 29, 2013:

> "According to the terms of the Progressive policy issued to MATTHEW GROULX effective July 14, 2011, Part II EXCLUSIONS as well as the Michigan No-Fault Act MCL 500.3114, COVERAGE DOES NOT EXIST for JUSTIN CHILDERS.

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> Part II EXCLUSIONS of the Progressive policy states that Personal Protection Insurance coverage does not apply to:
>
> ...any person other than our POLICY HOLDER or domiciled relative of our POLICY HOLDER who is occupying a motor vehicle, which is not a COVERED VEHICLE; operated by policy holder or domiciled relative; and covered by security as required by the Michigan No-Fault Law chapter 31 of the Michigan Insurance Code."

(Exhibit E - PMIC letter dated October 29, 2013 denying Childers claim for PIP benefits.

More importantly, PMIC did not reserve the right to rely upon any other policy provisions, or even other provisions of the Michigan No-Fault Insurance Act in support of its denial of coverage. As demonstrated below, PMIC's defense to this claim rises or falls on this basis for denying coverage, and this basis alone, pursuant to the "*Mend the Hold*" doctrine enunciated by the Michigan Supreme Court many years ago.

In fact, the exclusion which provided the basis for denying coverage is actually found in the certified copy of the PMIC policy, under the section entitled "PART II—Personal Protection Insurance and Property Protection Insurance Coverage. The specific exclusion is Exclusion 7.c. which provides:

> "Coverage under personal protection insurance does not apply to accidental bodily injury:
>
> * * *
>
> 7. To any person, other than **you** or a **relative**, who is:
>
> * * *
>
> c. occupying a **motor vehicle**, or struck as a pedestrian by a **motor vehicle**, which is:
>
> (i.) not a **covered auto**;
>
> (ii) operated by **you** or a **relative**; and
>
> (iii) covered by security as required by the Michigan No-Fault Law, chapter 31 of the Michigan Insurance Code, as amended..."

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The word "**you**" in the policy is defined on page 2 as "a person shown as a named insured on the **Declarations Page**", which would be the POLICY HOLDER, Matthew M. Groulx. The term "**relative**" is defined likewise on page 2 of the policy as including:

> "'**Relative**' means a person residing in the same household as you, and related to you by blood, marriage, or adoption, and includes a ward, step-child or foster child. Your unmarried dependent children temporarily away from home will qualify as a **relative** if they intend to continue to reside in **your** household.

Exhibit C – Letter dated 2/27/2015 from PMIC co-counsel with certified copy of PMIC Policy number 18940781-7.

After PMIC denied the claim, the Plaintiff/Appellee, Justin Childers, by his conservator, Susan Childers, filed suit against PMIC on November 30, 2013, case number 13-101626-NF. This is because, under the Guaranty Act, MCL 500.7931(3)(the "credit provision"), (a) Childers is required to exhaust all coverage provided under any other insurance policy, (b) any such benefits recoverable by Childers would be a credit against the "covered claim" payable by the MPCGA, and (c) to the extent any benefit payments are made by the MPCGA, Childers is deemed to have assigned to the MPCGA any rights he may have against any other insurer for payment of the "covered claim." MCL 500.7931(3): MCL 500.7935(2).

On June 9, 2014 MPCGA intervened in the action filed by Childers against PMIC, seeking reimbursement for all amounts paid to or on behalf of Mr. Childers pursuant to its statutory entitlement to reimbursement.

Although Defendant/Appellant PMIC is not willing to concede that Shaina Groulx is a "domiciled relative", Defendant/Appellant PMIC did, by way of stipulation, that for purposes of deciding the Cross-Motions for Summary Disposition, the trial court was to assume that, in fact, Shaina Groulx was "domiciled in the same household" as PMIC named insured, Matthew

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Groulx.[2] Therefore, she qualifies as a "**relative**" under the PMIC policy.

The parties have stipulated that only Matthew M. Groulx is listed as a "named insured" under the policy, but that is not the end of the inquiry. The issue before this Court is whether or not Matthew M. Groulx's sister, Shaina Lee Groulx qualifies as a "contractual insured" under the PMIC policy.

Additionally, whether Shaina Groulx was injured in the motor vehicle accident of August 6, 2011 is not a stipulated fact, but is a disputed point. For purposes of the Cross Motions for Summary Disposition, order all parties will assume that Matthew M. Groulx and Shaina Lee Groulx were domiciled in the same household at the time of the subject accident and that Shaina Lee Groulx was injured in the subject accident.

As indicated below, Shaina Groulx does, in fact, qualify as a "*contractual insured*" of PMIC. Therefore, PMIC occupies the next highest order of priority under MCL 500.3114(4), as the insurer of the "owner", "registrant", and "operator" of the uninsured motor vehicle occupied by Plaintiff/Appellee Childers on August 6, 2011, pursuant to MCL 500.3114(4)(a) and (b). Therefore, due to the declared insolvency of American Fellowship, PMIC became first in priority for the payment of benefits, and summary disposition should have been granted in favor of the MPCGA pursuant to the Credit Provision. Accordingly, the trial court erred when it granted PMIC's motion for summary disposition.

In addition to the exclusion it relied upon in the October 2013 letter, PMIC raised the one-year statute of limitations contained in MCL 500.3145(1) as a defense to the lawsuit. The

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[2] As an aside, the PMIC policy uses the phrase "residing in the same household" as the named insured, not "domiciled in the same household" as the named insured. As noted by the Michigan Supreme Court in *Grange Insurance Company v Lawrence*, 494 Mich 475, 498; 835 NW 2d 363 (2013), the word "domiciled" is not synonymous with "residence." In *Grange*, the Supreme Court reaffirmed a long line of cases, dating back to the mid-1800s, which held that a person can have multiple residences, but only one domicile. Thus, even if Shaina Lee Groulx may have had a residence somewhere else, there is no doubt but that she was "residing in the same household" as PMIC's named insured at the time of the occurrence, thereby coming within this policy language..

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parties each filed dispositive motions, responses, reply briefs, and supplemental briefs arguing the legal issues before the Court. Also submitted to the Court were the stipulated facts. **Exhibit G – Stipulated Facts.**

Three main issues were raised in the parties' respective cross-motions: 1) Whether, per the "mend the hold" doctrine, PMIC waived reliance on the one-year statute of limitations by failing to raise it in its initial denial letter; 2) whether the action against PMIC was time-barred pursuant to MCL 500.3145(1), irrespective of the "mend the hold" doctrine; and 3) whether the contractual language contained in the PMIC policy rendered Ms. Groulx an "insured" such that PMIC qualified as the "insurer of the owner, registrant or operator of the motor vehicle" occupied by Justin Childers for purposes of MCL 500.3114(4) (as it existed before the 2019 amendments).

The Court held oral argument on the cross motions for summary disposition October 25, 2016. On March 29, 2021, the Court issued a lengthy written opinion and order deciding the various issues posed by the parties. **Exhibit F – Opinion and Order regarding Summary Disposition Motions dated March 29, 2021.**

With respect to the first issue, the trial court ruled that "mend the hold" did not apply because the one-year limitations defense raised by PMIC was a statute of limitations defense that did not need to be raised until the lawsuit was filed.

Turning to the second issue, although it held that PMIC did not need to raise the one-year limitation defense in its denial letter, it agreed with Plaintiff/Appellee Childers that its lawsuit against PMIC was not time-barred by MCL 500.3145(1) because the action by Plaintiff/Appellee Childers is governed by the Guaranty Act, not the No Fault Act. Therefore, the MPCGA is not subject to the time limitations contained in the No Fault act, especially since the point of MCL

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500.7931(3) is to shift priority of payment for a claim to a solvent insurer. Moreover, the trial court agreed with Plaintiff/Appellee Childers that a claim for benefits against the next-in-line insurer cannot accrue under 7931(3) unless and until the primary insurer is declared insolvent. Because the claim against PMIC did not accrue until American Fellowship was declared insolvent on June 12, 2013 and therefore the statute of limitations could not begin to run before then. The notice provided to PMIC, therefore, was timely.

With respect to the third issue, the trial court found that Ms. Groulx was not an insured under the policy PMIC issued to her brother. As such, it was not within the order of priority to pay No Fault benefits to Childers. Because Ms. Groulx was not an insured, PMIC was not obligated to reimburse the MPCGA for benefits already paid. Accordingly, it granted summary disposition in favor of PMIC and denied Plaintiff/Appellee Childers's motion for summary disposition.

Plaintiff/Appellee Childers submits that the trial court's determination on issues one and three constitute error. Specifically, it is Plaintiff/Appellee Childers's position that the "mend the hold" doctrine barred PMIC from raising the one-year notice provision of the No Fault Act in response to the lawsuit when it did not raise that as a defense in its initial denial letter in October 2013. In addition, and more importantly, Plaintiff/Appellee Childers submits that under the PMIC policy provisions, Shaina Groulx qualified as a **contractual insured** pursuant to the plain language of the PMIC policy. Thus rendered PMIC the "insurer" of the operator of the vehicle involved in the accident under MCL 500.3114(4), and second in priority, behind American Fellowship, for the payment of No Fault benefits to Childers. When American Fellowship was declared insolvent, PMIC became first in priority for the payment of benefits, and summary disposition should have been granted in favor of Plaintiff/Appellee Childers. Accordingly, the trial court erred when it granted PMIC's motion for summary disposition and denied Plaintiff/Appellee Childers's motion

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for summary disposition.

The parties lodged appeals with the Court of Appeals. MPCGC argued on appeal that the trial court correctly determined that its rights and obligations arose from the MPCGA Act, not the No-Fault Act, such that MPCGA was not simply another "insurer" for purposes of claim accrual.[3] Conversely, MPCGA argued that the trial erred in finding that Shaina Groulx did not qualify as a contractual insured pursuant to the plain language of the PMIC policy. The MPCGA explained in its briefing that the trial court should have found that she was an insured, which rendered PMIC the "insurer" of the operator of the vehicle involved in the accident, and second in priority *at that time*, behind American Fellowship, for the payment of No Fault benefits to Childers. When AFMIC was declared insolvent, PMIC became first in priority for the payment of benefits due to the operation of the credit provision in the MPCGA Act, and summary disposition should have been granted in favor of the MPCGA.

The Court of Appeals issued its 15 page decision on September 15, 2022. The first legal issue concerned the statute of limitation purportedly applicable to the MPCGA to enforce its statutory right to a credit for "other insurance," *i.e.*, to achieve the result of having another insurer becoming primary on a claim previously handled by the insolvent carrier. **Exhibit A, pp. 6-10**. The Court of Appeals initially ruled that the trial court did not err by rejecting MPCGA's and Plaintiff's "mend-the-hold" argument which, if applied, would have meant that PMIC was barred from even relying on a statute of limitations defense. **Exhibit A, pp. 6-8**. Although Plaintiff

[3] MPCGA also argued that the trial court erred in finding that the "mend the hold" doctrine did not PMIC from raising the one-year notice provision of the No-Fault Act in response to the lawsuit when it did not raise that as a defense in its initial denial letter in October 2013. Although Justin Childers retains its position on this, the point arguably is no longer germane given that the Court of Appeals rejected PMIC's statute of limitations arguments on the merits.

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respectfully disagrees with the Court of Appeals on this point, the issue is not on appeal and this Court need not consider it.

The next issue is the one at the heart of PMIC's Leave App – whether MPCGA was barred by the one-year rule in the No-Fault Act from pursuing its statutory right under the *MPCGA Act* to a credit against other insurance available to the claimant. **Exhibit A, pp. 9-10**. The Court of Appeals considered the plain language of the MPCGA Act, the No-Fault Act, and case law concerning the MPCGA's limited statutory role to conclude that: (a) the MPCGA is not an insurer and does not simply step into the shoes of the insolvent insurer; (b) the MPCGA has its own rights and duties that are governed by the MPCGA Act, and it is not just subrogated to the rights of the insolvent insurer or the claimant, (c) the one-year back rule does not exist in the MPCGA Act, and (d) regardless of whether a one-year or traditional six-year deadline exists for the MPCGA to assert its rights, its rights (and claimant's claim) do not – and logically cannot – accrue until at least the date of the insolvency. Indeed, the MPCGA is not even involved with any insurer's claims unless and until there is an order of insolvency. The Court of Appeals therefore readily recognized that the argument advanced by PMIC - that MPCGA's statutory rights could be extinguished under the one-year rule ***before it even had them*** via a particular insolvency – made little sense. Moreover, the Court of Appeals determined that the same logic applied equally to Plaintiff, given that Plaintiff had initially put the original (but now insolvent) insurer on notice. As noted by the Court of Appeals, "[a]though the priority of insurers is governed by MCL 500.3114(4), plaintiff's obligation to pursue other priority insurers arises under MCL.7931(3) of the guaranty act." **Exhibit A, p. 10**. This meant that Plaintiff's claim too was timely because she had perfected her rights by putting American Fellowship on notice in the first instance, and then by timely pursuing a claim within a

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year against PMIC when the insolvency hit and the MPCGA Act mandated a re-set of the landscape for all stakeholders. *Id.*

The final topic considered by the Court of Appeals was the factual question of who was an "insured" on the PMIC policy. **Exhibit A, pp. 11-13**. If the driver of the vehicle was an "insured" on PMIC's policy then, pursuant to the terms of the MPCGA Act, other insurance was available. Here, the Court of Appeals did a painstaking analysis of the factual record, including to ascertain familial relationships and where people lived. Then, the Court of Appeals reviewed the PMIC policy, applied basic principles of contract interpretation, and ultimately ruled that the driver (Shaina Groulx) was an insured. **Exhibit A, p. 14**.

Having ruled that the MPCGA and Plaintiff timely asserted rights against PMIC and that the driver was an insured on PMIC's policy, the Court of Appeals correctly determined that there were no factual or legal impediments to a finding of responsibility as to PMIC. It therefore reversed and remanded for entry of an order granting summary disposition in favor of Plaintiff and MPCGA. **Exhibit A, p. 15**.

As a result of the Court of Appeals' Decision, PMIC filed an Application for Leave to Appeal on October 27, 2022. Both MPCGA and Plaintiff oppose it.

STANDARD OF REVIEW

Plaintiff agrees that when this Court grants an Application for Leave to Appeal to consider a decision on a motion brought under MCR 2.116(C)(7) and MCR 2.116(C)(10), then the Court ultimately would review the decisions *de novo*. PMIC's Application first must show, however, that there are grounds for the Court to consider the case in the first place, see MCR 7.305(B), which PMIC fails to do.

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ARGUMENT

Giving PMIC the benefit of the doubt that it intended to rely on the specific standards in on MCR 7.305(B) (see Application p. 5), PMIC nonetheless fails to give this Court a reason to take the case. The "major significance" standard under 7.305(B)(3) is discussed in Section I, below, whereas the "clearly erroneous/material injustice" standard under 7.305(B)(5)(a) is discussed on Section II.

I. PMIC Has Not Established Grounds For Leave Under MCR 7.305(B)(3).

This case does not "involve a legal principle of major significance to the state's jurisprudence" because the paradigm is rare. MCR 7.305(B)(3). The parties' dispute arises out of the intersection of two specific fact-patterns. On the one hand, we have the insolvency of American Fellowship, which triggered the involvement of the MPCGA. In and of itself, disputes arising out of insolvencies concerning the MPCGA are rare in relation to the sea of insurance no-fault cases in our state's courts. Rarer still are disputes over priority pursuant to the MPCGA Act, MCL 500.7001 *et seq*. When the MPCGA becomes involved due to an insurance insolvency, it picks up claims that are "covered claims" under the Act and pays them pursuant to the Act, following decades of settled practices and law concerning the MPCGA. Only when there is other insurance available might a potential dispute arise about priority in relation to the credit provision in the MPCGA Act. Additionally, our case is unique given the underlying facts that triggered PMIC's role and obligation to assume coverage. As evident from PMIC's own brief, the case concerns a passenger injured in a vehicle driven by an apparently uninsured motorist, leading to an inquiry as to other coverage by virtue of a familial relationship and shared residency.

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The Court of Appeals' rulings as to the parties' rights and obligations flowing from this paradigm might be meaningful to a select few stakeholders if and when identical priority disputes arise in insolvency matters, but that potential can hardly be characterized as constituting a "legal principle of major significance to the state's jurisprudence." Indeed, PMIC *itself* admits in the second paragraph of its brief that the Court of Appeals' ruling below is new and that there have been no other similar appellate rulings. PMIC Leave App, p. 2. PMIC's statement is self-defeating as to consideration under MCR 7.305(B)(3). Nor does PMIC carry its burden to establish that the unique paradigm in this case will impact many others in the No-Fault arena, including because the no-fault issues here were resolved pursuant to the pre-2019 No-Fault Act.

PMIC's reference to a pending application for leave to appeal in *Vann v Michigan Prop & Cas Guaranty Assoc and Progressive Michigan Ins Co*, Supreme Court No 164276, changes nothing. PMIC Application, p 3. That case again involves PMIC and the MPCGA. The irony of PMIC citing to its ***own*** appeal in *Vann* is that it proves how narrow the concerns are in relation to the overall insurance arena. Far from being issues of "major significance" to the state's jurisprudence, what is at stake are issues of significance to ***PMIC*** only. It is the only insurance company it identifies going to these lengths to oppose a straightforward application of the MPCGA Act. Its own litigation strategy does not, *ipso facto*, create a "significant" issue for the whole state's insurance jurisprudence.

PMIC's individual agenda is apparent from the procedural posture in *Vann* too. There, PMIC sought **interlocutory** leave to the Court of Appeals following denial of its motion at the trial court level. And PMIC now seeks leave from the Court of Appeals' denial of leave. It is a stretch, to say the least, to conclude that PMIC *must* be heard by an appellate court *now*, given future opportunities for factual development and dispositive briefing at the trial court level.

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Regardless, relying on one of its own cases, which itself is not remotely ripe for Supreme Court review, illustrates just how thin the grounds for leave are in our case.

Next, the fact that the trial court in *Vann* rejected PMIC's argument just means that another court applied the same, correct analysis as the Court of Appeals did here in *Childers*. This undercuts PMIC's argument that the Court of Appeals in Childers was "clearly erroneous" and went out on a limb with no basis.

Finally, it is worth noting that the overall dispute in *Vann* appears to be broader and more complex than as presented in the *Vann* state court leave application. Upon information and belief, there is yet another priority dispute in that matter involving a self-funded an ERISA plan pending in federal court involving the same (and more) parties. *See Vann v MPCGA, Progressive, Health Alliance Plan of Michigan, and MGM Grand Detroit, LLC, et al.*, Case No. 22-cv-10905-BAF (EDMI 2022). In short, the *Vann* case hurts, not helps, PMIC's argument for leave here.

There is no basis to take this case under MCR 7.305(B)(3).

II. PMIC Also Fails To Establish Grounds For Leave Under MCR 7.305(B)(5)(A) Because The Court Of Appeals' Decision Is Correct.

PMIC does not satisfy its burden of demonstrating that "the decision is clearly erroneous and will cause material injustice." MCR 7.305(B)(5)(a). Despite the unique factual paradigm that surfaced the issues here, the Court of Appeal's legal rulings flow from basic principles of statutory construction and settled law concerning the role of the MPCGA. The Court of Appeals did its job to just apply the law as it exists.

The fact that PMIC has not identified any cases that are contrary to the Court of Appeals' Decision illustrates this point. Although PMIC disagrees with the ruling and subjectively believes it is wrong, it identifies no other precedent to support its position. To the contrary, we explain below that the Court of Appeals was *correct*, including because PMIC's argument conflicts with

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the plain language of the MPCGA Act and is based on the flawed premise that the MPCGA is an "insurer." Thus, even if the precise holding by the Court of Appeals regarding statutes of limitations could be characterized as new, as PMIC argues, the Decision is predicated on a basic statute and settled principles of law from cases like *Meridian* and *Yetzke* that were decided in 1990's.[4] Court of Appeals' Decision, pp. 8-9.

But perhaps more importantly, however, PMIC does not even attempt to argue that the ruling "will cause material injustice." PMIC is a large insurer that is in the business of playing claims. It may now, and will in the future, advance its legal rights and will win some and lose some. But merely disagreeing with a particular result in a unique case leading to it having to a claim is not a "material" injustice that merits this Court's time and review.

In short, PMIC's failure even to address the specific criteria in MCR 7.305(B) justify denial of their request. Should the Court wish to preview the merits, however, we explain below that the Court of Appeals was correct in its Decision given the plain language of the MPCGA Act and settled case law about its role when handling claims.

Below, we discuss the issues involving the MPCGA in Section A and the issues involving the identity of the "insured" under the PMIC policy in Section B.

A. The Court Of Appeals Correctly Rejected PMIC's Attempt To Characterize The MPCGA Is An Insurer.

A premise inherent in all of PMIC's arguments is that the MPCGA is essentially another "insurer" that, at best, is subrogated to the rights of an underlying claimant. PMIC necessarily must characterize the MPCGA this way in order to try and take advantage of the one-year rule in the

[4] See *Auto Club Ins Ass'n v Meridian Mut Ins Co*, 207 Mich App 37; 523 NW2d 821 (1994) and *Yetzke v Fausak*, 194 Mich App 414, 488 NW2d 222 (1992). The Court of Appeals in *Childers* likewise cited to a more recent case involving the MPCGA and Workers Compensation insurance (*Mathis v Auto-Owners Ins Co*, __ Mich App __, 2021 WL 5225925,(2021) (Ct App Docket 354824)(**Exhibit H**)) but that case too relied on *Meridian* and *Yetzke* and settled law regarding the MPCGA.

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No-Fault Act and otherwise to try and limit the MPCGA's rights by virtue of what a given claimant did or did not do. The Court of Appeals correctly rejected this position as being at odds with the plain language of the MPCGA Act, as well as with numerous appellate decisions that interpret the MPCGA Act and explain the MPCGA's role.

As a threshold matter, it is critical to note that the MPCGA is **not** an insurance company. It does not collect premiums nor write any policies. It is an association of property and casualty insurers authorized to transact insurance in Michigan. It was created pursuant to the Property and Casualty Guaranty Association Act, MCL 500.7901, *et. seq.*, to handle claims of insolvent member insurance companies to the extent that those claims meet the definition of "covered claims" under the Guaranty Act. MCL 500.7925; *Metry v MPCGA,* 403 Mich 117, 119 (1978). The Guaranty Act was enacted "to protect those persons who have a right to rely on the existence of an insurance policy, who otherwise would be rendered helpless because of an insurer's insolvency." *Yetzke v Fausek,* 194 Mich App 414, 422 (1992). It is a *limited* safety net and a creature of statute.

The MPCGA Act limits compensable claims and defines what constitutes a "covered claim," which remain subject to other potential statutory limits and exclusions. In this respect, although the MPCGA assumes the same *rights* as an insolvent insurer to investigate and handle those claims that are "covered" pursuant to the MPCGA Act, importantly, it does not assume all the obligations or burdens of the insolvent carrier. MCL 500.7901(2); *Felsner v McDonalds Rent-A-Car,* 173 Mich App 518, 522-524 (1988).

The Court of Appeals aptly noted as follows:

> In other words, MPCGA's role " 'is that of an insurer of last resort,' which an insured of an insolvent insurer can look to for coverage 'only if there is no other insurance company to turn to for coverage.' " *Id.* Thus, it is not merely a reinsurer,

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> and the guaranty act "is not designed for the purpose of the MPCGA to step into the shoes of insolvent insurers." *Id.*

Exhibit A, p. 9. Here, the American Fellowship insolvency triggered the MPCGA's involvement in this case and other American Fellowship matters. The MPCGA has paid substantial No Fault benefits to and on behalf of Mr. Childers, as well as to other individuals affected by the insolvency.

1. <u>The credit provision in the MPCGA Act shifts responsibility for the payment of benefits to the next-in-line insurer given MPCGA's role of providing benefits as a "last resort."</u>

Not only is MPCGA not an insurer, but it also has a statutory duty to preserve its limited assets by seeking to determine if other insurance is available to cover claims. Specifically, the MPCGA Act contains a "credit provision" that shifts responsibility for payment of a claim to an insurance company at any level of priority. MCL 500.7931(3). The "credit provision" provides that the MPCGA receives a credit against other claims where there exists other available insurance. *Id.* Thus, even if a claim is "covered" under the Act, and would otherwise be payable, the MPCGA is not obligated to pay the claim if there is another source of insurance to cover the claimant or insured. MCL 500.7931(3). The provision states, in relevant part:

> (3) **If damages or benefits are recoverable by a claimant** other than from any disability policy or life insurance policy owned or paid for by the claimant or by a claimant or insured **under an insurance policy other than a policy of the insolvent insurer,** or under a self-insured program of a self-insured entity, **the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter. The claimant,** insured, or self-insured entity **shall first exhaust all coverage provided by any policy....**

Thus, when benefits are recoverable under <u>any</u> insurance policy, other than the insolvent insurer's policy, the benefits recoverable **shall** act as a credit against a covered claim. MCL 500.7931(3). The statute further states that the claimant seeking benefits **shall** first exhaust all coverage provided by any policy. *Id.* In other words, the MPCGA's responsibility triggers **only** when there exists no other available insurance (and no other valid exceptions to payment). MCL 500.7931(3). By using

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the word "shall" the Legislature made clear that it is mandatory that this credit provision be applied.[5] The Court of Appeals recognized this point and aptly noted as follows:

> But "MPCGA is not obligated to pay benefits for all 'covered claims[,]' " as MCL 500.7931(3) states that it "shall receive a credit against a covered claim if damages or benefits are recoverable by a claimant or insured under an insurance policy other than a policy of the insolvent insurer." *Mathis*,__Mich App at__; slip op at 3. In other words, MPCGA's role " 'is that of an insurer of last resort,' which an insured of an insolvent insurer can look to for coverage 'only if there is no other insurance company to turn to for coverage.' " *Id.* Thus, it is not merely a reinsurer, and the guaranty act "is not designed for the purpose of the MPCGA to step into the shoes of insolvent insurers." *Id.*

COA Decision – Exhibit A, p. 9.

All of this makes sense given that the MPCGA's role has been described by this court as "**an insurer of last resort**." *ACIA v Meridian Mutual Ins Co.*, 207 Mich App 37, 41 (1994); *Yetzke v Fausek*, 194 Mich App 414, 422 (1992). According to this Court, "[a]n insured of an insolvent insurer can look to the MPCGA for coverage only if there is no other insurance company to turn to for coverage." *Id* at 41 (emphasis added); *See also Yetzke* at 422 ("...the setoff provision...clearly states that if coverage is available under another, valid policy, that coverage must be exhausted before the MPCGA becomes involved."). In resolving a similar dispute, this Court in *Meridian* framed the issue as whether the MPCGA is "little more than a reinsurer who assumes all the obligations of an insolvent insurer or an insurer of last resort who assumes the obligations of an insolvent insurer **only when the insured has nowhere else to turn."** *Meridian* at 40 (emphases added). This Court explained:

> This statutory provision, in our opinion, reflects a statutory intent that an insured must first look to other possible insurance coverage before looking to the MPCGA for payment of the obligations of an insolvent insurer. That is, this statutory provision reflects an intent by the Legislature to make the MPCGA an insurer of last resort rather than

[5] The Court must give "effect to every word, phrase, and clause to avoid an interpretation that would render any part of the statute surplusage or nugatory." *Haliw v City of Sterling Heights*, 471 Mich 700, 704-705 (2005). A statute must be read in conjunction with other relevant statutes to ensure the legislative intent is correctly ascertained. *Adanalic v Harco National*, 309 Mich App 173, 179 (2015). (citations omitted). "The statute must be interpreted in a manner that ensures it works in harmony with the entire statutory scheme." *Id.*

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> merely a reinsurer who simply assumes the obligations of an insolvent insurance company.

Id at 40 (emphasis added).

In sum, the credit provision effectively alters the ordinary the order of priority/coordination of insurers, causing a secondary carrier to become primary if the primary becomes insolvent. The effect of this provision is simple: if any other insurance policy exists to cover a loss, that insurance pays first and the MPCGA only pays to the extent there are excess, unpaid benefits not covered by the other insurance policy

2. The Court of Appeals correctly focused on the legal and logical accrual date when rejecting PMIC's argument on statute of limitations.

In response to MPCGA seeking to asserts its rights under the credit provision in the MPCGA Act, PMIC asserted the one-year notice provision contained in the No-Fault Act as a defense to payment. PMIC's position is that is that, like any underlying claimant, the MPCGA had one-year from the accident to lodge a claim against PMIC. There are two fundamental problems with PMIC's argument.

First, the argument presumes that the MPCGA is subject to the No-Fault Act in the same manner as a claimant. But the MPCGA Act states that while the MPCGA is subject to the requirements of Chapters 79 and 81 of the Insurance Code, it is not subject to the other chapters of the Insurance Code. MCL 500.7911(3); *See also Felsner v McDonalds Rent-A-Car,* 173 Mich App 518, 522-524 (1988). Because the MPCGA is not subject to other Chapters within the Insurance Code, which includes Michigan's No-Fault Act, the notice requirement contained in MCL 500.3145(1) does not apply to the MPCGA. This means the No-Fault Act does not preclude the MPCGA from seeking reimbursement more than one year out from the accident.

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In short, PMIC's argument both seeks to create a conflict between the MPCGA Act and the No-Fault Act, and then to resolve it in favor of the No-Fault Act. A similar effort was flatly rejected in by a different panel of the Court of Appeals in *Mathis v Auto-Owners Ins Co*, __ Mich App __, 2021 WL 5225925, (2021)(Ct App Docket 354824) **(Exhibit H)**. In *Mathis*, the plaintiff was hurt getting out of a truck during the course of his employment. Plaintiff's employer had a Worker's Disability Compensation policy as well as a No-Fault policy through Homeowner's Insurance ("Homeowner's"). Subsequently, the Worker's Compensation carrier became insolvent, at which point MPCGA assumed responsibility for the Plaintiff's claim as "covered claim."

Following investigation of potential other insurance, MPCGA asserted that Homeowner's, as the no-fault insurer, now had priority. Homeowner's rejected the claim and relied on MCL 500.3106(2)(b). The Court of Appeals correctly noted the Decision must turn on the MPCGA Act, not the other insurance acts applicable to insurers. It stated that "**when the MPCGA satisfies 'covered claim' obligations of the insolvent insurers, it does so pursuant to the Guaranty Act, not the Worker's Disability Compensation Act or the No-Fault Act**, so MCL 500.3106(2)(a)" did not preclude coverage by Homeowner's. This Court specifically relied on the credit provision in the MPCGA Act, MCL 500.7931(3):

> If damages of benefits are recoverable by a claimant other than from a disability policy or life insurance policy owned or paid for by the claimant or insured under an insurance policy other than a policy of the insolvent insurer, or under a self- insured program of a self-insured entity, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter.

Mathis, at p. 2. PMIC cannot avoid the clear import of *Mathis*, not to mention the plain language of the MPCGA Act.

All of this means that the MPCGA by default would have a six-year limitations period on its independent statutory claims for reimbursement. See *Allen v Farm Bureau*, 210 Mich App 591

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(1995)(discussing that an insurer with a "statutorily created right to reimbursement is independent of the party to whom it paid benefits," and not subject to MCL 500.3145); *Titan v Farmers,* 241 Mich App 258 (2000)(discussing that a statutory action is subject to the general six-year limitation period and distinguishing a statutory right to reimbursement from subrogation actions). The Court of Appeals correctly held as follows:

> Given the structure and purpose of MPCGA, we hold that the one-year limitations period in MCL 500.3145(1) does not govern because MPCGA is not generally subject to the no-fault act and has not brought this action directly under the no-fault act. Instead, MPCGA's right to proceed against Progressive flows from its authority to file a claim for reimbursement from another insurer in the chain of designated priority insurers. For this reason, we agree with MPCGA that because there is no specified limitations period for covered claims, the default six-year limitations period prescribed by MCL 600.5813 for actions not subject to other limitations periods applies. See *Titan Ins Co v Farmers Ins Exch*, 241 Mich App 258, 263; 615 NW2d 774 (2000).

COA Decision – Exhibit A, p. 9; *see also, Madden v Employers Ins of Wausau*, 168 Mich App 33, 424 NW2d 21 (1988) (six-year statute of limitations applied to claims between insurers and under MCL 500.3145(1)).

Second, and practically speaking, the real issue here concerns the issue of accrual. American Fellowship was not declared insolvent until June 2013, nearly two years after the accident. Before that time, the MPCGA could not have been involved in this case to investigate the insurance coverage issue. The primary plaintiff would have had no reason to pursue other potential insurers for coverage. The trial court and Court of Appeals correctly recognized this point and held that the claims did not and could not have accrued until the insolvency occurred. It stated as follows:

> Furthermore, even if MPCGA's claim against Progressive is governed by the one- year limitations period in MCL 500.3145(1), that claim could not have accrued until the highest-priority insurer was declared insolvent. Until American Fellowship became insolvent, MPCGA did not have any claim against the next-priority insurer. Under MCL 600.5827, unless otherwise expressly provided, the limitations period begins to run from the date the claim accrues. In a case where the applicable statute

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> does not address accrual, MCL 600.5827 makes clear that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." In other words, the claim accrues on the date the plaintiffs first incurred the harms they assert, not the date the defendant breached its duty. *Frank v Linkner*, 500 Mich 133, 150; 894 NW2d 574 (2017). Considering MPCGA's purpose as an insurer of last resort for injured parties and that MPCGA's potential liability for PIP benefits does not arise until a higher-priority insurer is found to be insolvent, MPCGA should be afforded, at a bare minimum, one year from the date of insolvency to pursue its right to a covered claim. Any other approach would defeat the purpose of the guaranty act if MPCGA could only pursue covered claims that occur within the limitations period for the underlying automobile accident.

COA Decision – Exhibit A, pp. 9-10.

Given the Court of Appeal's correct (and common sense) ruling that any claim by the MPCGA against PMIC would not accrue until an order of insolvency, the result would be the same in this case even if one were to artificially create a one-year deadline for the MPCGA as well. Put differently, based on the facts of this case, the claims against PMIC were timely under either a one- or six-year rule, assuming that one correctly views accrual as being the date of insolvency. The Court of Appeals likewise recognized this point as well. *Id.*, at p. 10.

3. The MPCGA is not merely subrogated to the rights of the insolvent insurer and/or a given claimant.

PMIC ignores the analysis above and, as it did below, tries to recharacterize the MPCGA as little more than Childers' subrogee as a way to avoid the import of the MPCGA Act. But once again, to argue that the MPCGA is a mere subrogee of Childers ignores that the MPCGA's governing statute exempts it from the No-Fault Act – *an act that does apply to Childers*. In addition, PMIC's position ignores not just the purpose of the MPCGA Act, but it renders both MCL 500.7911(3) and the credit provision nugatory in virtually all PIP claims.

MPCGA has *direct* statutory rights granted its under its own governing Act. The Court of Appeals, however, correctly recognized that . . .

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> To be sure, the one-year limitations period in MCL 500.3145(1) applies when one insurer seeks subrogation from another higher-priority insurer. See *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343-344; 715 NW2d 324 (2006). But MPCGA does not simply stand in the shoes of an insured. *Mathis*,__Mich App at ; slip op at 3. Because the Legislature has seen fit to largely exempt MPCGA from the Insurance Code, MCL 500.7911(3), MPCGA is not subject to the one-year limitations period that applies to a party pursuing benefits under the no-fault act, including other insurers asserting rights to subrogation. And because no such limitations period has been adopted for covered claims brought by MPCGA, it is appropriate to apply the default six- year limitations period in MCL 600.5813 to such claims.

COA Decision – Exhibit A, p. 9. Once again, the Court of Appeals got it right.

Similarly, PMIC argues that the credit provision cannot apply here because the MPCGA is only able to take a credit when benefits are "recoverable." MCL 500.7931(3). It posits that benefits are not recoverable here *to Childers* because it received notice of the claim more than one year after the accident occurred. But this is circular; no limitations period on a claim begins run until it accrues. The claim here could not accrue until Childers had a legally viable claim against PMIC. Since no legally viable claim arose until the insolvency occurred in June 2013, nearly two years after the accident, and because Childers put PMIC on notice within one year of that occurring, the claim was timely. In addition, if the one-year notice provision ran against Childers, but not the MPCGA, that simply serves to make the MPCGA the middleman on plaintiff's claims, which is inefficient and makes no common sense.

In sum, the primary plaintiff would have had no reason to pursue other potential insurers for coverage, because no other insurers would have been higher in priority to pay his claims than his household insurer, American Fellowship. Insurance insolvencies cannot be predicted. PIP claims in Michigan can last a lifetime. The chances that an insolvency will occur within the first year after a claimant's accident is low. Progressive's position on the one-year notice provision would require a claimant, like Childers, to put on notice every possible insurer, no matter how remotely they might be related, just in case their primary insurer is declared insolvent 20 years

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down the road. But until Childers had viable claims against anyone else, there was simply no basis for him to notify other insurers, including PMIC.

4. The net result is that when there is an insolvency and other insurance is available, a claim accrues at that point and the credit provision in the MPCGA renders the other insurer first in priority.

The key point in all of this analysis is that the MPCGA could not have been involved in this case to investigate the insurance coverage issue until the insolvency. Based on the plain language of the MPCGA Act and supporting case law about the MPCGA's limited role, the only logical and common-sense outcome is that PMIC became primary and both the MPCGA and the claimant had at least one-year to pursue a claim against it.

This precise paradigm has not been addressed by this appellate courts until now. Likely owing to the unique nature of Michigan's No-Fault system, foreign courts have not opined on this precise issue, either. However, several courts, in both Michigan and sister states, have discussed parallel issues in the context of uninsured motorist claims.

In *Mapes v ACIA,* 208 Mich App 5 (1994), *leave denied,* precedential effect nullified, 405 Mich 917 (1995), the plaintiff sought uninsured motorist benefits from his insurer after the insurer of the alleged tortfeasor was declared insolvent. The plaintiff did not assert a claim against his insurer until after the statute of limitations expired. ACIA argued that his claim against it was time-barred. This Honorable Court, however, disagreed. It held that the plaintiff had no "legally enforceable" claim for UM benefits against his personal insurer until the tortfeasor's insurer was declared insolvent. Thus, despite that the plaintiff's claim ran afoul of the ordinary limitations period, the claim remained timely because it did not and could not exist until the claim accrued.

Courts in other jurisdictions have reached similar conclusions, finding that claims accrue at the date of insolvency and that arguments like that advanced by PMIC would create the absurd

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result that a claim was time barred before it could exist. For instance, in *Oganov v American Family,* 767 NW2d 21, 26 (Minn. 2009), the Minnesota Supreme Court interpreted its no-fault law and determined that a UM claim accrued at the time of the insolvency, not the date of the accident. It reasoned as follows:

> First, it is **illogical to conclude that a UM claim accrues and the limitations period begins to run on the date of the accident when the claim does not exist at the time of the accident, but rather is created by the subsequent insolvency of the tortfeasor's insurer**. Second, fixing the accrual date at the time of the accident may effectively leave a claimant without coverage if the tortfeasor's insurer declares insolvency so close in time to the expiration of the limitations period that the claimant is unable to adequately present his or her claim. **Such a result does not comport with our sense of justice and fair play. Nor does it comport with the express legislative purpose behind the No-Fault Act, which is "to relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity**.

Oganov, at 26 (emphasis added). Accordingly, the court held that the UM claim did not accrue until the underlying insurer was declared insolvent.

Similarly, in *Kraly v Vannewkirk*, 69 Ohio St 3d 627 (1994), the Supreme Court of Ohio noted that a claim for uninsured motorist coverage does not accrue, and the statute of limitations does not begin to run, until an insurer's insolvency, **because a contrary result could render a claim time barred before the claim ever accrues**. See also, *Alabama Ins Guaranty Association v Mercy Medical Association,* 120 So3d 1063 (2013)(holding that certain worker's compensation claims did not and could not accrue until an insurer is deemed insolvent).

The same rationale applies with equal force to this case. Ordinarily, Childers would look to American Fellowship, his household insurer, for the payment of no-fault benefits. Because of how priority works in Michigan, he could not have had a legally enforceable claim against a different PIP insurer because there was no question that AFMIC was the highest in priority to pay his claims. He would not have had any basis to file suit against a different priority insurer so as to

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preserve the one-year limitations period; indeed, to do so could arguably subject a claimant to both swift dismissal and sanctions for the filing of a frivolous suit. It was not until the insolvency occurred that Childers could have had a legally enforceable claim against another insurer.

And then, as noted by the courts above, it is impossible to comply with a limitations period if the claim does not exist at the time that period expires. As such, in the unique circumstance of an insurance insolvency, the claim does not accrue until there exists a "legally enforceable" claim against another. Since the clear intent of the Legislature was to make the MPCGA a "last resort," and to place the burden of paying claims onto solvent insurance companies, it cannot reasonably be argued that the MPCGA should ever pay a PIP claim when there exists an identifiable, solvent insurer at a higher rung on the priority ladder. As such, the Court of Appeals correctly ruled that the trial court should summary disposition in favor of the MPCGA. **Exhibit A, p. 10**.

B. The Court of Appeals Correctly Determined That Shaina Groulx Is an Insured Under the Plain Language of The PMIC Insurance Policy.

The other question in this case is whether Ms. Groulx was an "insured." Once again, the Court of Appeals appropriately applied basic legal principles to regarding insurance policies and the No-Fault Act to resolve the dispute. **Exhibit A, pp. 10-11**. Courts "must construe and apply unambiguous contract provisions as written." *Rory v Continental*, 473 Mich 457 (2005).

The trial court erred on this point, and the Court of Appeals appropriately reversed as a result. First, the plain language of the PMIC policy issued to its named insured, Matthew Groulx, rendered his sister, Shaina Groulx, a contractual insured. Second, whether Ms. Groulx was herself entitled to benefits from PMIC is not relevant to the determination of whether she qualified as an "insured" for purposes of MCL 500.3114(4). As explained below, because the policy rendered her a contractual insured under its plain terms, PMIC is the insurer of the operator of the vehicle involved in the accident, which places PMIC squarely within the order of priority for the payment

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of PIP benefits as delineated in MCL 500.3114(4), before the 2019 amendments took effect.

1. <u>The policy dictates that Ms. Groulx is a contractual insured.</u>

PMIC first argues that Ms. Groulx was not even deemed an "insured" under the terms of the PMIC Policy. The Court of Appeal rejected this argument based on the terms of the Policy and the absence of issues of fact that she was a "resident relative" at the time of the accident and that she suffered "bodily injuries in the accident." **Exhibit A, p. 12**.

The Court of Appeals' analysis of the Policy and the undisputed facts is well grounded in case law. For example, it relied in part on the case of *Amerisure Ins Co v Coleman,* 274 Mich App 432 (2007), which addressed the issue of who is a "contractual insured." The facts of that case are similar to the facts in ours. In that case, Tonya Coleman was the named insured on an automobile policy issued by Titan Insurance Company. Her husband, Bernard Coleman, was operating a motor vehicle owned by Tonya's mother when he was involved in an accident. The vehicle involved in the accident, like the vehicle involved in this accident, was not a covered auto on the policy Titan issued to Tonya. Moreover, like Shaina Groulx in this case, Tonya's husband, Bernard, was not a named insured on the Titan policy. Bernard's nephew, Reginald Coleman, sustained injury in the accident. Like Childers does in this case, Reginald sought PIP benefits through Titan, arguing, as the Appellant does in this case, that Titan was the "insurer" of Bernard, the operator of the vehicle in which he was a passenger when he sustained injury. Titan denied the claim, arguing that it was not Bernard's insurer, and therefore owed no PIP benefits under its policy. Amerisure, an assigned claims insurer, paid Reginald's PIP benefits, then sued Titan for reimbursement. Titan appealed after the trial court ordered it was responsible to reimburse Amerisure.

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The court of appeals upheld the trial court's ruling, finding that the language of the Titan insurance contract defined an "insured" under more than one section of the policy. One definition included not just the named insured, but the named insured's spouse. Another section – similar in substance to the provisions of the PMIC policy at issue in this case - defined an "insured" as including "you or any family member." Since Bernard clearly qualified as an insured under both definitions, the court of appeals held:

> In this case, Reginald had no available insurance of his own or through his family, and the owner and registrant of the occupied vehicle, Fleming, was also uninsured. The term 'insurer' is not defined in the No-Fault Act. Black's Law Dictionary (7th ed.) defines 'insurer' as '**one who agrees, by contract, to assume the risk of another's loss and to compensate for that loss**.'.... **We conclude that, under the clear terms of the policy, Titan was Bernard's insurer**. Titan under the policy **pursuant to both of these definitional sections because he was the spouse of Tonya residing in her household and, therefore, one of her family members at the time of the accident.** Thus, we conclude that, for purposes of MCL 500.3114(4)(b), **Titan was the 'insurer of the operator of the vehicle occupied' by Reginald at the time of the accident and therefore liable for payment of PIP benefits**.

Amerisure at 436-437 (emphasis added). The appellate court also flatly rejected Titan's argument that MCL 500.3114(4) required the vehicle's operator to be a "named insured" on the insurance policy. *Id* at 437. In discussing (and rejecting) other arguments raised by Titan, the court observed, further, that "PIP coverage applies to the insured person, and not to the motor vehicle." *Id* at 438. An insured person, of course, is a person defined by the insurance policy as an insured. *See also Dobbelaere v Auto-Owners,* 275 Mich App 527, 533 (2007). Put simply, the policy language did not limit its coverage to only the named insured but was instead written broadly to extend coverage to others in the named insured's family and household.

Similarly, in *Titan Insurance Company/Hughes v State Farm,* unpublished opinion per curiam of the Court of Appeals, issued March 27, 2012 (Docket no. 301978)(**Exhibit H),** a motorcyclist was involved in an accident with a vehicle insured by defendant, State Farm. The

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defendant's named insured, however, did not own the vehicle. Rather, the vehicle was titled to the insured's son, Bradley. Bradley moved out of the home and got married before the accident. At the time of the accident. Bradley's wife, the named insured's daughter-in-law, was driving the vehicle. Titan paid PIP benefits on behalf of the motorcyclist, then sought reimbursement from State Farm, arguing, in part, that State Farm was the insurer of the operator of the vehicle.

A panel of the court of appeals agreed that State Farm was, in fact, the insurer of the **operator** of the vehicle. The policy language defined an insured as follows:

> **"Insured** for Personal Injury Protection Covered means:
>
> 1. *You* or any *resident relative*; and
> 2. **Any other *person* while *occupying* or injured as a *pedestrian* by**:
>
> a. *Your car;*
> b. A *newly acquired car,* or
> c. **Any other *motor vehicle* that is being operated by *you* or a *resident relative* and for which that operator is provided Liability Coverage by this policy**.

The court found that Bradley's wife qualified as "any other person" who was "occupying" the insured vehicle. As such, she qualified as an "insured" under the plain language of the policy, thereby rendering State Farm her insurer for purposes of MCL 500.3114.

Another panel of the Court of Appeals reached a similar conclusion in *Sours v Titan,* unpublished opinion per curiam of the Court of Appeals, issued December 27, 2011 (Docket no. 301328)(**Exhibit H**). The facts in *Sours* are substantively identical to the facts in this case. In that case, Jerald Sours III was a passenger in an uninsured vehicle owned and operated by Nakeysha Vond.[6] Vond resided with her father, who was the named insured on a policy issued by Westfield Insurance Company.[7] The policy indicated that it would pay damages for "bodily injury or

[6] Jerald Sours, III, is equivalent to Justin Childers, while Nakeysha Vond is equivalent to Shaina Groulx.
[7] Ms. Vond's father is the equivalent to Matthew Groulx. Westfield Insurance Company is the equivalent to PMIC in this case.

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property damage for which any insured becomes legally responsible because of an auto accident." It defined insured as "you or any family member for the ownership, maintenance or use of any auto or trailer." "Family member" was defined as a person related to the named insured by blood and who was residing in their household. Titan, an assigned claims insurer, paid PIP benefits on behalf of Sours, and then it sought reimbursement from Westfield.

Westfield sought summary disposition on the claim arguing, like PMIC does in this case, that Vond was not an insured within the meaning of the policy because it excluded from coverage any vehicle owned by a family member. Since Vond owned the vehicle and was a family member of the named insured, Westfield argued that the exclusion applied to bar coverage. Westfield also argued that it was not Vond's insurer because she was personally excluded from PIP coverage. Just as has been argued by PMIC in this case, Westfield argued that *Vond* was precluded from obtaining PIP benefits from Westfield because she was operating her own uninsured vehicle.

The panel, however, rejected these arguments. It found that the exclusions were "not relevant to defining *who* is an 'insured' for purposes of MCL 500.3114(4)." Rather, the exclusions set forth specific circumstances not covered by insurance – circumstances that were not relevant to the initial question of determining whether Vond was a contractual insured in the first instance. As the Court observed, "there is no requirement that an owner's PIP claim be successful for purposes of MCL 500.3114(4)." Put simply, whether Vond was an insured was the **only** question relevant to determining whether coverage existed for her passenger, Sours, under MCL 500.3114. Given the definition of an "insured," it was clear that Vond qualified as an insured, and, therefore, Westfield constituted the "insurer of the operator" of the vehicle in which Sours was a passenger at the time of the accident.

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The case law makes clear that an insurance company is free to define the scope of individuals deemed to be an insured under their contract. So long as the contract does not violate public policy, the insurer can define its insureds as broadly or narrowly as it chooses. But it should ultimately be held to what they bargained for based on the plain language of a contract that it prepared. As the case law demonstrates, the insurer cannot choose to define its "insured" broadly, then ask the Courts to rewrite that language to reflect a narrower intent than what is written simply because it is faced with a catastrophic loss. In this case, although the PMIC provisions are written as broadly as those discussed in the cases above, the trial court erroneously concluded that PMIC did not assume the risk associated with insuring Ms. Groulx, and, therefore, could not be her insurer for purposes of MCL 500.3114(4). To reach that conclusion, the trial court noted that Ms. Groulx, herself, would not be eligible to claim PIP benefits from PMIC because she was operating her own uninsured vehicle. The trial court concluded that "no rational basis" existed for concluding that PMIC was her "insurer" when it did not name her as an insured, nor did it issue coverage for her vehicle.

But this is precisely the argument Westfield advanced in *Sours,* and which has been rejected by this Court. Michigan Courts must interpret the contract *as written,* not, as PMIC would argue, *in hindsight* to rewrite the contract to reflect a narrower definition of "insured." The trial court in this case erred by relying on PMIC's ex post facto arguments about what it *wanted* the policy to mean once faced with the possibility of payment on this loss, rather than looking at the plain, expansive definition of insured that PMIC wrote into the policy. Indeed, the insurers in the above-cited cases likewise suggested during litigation that they assumed no risk associated with the persons they were ultimately deemed to have insured, even if they did so inadvertently.

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In this case, the PMIC policy speaks in terms of "**eligible injured person**" in the PIP coverage section, beginning in Part II, at page 7. **Exhibit C, p. 7.** An eligible injured person is defined as:

> **"Eligible injured person'** means:
>
> a. **You** or any **relative** who sustains accidental bodily injury in an accident involving a motor vehicle."

The policy definitions are contained on pages 1 and 2, under "general definitions." **"Relative"** is defined as "a person residing in the same household as **you,** and related to **you** by blood, marriage, or adoption…" **Exhibit C, p. 2.**

The bodily injury provisions of the policy also support that Ms. Groulx qualifies as a contractual insured. Those provisions, contained in Part I, define an "insured person" as "**you** or a **relative** with respect to an accident arising out of the ownership, maintenance or use of an **auto.**" **Exhibit C, p. 3.** ***Significantly, the policy does not state that a covered auto must be involved in the accident***; it simply states that the resident relative be involved in an accident involving an automobile.

Similarly, under Part III of the policy, it states that PMIC will pay uninsured/underinsured motorist benefits to an "**insured person**" who sustains **bodily injury** in an accident arising out of the ownership, maintenance, or use of an uninsured motor vehicle. Notably, "**insured person"** is again defined, without limitation or restriction, as "**you or a relative**." **Exhibit C, p. 13.**

In this case, Shaina Groulx undoubtedly qualified as Matthew Groulx's "relative," as the policy itself defines the term. Ms. Groulx resided with her brother on the date of the accident; she had lived there for ten months, since October 2010.[8] Her driver's license identified his address as

[8] Because the policy speaks in terms of *residing* in a home, rather than it being one's domicile, whether there remains a dispute as to Shaina's domicile is ultimately irrelevant to the coverage question, as there can be no valid dispute that she *resided* there at the time of the accident.

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her residence, she had executed change of address forms with the post office, and she was not using any other address as her own. **Indeed, that fact was not in dispute for purposes of deciding the motions in the trial court**. Ms. Groulx also sustained accidental bodily injury. The police report, attached as **Exhibit B,** reflects that she reported a "C" type injury on the scene. Moreover, at her deposition, Ms. Groulx testified that she sustained fractured ribs and an injury to her ankle. **Exhibit D, p. 63.** Given that she was a relative who sustained accidental bodily injury, she qualifies as an "eligible injured person" under the PIP section of the policy. More important, the policy squarely identifies her as an "insured person" under both the liability coverage section, and the uninsured/underinsured motorist provisions of the policy. This means that PMIC is Shaina Groulx's insurer, and the trial court erred in concluding otherwise.[9]

Given that the policy definitions include Ms. Groulx as an insured, the Court of Appeals correctly found that Ms. Groulx was a contractual insured under the policy, consistent with this Court's determination in *Amerisure/Coleman,* supra. Since Ms. Groulx is a contractual insured under its policy, PMIC is the insurer of the operator of the motor vehicle involved in the accident pursuant to MCL 500.3114(4), and was next in priority, following American Fellowship, for the payment of benefits.

[9] The Court should reject any argument that one should look only at the definitions contained in Part II of the policy to determine if Groulx was an "insured," and that definitions contained under other sections of the policy are irrelevant. Such an argument lacks merit. Nothing within the language of MCL 500.3114(4), or the definition of insurer as cited by the courts, suggests that examination of policy language turns only on the definitions contained in one section of the policy. Indeed, such an argument by PMIC would be contrary to its argument that the policy must be read as a whole to determine intent. Moreover, the case law reflects that the examining Courts have looked at all portions of an issues policy, not just the PIP section, to make this determination. The panel in *Sours,* supra, relied on the definition of insured contained in the liability section of the policy issued by Westfield to reach its conclusion that the owner operator of the uninsured vehicle involved in the accident was a contractual insured of Westfield for the purpose of providing PIP benefits under circumstances identical to this case. Likewise, the *Amerisure* opinion references definitions contained in more than one section of the policy, as is evident by its reference to multiple definitions, with a specific reference to a definition contained "in the part relating to no- fault coverages…" In *Titan/Hughes,* the Court cited a definition that specifically referenced the *liability* coverage covering an auto. The case law simply does not support the notion that the definition of "insured" must come from a No-Fault endorsement and only a No-Fault endorsement.

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2. The theoretical existence of a policy exclusion does not mean a person is not an "insured" in the first place.

As the Court of Appeals noted, its inquiry was "not yet complete" **(Exhibit A, p. 12)** because PMIC also focused on exclusions in the Policy and whether Ms. Groulx would herself be excluded from PIP benefits through PMIC because she was driving an uninsured vehicle at the time of the accident. Just as was the case in *Sours*, the Court of Appeals here rejected this argument as missing the point. Not only does the language of the policy control, but whether there are exclusions that theoretically bar coverage is irrelevant to answering the question of whether a person is an insured in the first instance.

Indeed, this is a question separate and apart from whether she is its contractual insured for purposes of the *priority* analysis under MCL 500.3114(4). Since Ms. Groulx was operating the vehicle at the time of the accident, the only salient inquiry here is whether Ms. Groulx qualified as an "insured" under the PMIC policy, as addressed and resolved in the discussion above. Because the PMIC policy definitions included Ms. Groulx as an insured, PMIC was her insurer for purposes of MCL 500.3114(4). Therefore, it was *initially* second in the order of priority, after American Fellowship, but that changed upon the insolvency and the claims from the MPCGA and Plaintiff pursuant to the application of the MPCGA Act. It matters not whether PMIC has *other* defenses to coverage under *other* scenarios, because even where coverage exclusions apply, an insured does not cease to be an insured.

Importantly, in the briefing before the Court of Appeals, PMIC effectively admitted that its policy includes Ms. Groulx within its definition of insured pursuant to several policy definitions.[10] Indeed, even the exclusions PMIC relies upon identify and define Ms. Groulx as an insured person. As an example, PMIC admits that Ms. Groulx is an "insured" under the BI portion

[10] See PMIC Brief on Appeal to the Court of Appeals, Page 18, n. 7.

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(Part I) of its policy, but states that it would not owe her coverage for an accident involving any vehicle that is not a covered auto under the policy. Significantly, however, ***even that exclusion identifies Ms. Groulx as an "insured person."*** Indeed, these same exclusions would also apply to its ***named*** insured, Matthew Groulx. The existence of the exclusion does not, however, eliminate Ms. Groulx's status as an insured person under the policy. To the contrary – those exclusions continue to identify her as an insured. The exclusions reinforce the MPCGA's position that PMIC was her insurer.

The Court of Appeals summarize the point as follows, noting that *Sours* was directly on point and that presenting the argument itself serves as an admission as to who is an insured:

> As in *Sours*, the case before us presents a policy exclusion that excludes coverage under a specific circumstance. Specifically, the exclusion purports to preclude Shaina from recovering PIP benefits under the policy because she was not driving a covered auto at the time of the accident. But as in *Sours*, the exclusion does not change who is an insured person under the policy, so it does not alter the application of MCL 500.3114(4). Indeed, the exclusion only applies to an "insured person," so Progressive's reliance upon it is an admission that Shaina was an insured person.

COA Decision – Exhibit A, p. 13.

In short, the Court of Appeals correctly found that an insurer does not cease being its insured's insurer simply because it has a basis to deny coverage for a claim. The question before the trial court and Court of Appeals did not concern whether Ms. Groulx was entitled to benefits or coverage, or whether PMIC was responsible for defending or indemnifying Groulx, personally. The sole question was whether Ms. Groulx was an "insured" under the plain definitions of the policy such that PMIC could be defined as her "insurer" under MCL 500.3114(4). Here, both the definitions and exclusions afford Ms. Groulx "insured" status. That status does not disappear simply because PMIC might have a basis to deny coverage to *her* for *other* situations. Ms. Groulx qualified as an insured, and so PMIC qualified as "the insurer" for the operator of the vehicle. The Court of Appeals was correct. **Exhibit A, p. 14** ("the trial court erred by awarding Progressive

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summary disposition with respect to whether Shaina was an insured person under Progressive's policy issued to Matthew").

CONCLUSION

PMIC's Application presumes that this Court will delve into the merits immediately without regard for the actual standards for leave under MCR 7.305(B). That itself is a fatal flaw. PMIC has not shown that this matter is of significant important to the state's jurisprudence. And it most certainly did not show that that the Court of Appeals' Decision was "clearly erroneous" and would cause "material injustice." The opposite is true. Both the trial court and Court of Appeals correctly recognized that MCL 500.7911(3) is meant to *benefit* the MPCGA, not burden it. They further recognized the MPCGA is exempt from complying with MCL 500.3145(1), and that no claim against PMIC could even exist until the American Fellowship insolvency. Because of that, the Court of Appeals correctly held that the claims brought both by Childers and the MPCGA were timely. Furthermore, the Court of Appeals was correct in holding that Ms. Groulx was an "insured." Based on these two core holdings, the Court of Appeals appropriately remanded to the trial court of entry an order granting summary disposition to Plaintiff and MPCGA.

This Court should deny the Application for Leave and allow this unique case to run its course back in the trial court post-remand.

Respectfully submitted:

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Dated: November 28, 2022

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STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS, as Conservator for JUSTIN CHILDERS, a legally incapacitated person,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY, a Property and Casualty Insurer

Defendant-Appellant.

Supreme Court Nos. 164953 and 164954

Court of Appeals Nos: 356914 and 356915

Genesee County Circuit Court
No: 13-101626-NF

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CERTIFICATE OF SERVICE

I, Debra K. Ebright, for the law firm of Richard F. Burns, Jr., hereby certify that on November 28, 2022, I electronically filed the foregoing papers with the court, clerk of the court, using the ECF system, and utilizing the MiFile electronic service option to send notification to and serve said filings on the attorneys of record for all parties to the above cause.

Dated: November 28, 2022

/s/Debra K. Ebright
Legal Assistant to Richard F. Burns, Jr.