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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

CARLONDA NAISHE SWOOPE

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

Plaintiff/Appellant,

v

Wayne Circuit Court
Case No 21-011492-NF
Hon. Dana M. Hathaway

CITIZENS INSURANCE COMPANY
OF THE MIDWEST
Defendant/Appellee

_____/

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL (MOAA)
ORAL ARGUMENT REQUESTED

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I- INTRODUCTION

This Court's Order of March 26, 2025 granting oral argument on the application directs the parties to address:

> ...whether the plaintiff is barred from receiving personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq.*, because, at the time of the accident, she "was willingly operating or willingly using a motor vehicle … that was taken unlawfully, and [she] knew or should have known that the motor vehicle... was taken unlawfully." MCL 500.3113(a). [(Order Granting MOAA 3-26-25)].

Plaintiff is not barred from receiving personal protection insurance benefits under the No-Fault Act, MCL 500.3101 *et seq*, under the circumstances of this case, as she did not unlawfully take the motor vehicle she was using at the time of the accident. The trial court's order denying Defendant-Appellee Citizens Insurance Company of the Midwest's ("Citizens") Motion for Summary Disposition was the correct one, as "[w]hether Plaintiff had permission to use the vehicle is a question of fact for the trier of fact." (Order of the Trial Court, 10/24/2022, **Ex. 4, Appx. 27-28**).

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II- STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff-Appellant provides this brief Statement of Facts and Procedural History for this Court's review, and directs the Court to the more expansive statement contained in her application.

A. Statement of Facts

This case arises from a claim for Michigan No-Fault Personal Injury Protection (PIP) benefits filed by Plaintiff/Appellant Carlonda Naishe Swoope ("Ms. Swoope") related to injuries she sustained in an October 27, 2020 motor vehicle accident.

Ms. Swoope testified that on October 27, 2020, she was sleeping over at her friend of four years, Kandice Valentine's house and that the following morning she woke up to a notification that her mother was having a medical emergency. (**Ex 2,** Dep of Ms. Swoope, pp. 9, 33, **Appx. 9, 15**). Ms. Swoope testified that "[m]y mother called me and told me that her chest was hurting, and the ambulance wasn't coming fast enough. So I tried to get there as fast as possible." (**Ex.** 2, p. 10 **Appx. 9**). Ms. Swoope testified that her mother was caring for Ms. Swoope's children while the emergency was occurring. (**Ex. 2,** p. 37, **Appx. 16**).

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After arriving at her mother's house the subject accident occurred. Ms. Swoope was in the right lane, and a truck turned into her vehicle from the left lane. (**Ex. 2**, p. 34-35, **Appx. 15**). Ms. Swoope was injured in the accident. (**Ex. 2**, p. 39-40, **Appx. 16**). When the police arrived to the scene of the accident, Ms. Swoope declined going in the ambulance because her mother was still home waiting to go to the hospital. (**Ex. 2**, p. 36, **Appx. 15**).

Ms. Swoope took an Uber from the scene of the accident to her mother's house. (**Ex. 2**, p. 36, **Appx. 15**). The Uber then took Ms. Swoope and her mother to Harper Hospital in Detroit, Michigan where they were both evaluated. (**Ex. 2**, p. 36, **Appx 15**).

Plaintiff was injured in the accident on October 27, 2020. On November 11, 2020, Plaintiff submitted an Application for Benefits to the Michigan Automobile Insurance Placement Facility ("MAIPF") for assignment of benefits related to the accident. In her Application for Benefits, Ms. Swoope, in response to question 42(k) answered "yes" to the question of whether she had permission to operate the vehicle. (**Ex. 3**, App for Benefits, **Appx. 24**). However, Ms. Swoope left the follow-up question to 42(k) which asks "If Yes, from who?_____" blank in her Application

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for Benefits. (**Ex. 3**, App for Benefits, **Appx. 24**). Ms. Swoope believed she had implied permission to use her friend's vehicle due to the need to respond to a medical emergency her mother was having. The claim was assigned to Citizens Insurance Company of the Midwest ("Citizens").

B. Procedural History

On September 2, 2021, Plaintiff filed suit against Defendant Citizens alleging that Citizens had failed to pay for medically necessary, reasonable, and related no-fault benefits due as a result of the accident.

Citizens moved for summary disposition under MCR 2.116(C)(10), alleging that Plaintiff did not have permission to use the vehicle, and so MCL 500.3113(a) operates to bar Plaintiff from receiving no-fault benefits.

The trial court denied Citizens' motion without oral argument, holding that "Whether Plaintiff had permission to use the vehicle is a question of fact for the trier of fact." (Order of the Trial Court, 10/24/2022, **Ex. 4, Appx. 27-28**).

Defendant Citizens moved for reconsideration of the trial court's order, and the trial court denied that motion for reconsideration on January 24, 2023. (Order of the Trial Court Denying Reconsideration, 1/24/23,

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LCF).

Citizens filed an Application for Interlocutory Appeal on February 13, 2023, along with a Motion for Immediate Consideration. The Court of Appeals granted that Application and Motion for Immediate Consideration on March 24, 2023. The matter was briefed and argued, and on December 14, 2023 the Court of Appeals, in an unpublished opinion, reversed the trial court and remanded the matter for further consideration. See *Swoope v Citizens Insurance Company of the Midwest*, docket no. 364924, unpublished decision rel'd 12/14/23. (**Ex. 1, Appx. 1**). Defendant sought publication of the decision, which was granted on January 25, 2024.

The instant Application for Leave to Appeal to the Michigan Supreme Court followed. On March 26, 2025, this Court granted Plaintiff-Appellant's application for leave, and directed the Clerk to schedule oral argument on the application. [(Order Granting MOAA 3-26-25)].

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III- ARGUMENT

STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

THE TRIAL COURT PROPERLY DENIED SUMMARY DISPOSITION WHERE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER CARLONDA SWOOPE UNLAWFULLY TOOK HER GOOD FRIEND'S MOTOR VEHICLE THAT WAS INVOLVED IN THE OCTOBER 27, 2020 MOTOR VEHICLE ACCIDENT AND WHETHER MS. SWOOPE KNEW OR SHOULD HAVE KNOWN THAT SHE DID NOT HAVE AUTHORITY TO USE HER FRIEND'S MOTOR VEHICLE.

The primary purpose of Michigan's No-Fault Act is "to provide victims of motor vehicle accidents assured, adequate and prompt reparation for certain economic losses", *McCormick v Carrier,* 487 Mich 180, 234; 795 NW2d 517, 547 (2010), quoting in part, *Shavers v Attorney General,* 402 Mich 554, 578-579; 267 NW2d 72, 77 (1978). The no-fault system was designed to provide victims of motor vehicle accidents adequate and quick reimbursement for certain economic losses. *Meemic Ins Co v Fortson*, 506 Mich 287, 297; 954 NW2d 115 (2020). The trial court properly denied

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summary disposition because there exists a genuine issue of material fact as to whether Carlonda Swoope unlawfully took her friend Kandace Valentine's motor vehicle that was involved in the motor vehicle accident that is the subject of this case and whether Ms. Swoope knew or should have known that the vehicle was taken unlawfully.

The sole issue in this appeal is whether Ms. Swoope acted in a manner that implicated MCL 500.3113(a) when taking her good friend's motor vehicle on May 24, 2020. MCL 500.3113(a) provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully. MCL 500.3113(a).

To deny no-fault insurance benefits under §3113(a) as a matter of law as Citizens argued in its motion for summary disposition, it must be established that Carlonda Swoope (1) willingly operated or used her friend Kandace Valentine's vehicle, (2) after taking Ms. Valentine's vehicle

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unlawfully, and (3) that she knew or should have known that Ms. Valentine's vehicle was taken unlawfully.

There is no question that the first of these three elements was established; Ms. Swoope was willingly operating or using Ms. Valentine's vehicle on the night of October 27, 2020. This leaves the two remaining elements of defense predicated on §3113(a). The first level of inquiry when applying §3113(a) concerns whether the taking of a vehicle was "unlawful." *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 747; 896 NW2d 32 (2016). If the taking was lawful, the inquiry ends because the statute is inapplicable. *Id*. Where there is an unlawful taking, the next step in the analysis is to determine whether the claimant "knew or should have known that the motor vehicle ...was taken unlawfully." The statute does not apply if, although an unlawful taking occurred, the claimant did not know and did not have reason to know that the taking was unlawful. *Id*. Here, Ms. Swoope was responding to her mother's urgent medical emergency and did not know or have reason to know that the taking, under those circumstances, was unlawful. Under *Monaco*, the appropriate standard, the facts of this case do not trigger the application of §3113(a).

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A. The Trial Court Properly Held That There Is an Issue of Fact as to Whether Ms. Swoope Unlawfully Took Her Friend's Motor Vehicle.

This Court first addressed the meaning of the phrase "taken unlawfully" in §3113(a) in *Spectrum Health Hosps v Farm Bureau Mut Ins of Mich*, 492 Mich 503, 517; 821 NW2d 117 (2012).[1] The *Spectrum Health* Court held that the meaning of the phrase "taken unlawfully" in §3113(a) "embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law." *Id*. at 517. In determining whether possession of a vehicle is "contrary to law," the Court noted that the Michigan Penal Code contains several statutes that prohibit "takings," including two statutes that prohibit "joyriding," MCL 750.413 and MCL 750.414. *Id*., at 517. MCL 750.413 provides in pertinent part that "[a]ny person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a

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1 As discussed more fully below, §3113(a) previously provided that a person was precluded from collecting PIP benefits if "[t]he person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." The "knew or should have known" language now contained in §3113(a) was added by 2014 PA 489. Thus, this Court's opinion in *Spectrum Health* considered the pre-2014 amendment of the statute and its determination was limited to a consideration of the meaning of "taken unlawfully" in that earlier version. The *Spectrum Health* decision, therefore, did not involve interpretation of the "knew or should have known" language that was added to §3113(a) two years later.

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felony." MCL 750.414 provides in relevant part that "[a]ny person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor."

The *Spectrum Health* Court held that both joyriding statutes "make it unlawful to take a motor vehicle without authority, effectively defining an unlawful taking of a motor vehicle as that which is unauthorized." *Id.*, at 517-518. The Court thus concluded that the phrase "taken unlawfully" in §3113(a) "applies to anyone who takes a vehicle without the authority of the owner, regardless of whether that person intended to steal it." *Id.*, at 518 (emphasis in original). The Court confirmed that §3113(a) "examines the legality of the taking from the driver's perspective." *Id.*, at 522 (emphasis in original).

In *Spectrum Health*, the claimant, Craig Smith, was injured in a motor vehicle accident while driving his father's vehicle. *Id.*, at 511. Mr. Smith's father had forbidden Mr. Smith from operating the vehicle because he did not have a valid driver's license, but permitted Mr. Smith's girlfriend, Kathleen Chirco, to operate the vehicle. *Id.*, at 512. The evidence

established in that case that the father instructed Ms. Chirco in Mr. Smith's presence not to allow Mr. Smith to drive the vehicle. *Id*. On the night of the accident, Mr. Smith asked Ms. Chirco for the keys to his father's car, and, although she initially resisted, Ms. Chirco ultimately gave Mr. Smith the keys. Mr. Smith later crashed the vehicle. *Id*.

In the companion case to *Spectrum Health*, *Progressive Marathon Ins Co v DeYoung*, Ryan DeYoung was injured in a motor vehicle accident while driving his wife's vehicle. *Id*., at 513. Similar to *Spectrum Health*, the plaintiff's wife had forbidden DeYoung from operating her vehicle because he was a named excluded driver on the insurance policy with Progressive. *Id*. On the night of the accident, DeYoung took the key to his wife's car out of her purse and took the vehicle, contrary to his wife's standing instructions and without her permission. *Id*.

This Court ultimately held in *Spectrum Health* that §3113(a) precluded PIP benefits for both of the claimants involved in the two companion cases because the claimants took the respective vehicles contrary to the express prohibition of the vehicle's owner, in violation of MCL 750.414. *Id*., at 524, 537-538. This Court's rejection of the claimants' claims was "premised on

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the notion that a person cannot take a vehicle contrary to an owner's express prohibition and maintain that he or she did not 'unlawfully take' the vehicle under MCL 500.3113(a)." *Rambin v Allstate Ins Co*, 495 Mich 316, 326; 852 NW2d 34 (2014).

Following its decision in *Spectrum Health*, this Court decided *Rambin v Allstate Ins Co*, supra.[2] In *Rambin*, the Court analyzed a question that it did not reach in *Spectrum Health*, whether MCL 500.3113(a) requires the person using the motor vehicle to know that such use has not been authorized by the vehicle's owner. *Rambin*, at 327. In *Rambin*, the plaintiff was injured when the motorcycle he was operating was involved in an accident. Plaintiff, however, claimed that a person whom he believed was the owner of the motorcycle loaned him the motorcycle. The motorcycle actually was owned by another who had reported it stolen several weeks before the accident. The plaintiff argued in *Rambin* that he did not knowingly lack authority to take the motorcycle because he believed that the person who gave him access to the motorcycle was the rightful and legal owner of the motorcycle.

2 *Rambin*, like *Spectrum Health,* construed §3113(a) in its form prior to the 2014 amendment of that statute.

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This Court held in *Rambin* that, considering MCL 750.414 "as a whole," the statute "properly requires a showing of knowingly taking without authority or knowingly using without authority." *Id.*, at 332. The *Rambin* Court concluded that the plaintiff could present evidence that he did not run afoul of MCL 750.414, and thus did not unlawfully take the motor vehicle under §3113(a), because plaintiff did not "knowingly" lack authority to take the motor vehicle since he took the vehicle "believing that he had authority to do so." *Rambin*, at 333, 336. "Stated differently, plaintiff's argument that he did not unlawfully take the motorcycle under MCL 500.3113 is subject to the criminal statute that prohibits an unlawful taking, MCL 750.414, under which plaintiff may present evidence to show that he did not knowingly take the motorcycle without the owner's authority." *Id.*, at 333-334.

After the Supreme Court decided *Rambin*, the Legislature in 2014 PA 489 amended §3113(a) to its current language. While the statute previously read that a person was not entitled to PIP benefits if the person "was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take

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and use the vehicle," the amended language now reads that a person is not entitled to PIP benefits if the person "was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully."

According to the Michigan Senate's Legal Analysis report, 2014 SB 1140 was written in response to the holding in *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 599-600; 808 NW2d 1 (2010). A copy of the Bill Analysis for 2014 SB 1140 is attached as **Exhibit 5** to this brief. **Ex. 5, Appx. 29-32.** *Henry Ford* held that, under the prior version of §3113(a), only a person who had unlawfully taken a vehicle *and* used it could be excluded from no-fault benefits. *Henry Ford*, at 602-603. The Court of Appeals concluded in *Henry Ford* that a passenger in a stolen vehicle, who was not involved in the taking of the vehicle but who was aware of the fact that the vehicle had been stolen, was not precluded from obtaining PIP benefits. *Id*., at 600-601. The Legislature thereafter passed the amended version of §3113(a), which according to the legislative analysis "clarifies" the "unlawful taking" exclusion to PIP benefits under §3113:

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> "The bill clarifies the exclusions to personal protection insurance benefits under Section 3113. Before the *Henry Ford Health System* decision, some understood that if a person was knowingly using a stolen motor vehicle and was injured in an accident, that person would be ineligible for PIP benefits through the State's no-fault system. The *Henry Ford Health System* Court, however, held that only a person who had unlawfully taken and used the vehicle could be excluded from no-fault benefits. The bill will ensure that a person who willingly uses a stolen vehicle at the time of a car accident and injury is not protected by no-fault." Senate Legislative Analysis, SB 1140 (**Ex. 8, Appx. 31**).

Consistent with the legislative analysis, the Legislature amended §3113(a) to its current language, which provides that a person is not entitled to PIP benefits if the person "was willingly operating *or willingly using* a motor vehicle or motorcycle *that was taken unlawfully*, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully." (Emphasis added).

After the amendment to §3113(a), the Court of Appeals decided *Monaco v Home Owners Ins Co*, 317 Mich App 738; 896 NW2d 32 (2016). The Court of Appeals noted in *Monaco* that §3113(a) was amended in 2014 PA 489, but held that the amended version of the statute "still generally bars

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the recovery of PIP benefits by a person who operated a vehicle that he or she had 'taken unlawfully.'" *Id*., at 747.

In *Monaco*, a 15-year-old driver who was not legally authorized to drive by herself was injured in a motor vehicle accident and sought no-fault benefits. *Id*., at 744. A jury determined that the driver had permission from the owner of the vehicle – her mother – to drive the vehicle at the time of the accident. *Id*. Based upon the jury's conclusion, the *Monaco* Court held that the driver did not unlawfully take the vehicle within the meaning of §3113(a). *Id*., at 748-749. In so ruling, the Court of Appeals held that there is a difference between "unlawfully taking a motor vehicle and unlawfully using a vehicle," and only the former is relevant for the purposes of determining whether an unlawful taking occurred under §3113(a). *Id*., at 749.

The Court of Appeals again addressed the amended language of §3113(a) in *Ahmed v Tokio Marine America Ins Co*, 337 Mich App 1; 972 NW2d 860 (2021), the case that the Court of Appeals in the instant case relies upon in making its decision. In *Ahmed*, the plaintiff was involved in a motor vehicle accident while driving a rental car, which had been rented

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by his wife. *Id*., at 5. The plaintiff did not have a valid driver's license, and the rental agreement provided that only a licensed driver was authorized to use, operate, or drive the motor vehicle. *Id*. The *Ahmed* Court held that plaintiff's taking of the vehicle was in violation of MCL 750.414, and thus was "unlawful" under §3113(a), because the rental agreement prohibited plaintiff's use and operation of the rented vehicle and thus his use and operation of the vehicle was without the authority of the owner. *Id*., at 13-15.[3]

Here, the trial court properly held that, under the facts of this case, there is a question of fact as to whether Ms. Swoope unlawfully took her good friend's vehicle. Unlike in *Spectrum Health* and *Ahmed*, there is no evidence that Ms. Swoope's use of the motor vehicle on October 27, 2020, was expressly "unauthorized" by Ms. Valentine. Unlike the two claimants in *Spectrum Health*, there is no evidence that Ms. Swoope took the vehicle against the express prohibition of the owner. Additionally, there is no

3 After explicitly finding that the acts of the plaintiff in taking the vehicle against the terms of the rental agreement constituted an unlawful taking, *id*. at 15, the *Ahmed* Court engaged in an unnecessary discussion of whether the plaintiff's driving of the vehicle without a valid operator's license constituted a separate basis for concluding that he had unlawfully taken the vehicle. This discussion necessitated criticism and rejection of the Court's prior published decision in *Monaco*, *supra*. Somewhat remarkably, among the *Ahmed* Court's critiques of *Monaco* was that much of its commentary was dictum. *Ahmed*, 337 Mich App at 19. Thus, *Ahmed* represents one of those rare circumstances in which a panel of the Court of Appeals criticizes in what is pure dictum a prior panel opinion for containing dictum.

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evidence that Ms. Swoope took the vehicle in violation of an express contractual prohibition against Ms. Swoope using the vehicle, as in *Ahmed*. Under the circumstances where Ms. Swoope's mother was experiencing an urgent medical emergency, Ms. Swoope believed that she had implied consent to take the vehicle. The evidence, viewed in the light most favorable to the plaintiff, creates a question of fact as to whether Ms. Swoopes had Ms. Valentine's authority to take the vehicle on October 27, 2020. *Ahmed*, at 25-26.

Defendants, as the parties moving for summary disposition, had the initial burden of proof to show that there was no genuine issue of material fact. MCR 2.116(G)(4). While defendants focused their proofs and argument on whether Ms. Swoope "knew or should have known" that he unlawfully took her friend's vehicle (discussed below), defendants failed to offer conclusive evidence that Ms. Swoope took her friend's vehicle "unlawfully" in light of the particular circumstances presented to Ms. Swoope. Because a genuine issue of material fact exists as to whether Ms. Swoope unlawfully took her friend's vehicle, the trial court properly denied defendants' motion, and this Court should reverse the Court of

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Appeals' erroneous decision.

B. The Trial Court Properly Held That There Is an Issue of Fact as to Whether Ms. Swoope Knew or Should Have Known That She Unlawfully Took Her Friend's Vehicle.

Even if this Court concludes that the evidence, when viewed in the light most favorable to the plaintiff, conclusively establishes that Ms. Swoope unlawfully took her friend's motor vehicle on October 27, 2020, the trial court properly held that a genuine issue of material fact exists as to whether Ms. Swoope "knew or should have known" that she unlawfully took her friend's vehicle.

Based upon the 2014 amendment to §3113(a), the *Ahmed* case represents the first published Court of Appeals decision that has addressed the "knew or should have known" language added to that provision. In its analysis of this issue, the *Ahmed* Court concluded that the amendment of §3113(a), through 2014 PA 489, "modified the scienter requirement under that statute if a violation of MCL 750.414 is at issue." *Id*., at 24. The Court of Appeals held that when disqualification for PIP benefits under §3113(a) is at issue, a person acts unlawfully under MCL 750.414 if the person "takes a motor vehicle or motorcycle knowing that the owner has prohibited the

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taking," or if the person "takes a motor vehicle or motorcycle and 'should have known' that the owner prohibited the taking." *Id*., at 25-26. The *Ahmed* Court ultimately held that, because plaintiff testified that he was unaware of the terms of the rental agreement, which prohibited him from driving the vehicle, he therefore lacked *actual knowledge* that an unlicensed driver was prohibited by the rental agreement from taking the car. *Id*., at 26. The Court concluded, however, that under the "should have known" standard, plaintiff "was obligated to determine the scope of the authorization" that the owner of the vehicle had set under the rental agreement. *Id*., at 26. The Court held that plaintiff "should have known" the terms of the rental agreement "because a person may not simply take what he knows to be another's property without taking any steps to determine if the owner authorized the taking," and that the "mere assumption or supposition that it must be permissible to take a third party's property, without more, does not satisfy the 'should have known' standard of MCL 500.3113(a)." *Id*., at 27.

Here, Defendant Citizens does not argue that Ms. Swoope took her friend's motor vehicle despite "knowing" that her friend had prohibited

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the taking. *Ahmed* at 25. Again, there is no evidence that Ms. Swoope "knowingly" took the vehicle in violation of an express contractual prohibition against him using the vehicle, as in *Ahmed*. Additionally, as set forth above, unlike the two claimants in *Spectrum Health*, there is no evidence that Ms. Swoope "knowingly" took her friend's vehicle contrary to her *express prohibition*. No testimony was offered that Ms. Valentine ever prohibited Ms. Swoope from using her vehicle, either on the day of the motor vehicle accident or at any time prior. Unlike in *Spectrum Health* and *Ahmed*, there is no evidence that Ms. Swoope's use of the motor vehicle on October 27 was expressly "unauthorized," or that Ms. Swoope took the vehicle "knowing that the owner has prohibited the taking." *Spectrum Health* at 510; *Ahmed* at 25.

Defendant's argument, supported by the Court of Appeals, is that Ms. Swoope "should have known" that she did not have Ms. Valentine's authority to use her vehicle on the date of the motor vehicle accident because she knew (or should have known) that she needed to obtain her friend's "express permission" to take the vehicle. According to Defendant Citizens, its motion for summary disposition should have been granted by

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the trial court because Ms. Swoope failed to obtain express permission on the date of the accident in the midst of her mother's medical emergency, and instead merely assumed that she had permission to take the vehicle on the date of the accident. This argument was adopted by the Court of Appeals. In so holding, the Court of Appeals relies upon the language in *Ahmed* that the "mere assumption or supposition that it must be permissible to take a third party's property, without more, does not satisfy the 'should have known' standard of MCL 500.3113(a)." *Ahmed* at 27. Contrary to the Court of Appeals' holding, and as properly held by the trial court, there is a genuine issue of material fact as to whether Ms. Swoope "should have known" that her friend prohibited the taking under these circumstances. *Ahmed* at 25-26.

Ms. Swoope testified that on October 27, 2020, she was sleeping over at her friend of four years, Kandice Valentine's house and that the following morning she woke up to a notification that her mother was having a medical emergency. (**Ex 2**, pp. 9, 33, **Appx. 9, 15**). Ms. Swoope testified that "[m]y mother called me and told me that her chest was hurting, and the ambulance wasn't coming fast enough. So I tried to get

there as fast as possible." (**Ex.** 2, p. 10 **Appx. 9**). Ms. Swoope testified that her mother was caring for Ms. Swoope's children while the emergency was ocurring. (**Ex. 2,** p. 37, **Appx. 16**). Taking the evidence in the light most favorable to the plaintiff, a genuine issue of material fact exists as to whether Ms. Swoope "should have known" that she had taken her friend's vehicle without authority on October 27, 2020.

Unlike *Ahmed*, the evidence therefore creates a question of fact as to whether Ms. Swoope either knew or should have known that when she took her friend's vehicle on the night of the accident, she was doing so unlawfully. *Ahmed*, at 25-26. Contrary to defendant's arguments on appeal and the Court of Appeals' Opinion, the evidence here does not establish that Ms. Swoope took her good friend's vehicle on the date of the accident based upon nothing more than a "mere assumption or supposition" that she had the owner's permission to do so, as in *Ahmed*. The evidence instead supports the trial court's conclusion that a genuine issue of material fact exists as to whether Ms. Swoope took her friend's motor vehicle when she "should have known" that her friend "prohibited the taking" *Ahmed*, at 25-26.

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As the trial court properly held, a question of fact exists as to whether Ms. Swoope "should have known" that she did not have the authority to use her friend's vehicle in the face of her mother's medical emergency and believed that she had permission to use her friend's vehicle on the date of the accident. The trial court properly denied summary disposition on this basis as well, and this Court should reverse the Court of Appeals' erroneous decision.

C. The Court of Appeals' Argument Regarding Ms. Swoope's Drivers' License Should be Rejected.

The Court of Appeals holding that Ms. Swoope took the vehicle unlawfully and was precluded from recovering PIP benefits under §3113(a) because she did not have a valid driver's license at the time of the motor vehicle accident was error. Defendant and the Court of Appeals contend that §3113(a)'s disqualification from recovering PIP benefits is triggered by proof that the plaintiff was unlawfully using the vehicle at the time of the accident. These arguments must be rejected. The Court of Appeals in *Monaco*, *supra*, explicitly rejected this same argument, holding that the phrase "taken unlawfully" in §3113(a) "does not encompass the

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unlawful use or operation of a motor vehicle, just the unlawful taking of a vehicle." *Monaco*, 317 Mich App, at 741 (emphasis in original). In *Monaco*, the plaintiff's 15-year-old daughter was involved in a motor vehicle accident while operating plaintiff's vehicle. Plaintiff's daughter was not legally authorized to drive by herself due to the restrictions on her driver's permit, since she was not accompanied by an adult at the time of the accident. The deposition testimony in the case established, however, that the daughter had permission from her mother to take and drive the car on her own at the time of the accident.

The defendant insurer argued, much like defendant here, that plaintiff's daughter had taken the vehicle unlawfully, regardless of any possible parental permission, because plaintiff had violated the law by authorizing her daughter's unaccompanied use of the vehicle, given her daughter's age and the restrictions on her daughter's driver's permit.

The Court of Appeals in *Monaco* rejected defendant's argument, stressing the language of §3113(a) that speaks to the unlawful *taking* of a vehicle, not the unlawful *use* of a vehicle. The Court of Appeals held in *Monaco* that, although it may have been unlawful for plaintiff, as the owner

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of the vehicle, to authorize her daughter to drive the vehicle in violation of the law, "it had no bearing on, nor did it negate, the authorization and permission given by plaintiff for [her daughter] *to take the vehicle*." *Monaco*, at 750 (emphasis added). The Court noted that, while plaintiff's actions in granting her daughter permission to drive her vehicle "might have subjected her to prosecution," plaintiff's actions "did not turn an authorized or permitted taking into an unlawful taking." *Id*.

In so holding, the *Monaco* Court relied upon the Supreme Court's holdings in both *Spectrum Health* and *Rambin*, which addressed the meaning of the phrase "unlawful taking" in §3113(a) – language, the Court noted, that was not amended by 2014 PA 489 – as the basis for its conclusion that there is a distinction between unlawfully "taking" a motor vehicle and unlawfully "using" a vehicle. Monaco, at 747-750. As set forth above, and as reiterated in *Monaco*, the Supreme Court in *Spectrum Health* held that the phrase "taken unlawfully" in MCL 500.3113(a) "embraces a situation in which an individual *gains possession* of a vehicle contrary to Michigan law." *Spectrum Health*, at 516-517 (emphasis added); *Monaco*, at 750. The Court in *Spectrum Health* therefore looked to statutes within the

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Michigan Penal Code that prohibit "takings," including two statutes that prohibit joyriding. *Id*., at 517. As recognized by the Court of Appeals in *Monaco*, under *Spectrum Health*, the purported violation of law must be related to the unlawful possession or "taking" of the vehicle, rather than the unlawful "use" or "operation" of a motor vehicle. *Monaco*, at 750, citing *Spectrum Health*, at 517.[4]

Under the holdings in *Spectrum Health* and *Monaco*, there is no basis for the argument that the violation of any law renders the use of the motor vehicle an "unlawful taking" for purposes of §3113(a). The Court of Appeals and Defendant's reliance upon violations of the Michigan Penal Code and/or the Michigan Vehicle Code that have no relevance to the unlawful "taking" of a vehicle –including MCL 257.301 (driving without a license) – are irrelevant to the issue of the unlawful taking of the vehicle. Therefore, under *Spectrum Health* and *Monaco*, whether Ms. Valentine authorized Ms. Swoope to drive her vehicle despite the fact that she did

4 What is also of significance on this point is that the injured driver in *Spectrum Health*, Craig Smith, Jr., was unlicensed. 492 Mich at 512. Thus, if the defendant was correct in its argument in this case, there would have been no reason for this Court in *Spectrum Health* to explore the entire question of whether plaintiff's taking of the vehicle was in violation of the joyriding statute, MCL 750.414. The fact that this Court in *Spectrum Health* needed to discuss the joyriding statute clearly demonstrates that the defendant's arguments associated with any claimed unlawful use of the vehicle (and the *Ahmed* Court's dictum supporting that argument) is wrong.

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not have a valid driver's license does not turn an authorized or permitted taking into an "unlawful" taking, and thus is irrelevant with respect to examining the "taken unlawfully" phrase in MCL 500.3113(a). *Monaco*, at 741, 748-749. Any argument to the contrary is inconsistent with the holdings in *Spectrum Health* and *Monaco*.

Any contention that the Court of Appeals' holding in *Monaco* was undermined by the subsequent opinion in *Ahmed* is incorrect, as the criticism of *Monaco* is mere dicta, for reasons stated below. The *Ahmed* panel expressed its view that the *Monaco* panel had "incorrectly analyzed the case," 337 Mich App at 19-20 n 8, as it announced its own ruling that a person who does not have a valid driver's license and drives a vehicle has engaged in an unlawful taking of a vehicle.

There are two quite sizeable errors in the *Ahmed* Court's analysis of this issue. First, as already explained above in footnote 4 of this brief, the *Ahmed* Court's detour into a discussion of *Monaco* and its holding was completely unnecessary to its determination that the plaintiff in that case had "unlawfully taken" the vehicle. Prior to the criticism that the *Ahmed* Court leveled at the Court of Appeals' prior opinion in *Monaco*, the *Ahmed*

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Court had already decided that the acts of the plaintiff in operating the vehicle against the express dictates of the rental agreement "constituted an 'unlawful taking' of the car because they constituted possession of it contrary to the owner's authorization." *Id.*, at 15. The *Ahmed* panel's entire discussion of *Monaco* and its purported analytical errors was, therefore, patent dictum.

But there is a second serious error in *Ahmed*'s unnecessary critique of the prior ruling in *Monaco.* A panel of the Court of Appeals does not have the authority to announce, as the panel did in *Ahmed*, that a prior published decision of the court "incorrectly analyzed the case" and, on that basis, "overrule" that published precedent. Rather, the *Ahmed* panel had to follow the dictates of MCR 7.215(C)(2) and MCR 7.215(J)(1) and recognize that *Monaco* was precedentially binding. If the *Ahmed* panel was of the view that *Monaco* was wrongly decided, it had to follow the dictates of MCR 7.215(J), declare its disagreement with the holding in *Monaco* and request a vote of the entire Court on the impaneling of a special panel of the court to resolve this conflict.[5]

5 Had such a request for a special panel been made by the panel in *Ahmed*, it would have been categorically rejected for a very simple reason. A special panel may only be convened where the

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This is how conflicts within panels of the Court of Appeals are to be resolved. They are not to be resolved by a later panel engaging in criticism of a prior published decision of the Court of Appeals, presumably in the hope that future panels will heed this pointless criticism. Under the court rules, the Court of Appeals was compelled to follow the "first-out" rule of MCR 7.215(J)(1) and give precedential effect to the Court's *Monaco*, the first published decision on this subject. See *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 20-21; 762 NW2d 911 (2009).

As recognized by the trial court, the evidence in this case establishes that there was a genuine issue of material fact as to whether Ms. Swoope had permission to use the vehicle. There is, therefore, no basis for the argument that the fact that Ms. Swoope did not have a valid driver's license rendered her taking of Ms. Valentine's vehicle "unlawful." See *Morris v Progressive Michigan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 11, 2020 (Docket No. 350214) (holding that *Monaco* foreclosed defendant's argument that Morris knowingly lacked

disagreement that gives rise to the conflict is "outcome determinative." MCR 7.215(J)(3)(a). Obviously, the criticism of *Monaco* that somehow found its way into the decision in *Ahmed* was impossible to characterize as "outcome determinative" since that criticism was complete dictum.

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authority to take the vehicle, and therefore violated MCL 750.414, because he knew that he could not legally drive the vehicle, given the fact that he did not have a valid driver's license and the fact that he was intoxicated when he drove the vehicle). (**Ex. 6, Appx. 33-42**).

Nor is there any basis under the plain language of the current version of §3113(a) that an unlawful "use" of the vehicle would bar a claimant from PIP benefits. While prior courts have inferred that an unlawful "use" of a vehicle may be relevant to the inquiry under §3113(a), these statements were made in reference to the language contained in the prior version of §3113(a). Notably, the statute's former language did include the word "use." The former version of the statute specified that a person who took a vehicle unlawfully would be unable to claim benefits "unless the person reasonably believed that he or she was entitled to take *or use* the vehicle." (Emphasis added).

Thus, in *Spectrum Health*, this Court noted that "driving while legally unable may have implications under MCL 500.3113(a) for a person who has taken a vehicle unlawfully because 'as a matter of law, one cannot reasonably believe that he or she is entitled to use a vehicle when the

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person knows that he or she is unable to legally operate the vehicle.'" *Spectrum Health*, 492 Mich at 518 n 25. The Court of Appeals in *Monaco* expanded on this language from *Spectrum Health*, finding that note 25 in *Spectrum Health* "indicates that the unlawful operation or use of a motor vehicle is only relevant" when a claimant had unlawfully taken the vehicle "and was attempting to invoke the language in §3113(a) allowing recovery when 'the person reasonably believed that he or she was entitled to take and use the vehicle,' despite the unlawful taking." *Monaco*, 317 Mich App at 749. What is clear from these decisions, though, is that the Courts were relying upon the language contained within the prior version of §3113(a). Therefore, under the prior version of §3113(a), the person's entitlement to "use" the motor vehicle was relevant to that person's entitlement to PIP benefits.

The current language of §3113(a), however, has entirely removed the language relied upon by the Courts in *Spectrum Health* and *Monaco* – whether a person "reasonably believed that he or she was entitled to take *and use* the vehicle" – and replaced it with whether the person "knew or should have known that the motor vehicle or motorcycle *was taken*

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unlawfully." The plain language of the current statute removes any reference to a person's entitlement to use the motor vehicle. The Court of Appeals' opinion essentially attempts to rewrite the statute to re-introduce this concept of "entitlement to use" the vehicle that no longer is contained in the statute. This argument should be rejected.

The legislative intent behind the Legislature's amendment of §3113(a)[6] clearly indicates that the goal was not to punish people for acting in an emergency, but rather to make sure that those who willingly used stolen vehicles were not protected by no-fault. As set forth in the legislative analysis, the Legislature passed the amended version of §3113(a) to "ensure that a person who willingly uses a stolen vehicle at the time of a car accident and injury is not protected by no-fault." Senate Legislative Analysis, SB 1140, **Ex. 5, Appx. 31**. The Legislature's intent in amending §3113(a) was not to ensure that a person who takes a long time friend's

6 When there is ambiguity in the terms of a statute, Courts may apply the rules of statutory construction. Here, given the number of subsequent decisions that conflict with one another, ambiguity exists. "If a statute is ambiguous, construction is permitted, and the rules of statutory construction 'merely serve as guides' toward the ultimate goal of discerning the intent of the Legislature." *East Lansing v Thompson*, 291 Mich App 34, 36-37; 804 NW2d 567 (2010) (citation omitted). "Courts may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions." *Id.* In order to determine legislative intent, Courts "may examine the legislative history of an act to ascertain the reason for the act and the meaning of its provisions." *Swan v Wedgwood Christian Youth & Family Servs Inc*, 230 Mich App 190, 197; 583 NW2d 719 (1998).

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vehicle to respond to a family emergency is not protected by no-fault. The trial court's decision should be affirmed.

This case is most similar to the case of *Amos v Progressive*, unpublished opinion per curiam of the Court of Appeals, issued July 13, 2023 (Docket No. 360091) **(Ex. 7**, **Appx. 43-51**). In *Amos*, the Court of Appeals held that when Mr. Amos visited his mother's house while she was asleep, and took the keys to his mother's vehicle without permission, drove while intoxicated and without a valid license and got into an accident, that there was still a genuine issue of material fact as to whether Mr. Amos had unlawfully taken his mother's vehicle, rendering him ineligible for PIP benefits under MCL 500.3113(a). The *Amos* Court expressly held:

> Applying *Monaco* to the instant case, that Omar had a suspended license and was intoxicated is not relevant to whether the taking of the vehicle was unlawful. While Omar's use of the vehicle may have been unlawful, that is distinct from an unlawful taking. Accordingly, Progressive and USAA's argument that Omar's violations of the MVC render the taking of the vehicle per se unlawful is without merit. ... In *Spectrum Health*, the Supreme Court stated that "the term 'unlawful' can only refer to the Michigan Penal Code[.]" *Spectrum*

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> *Health*, 492 Mich at 517 n 22. The Supreme Court further explained that a vehicle is taken unlawfully "if it is taken without the authority of its owner." *Id*. at 518 n 25. Accordingly, this Court's holding in *Monaco* that the unlawful use or operation of a vehicle under the MVC has no bearing on the phrase "taken unlawfully" as used in MCL 500.3113(a) appears to be a straightforward application of the Supreme Court's statements in *Spectrum*. *Amos*, p. 7-8, **Ex. 10**, **Appx. 50-51.**

The question is not whether Ms. Valentine's vehicle was *used* unlawfully by Ms. Swoope, but rather whether the vehicle was *taken* unlawfully by Ms. Swoope, and given the facts and circumstances of Ms. Swoope's family medical emergency, a genuine question for the jury to determine still remains. The trial court was correct, and the Court of Appeals was incorrect and ought to be reversed.

D. Cases Decided Since *Swoope* was Published Have Only Contributed to the General Confusion

Since the Court of Appeals published the *Swoope* decision on January 25, 2024, the Court of Appeals has faced similar factual scenarios, and yet has reached multiple, conflicting results. This Court should clarify the state of the law, overturn the Court of Appeals in *Swoope,* and return to the previously sensible understanding of MCL 500.3113(a).

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1. Pena-Cruz v State Farm Mut Auto Ins Co, No. 364284

In the case of *Pena-Cruz v State Farm Mut Auto Ins Co*, unpublished Court of Appeals decision of March 14, 2024, Docket No. 364284, **Ex. 8**, **Appx. 52-64,** the Court of Appeals considered for the first time the effect of *Swoope* on Michigan law. In *Pena-Cruz*, the plaintiffs (father Tiburcio Pena-Cruz and son Jonathan Pena-Garcia) were involved in a serious car accident while in a Ford F-150 owned by plaintiff Tiburcio Pena-Cruz's wife, Maria Garcia-Lopez. At the time of the accident, despite being married, the two were not living together, and had not lived together for 2 years. Maria Garcia-Lopez testified that she had canceled insurance on the F-150 prior to the accident in question.

The various witnesses gave in-depth testimony about whether or not Tiburcio Pena-Cruz had permission on the date of the accident. Maria Garcia-Lopez, the owner, said that she would let her son Jonathan Pena-Garcia drive the F-150, and that she gave him permission to drive it on the date in question, but that she did not give Tiburcio Pena-Cruz permission on December 19, the date of the accident. She confirmed that Tiburcio had never driven the F-150 prior to the date of the accident, and that she would

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not have let Tiburcio drive the F-150, because "Well, no, he doesn't have a license." *Pena-Cruz*, slip op at 2. On the day of the accident, Tiburcio Pena-Cruz asked his son Jonathan Pena-Garcia for a ride to work, but when Jonathan arrived at Tiburcio's house to take him to work, he told Tiburcio that he was tired and so it "just made sense" for Tiburcio to drive. *Id.* Tiburcio was waiting for another truck to clear the road, and was rear-ended by another vehicle.

State Farm, the defendant in that case, failed to pay Tiburcio's no-fault benefits, and litigation ensued. State Farm filed for summary disposition, arguing Tiburcio's no-fault claim was barred by MCL 500.3113(a). The trial court concluded that there was a question of fact whether Tiburcio unlawfully took the F-150, reasoning that the "chain or permissive use" theory was viable, because this Court "did not rule that an intermediate use of a motor vehicle may never validly grant another permission to take and use a vehicle, rather the intermediary user cannot or overcome an owner's expressed instructions that the end-user may not take or use the vehicle." *Pena-Cruz,* slip op at 3.

The Court of Appeals in *Pena-Cruz* went through the history of

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Michigan jurisprudence, before *Swoope* in its opinion, describing the use of "taken unlawfully" as used in MCL 500.3113(a). Applying *Swoope* to the facts in *Pena-Cruz*, the Court of Appeals held that because Tiburcio did not have a valid drivers' license, knew he did not have a valid drivers' license, and he took the F-150 without Maria Garcia-Lopez's permission and without taking any steps to ensure that his taking of the F-150 was authorized, that MCL 500.3113(a) applied to bar Tiburcio from receiving no-fault benefits. However, the Court of Appeals in *Pena-Cruz* acknowledged that the holding in *Swoope* was necessarily reliant on following dicta set forth in *Ahmed v Tokio Marine Am Ins Co*, 337 Mich App 1; 972 NW2d 860 (2021) that "taken unlawfully" was not limited to violations of the Michigan Penal Code, but rather encompassed any taking "contrary to Michigan law." *Ahmed*, 337 Mich App at 11.

The Court of Appeals in *Pena-Cruz* also acknowledged that *Ahmed* created a scenario where "a person could also 'take' a motor vehicle by driving it, such that … driving the motor vehicle could constitute a taking." *Pena-Cruz*, slip op at 9, (internal citations omitted). *Pena-Cruz* went on to describe *Ahmed* as standing for the proposition that "...if a person is legally

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not allowed to drive a motor vehicle pursuant to the Motor Vehicle Code, but that person takes a vehicle anyway by driving it... then the taking would be unlawful because it would be illegal under the Motor Vehicle Code for the person to drive." (*Pena-Cruz*, slip op at 9). As a result of *Swoope*, the Court of Appeals in *Pena-Cruz* held that because Tiburcio did not have Maria Garcia-Lopez's permission, Tiburcio "took" the F-150 when he drove it, and that "taking" was unlawful. (*Pena-Cruz,* slip op at 10).

The facts in *Pena-Cruz* are different from those in *Swoope*- Tiburcio specifically **knew** that he did not have Maria Garcia-Lopez's permission to drive the F-150, making the facts much more akin to *Ahmed* than to *Swoope*, where Ms. Swoope had her mother's medical emergency to deal with, and the record is silent about whether her good friend Ms. Valentine who owned the vehicle would have permitted her to take the vehicle to deal with that family medical emergency. The conflation of "unlawful taking" and "unlawful using" present in *Swoope* and *Pena-Cruz* is not supported by previous Michigan caselaw.

2. *VHS v State Farm*, No 365479

The next case chronologically to consider this question was *VHS of*

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Michigan, Inc, d/b/a Detroit Medical Center v State Farm Mutual Auto Ins Co et al, unpublished Court of Appeals decision of June 20, 2024, Docket No. 365479, **Ex. 9, Appx. 65-75**. In that case, brought by VHS to recover for medical treatment provided to Michael Dantzler following an auto accident, the Court of Appeals held that the trial court erred in holding that Mr. Dantzler unlawfully took the Dodge Charger at issue by operating the Charger while under the influence of alcohol. Factually, Mr. Dantzler was self-employed as a "street mechanic", out of his home. A frequent customer dropped off the Dodge Charger and the keys for repairs. Mr. Dantzler repaired the vehicle on February 27, 2021. Later that evening, Mr. Dantzler took two neighborhood children for a ride in the Charger. Mr. Dantzler had been drinking alcohol, and did not have a valid license. Just before midnight, Mr. Dantzler crashed into a parked vehicle, and suffered injuries. It was later learned that the Dodge Charger had been stolen from its actual owner, Anthony Martin, long before it was dropped off at Mr. Dantzler's house.

The Court of Appeals in *VHS* continued to draw the traditional distinction between *using* and *taking* for the purposes of MCL 500.3113(a).

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The Court of Appeals noted that Plaintiff VHS did not contest that Dantzler's *use* of the vehicle was unlawful, by driving without a license and driving under the influence. The only remaining question was whether the vehicle had been *taken* unlawfully. Complicating the matter in this case, it was also undisputed that the Charger had been stolen from its actual owner, Martin, and that Martin and Dantzler did not know one another. But, the Court of Appeals in *VHS* held that the statute "...requires that the person who was operating the vehicle 'knew or should have known that the motor vehicle... was taken unlawfully ' in order for that person to be disqualified from PIP benefits. MCL 500.3113(a)." *VHS*, slip op at 6. The Court of Appeals held that there was no evidence that Dantzler knew that the Charger had been stolen, and that "[i]t is the insurer's burden to establish the requirements of MCL 500.3113(a) in order to disqualify a person from eligibility for PIP benefits. *VHS,* slip op at 6 (internal citations omitted). Ultimately the Court of Appeals in *VHS* held that "a person's subsequent use, even if not authorized by the owner or if otherwise unlawful, does not constitute an unlawful taking under MCL 500.3113(a) because there is no nexus between that unlawful conduct and

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how the person gained possession of the vehicle." *VHS* slip op at 9. Unfortunately, the Court of Appeals in *VHS* misconstrued the facts of *Swoope* while distinguishing the facts of *Swoope* from those in *VHS*. In *Swoope*, a question of fact exists as to whether Ms. Swoope "should have known" that she did not have the authority to use her friend's vehicle in the face of her mother's medical emergency and believed that she had permission to use her friend's vehicle on the date of the accident. The *VHS* panel of the Court of Appeals overstated the evidence of *Swoope* and characterized the *Swoope* facts as universally cutting against Ms. Swoope, which is not consistent with the record.

3. *Bradley v Westfield*, ___ Mich App ___ (2024) (No. 365828).

The Court of Appeals next considered the question in *Bradley v Westfield Ins Co*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 365828), a published opinion. In *Bradley*, Clementine Bradley, plaintiff's mother, had a no-fault insurance policy through defendant American Select Insurance Co. Clementine lived with plaintiff Kim Bradley, and Clementine allowed plaintiff to drive her car. Plaintiff was in an accident while driving in Kentucky and sought to recover PIP benefits from

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defendant, but defendant sought rescission of the policy. According to defendant, Clementine defrauded it by failing to disclose that plaintiff lived with her. Defendant notified Clementine that it had unilaterally rescinded her policy, and defendant issued a refund for her premiums, which Clementine deposited. Ultimately, the circuit court decided that plaintiff was not entitled to receive PIP benefits from defendant, and the appeal followed.

The Court of Appeals in *Bradley* dispensed with the issues of rescission, and fraud/misrepresentation, and then addressed the application of MCL 500.3113(a) to the case. Like the other decisions described above, the Court of Appeals in *Bradley* recounted the status of the law, and then addressed *Swoope* in particular. The Court of Appeals held that *Swoope* was not binding precedent, because *Swoope* failed to follow previous binding precedent set forth in *Monaco*. According to the Court of Appeals in *Bradley*, the Court of Appeals in *Swoope* "purported to overturn eight years of binding precedent by overlooking *Monaco* and misapplying *Ahmed*." *Bradley*, slip op, p. 12. The Court of Appeals in *Bradley* went on to say that *Swoope* "ignored the plain language of the

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statute by replacing the phrase 'taken unlawfully' with the phrase 'operated unlawfully.'" *Id*.

The Court of Appeals in *Bradley* pointed out that "In *Swoope*, the panel eliminated the distinction between taking and operating; the entire analysis was under a heading titled 'UNLAWFUL OPERATION.' *Swoope*, ___ Mich App at ___; slip op at 2. However, the statute clearly directs courts to focus on operation or use following an unlawful taking. See MCL 500.3113(a)." *Bradley*, slip op at 11. The *Bradley* panel correctly noted that: "[t]he Court [in *Swoope*] relied entirely on *Ahmed*'s articulation of "a three-prong test" for analyzing MCL 500.3113..." *Bradley,* slip op at 12. The Court then quoted the statement in *Ahmed* that:

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

The *Bradley* panel gets at the heart of the logical failure behind the decision in *Swoope*: while operating a vehicle without a driver's license

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might be a violation of criminal law, the key concept in *Ahmed* is that the violation of criminal law must **lead** to the taking. *Ahmed , supra*. As in *Bradley*, the 'violation of criminal law' here (driving without a valid license) did not lead to the taking, and thus did not satisfy the requirements of *Ahmed*.

The *Bradley* panel put it plainly:

> The present case [*Bradley*] cannot be meaningfully distinguished from *Swoope* and *Monaco*. Just like those cases, plaintiff took a vehicle with the owner's permission then operated it without a valid license. In *Monaco*, this Court determined that such facts do not constitute an unlawful taking, but in *Swoope* this Court determined that such facts do constitute an unlawful taking. "When a panel is confronted with two conflicting opinions published after November 1, 1990, the panel is obligated to follow the first opinion issued." *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 473; 556 NW2d 517 (1996). Because *Monaco* was decided first, *Monaco* is the case we must follow. *Bradley,* slip op at 12.

To highlight the problem further- in *Monaco* the driver at issue was 15, and could never have been able to drive legally. According to the holding of *Swoope*, which conflates "unlawful taking" with "unlawful use" into "unlawful operation", the underage driver in *Monaco* would not have been

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eligible for PIP benefits had *Swoope* been the law of the state at the time. As the panel held in *Bradley*, "In *Monaco*, this Court determined that such facts do not constitute an unlawful taking, but in *Swoope* this Court determined that such facts do constitute an unlawful taking." *Bradley*, slip op at 12.

4. *Witt v Smithson*, No. 367792

The most recent case to consider this issue is *Witt v Smithson*, an unpublished Court of Appeals decision of January 16, 2025, Docket No. 367792, **Ex. 10, Appx. 76-81**. *Witt* involved a collision between a motorcycle driven by plaintiff Witt and a motor vehicle driven by defendant. Plaintiff's significant other (Vaughn) owned the motorcycle plaintiff was using, but plaintiff testified that he considered the motorcycle his own. Plaintiff primarily used the motorcycle, and did not have to ask Vaughn for permission to use the motorcycle. Plaintiff Witt also did not have a license when the accident occurred, and had not had one for years It was undisputed that Vaughn knew that he didn't have a license but allowed Witt to use the motorcycle anyway. Plaintiff Witt sued the insurer of Smithson's vehicle, Auto-Owners Insurance Company("Auto-Owners"), for PIP benefits. Auto-Owners moved for summary disposition pursuant to MCL

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500.3113(a), arguing that Witt's taking of the motorcycle was unlawful, as he did not have a license to drive. Moreover, Auto-Owners added that it was unlawful under MCL 257.904(2) for Vaughn to allow someone without a license like plaintiff to "operate" her motorcycle, which made it unlawful for plaintiff to take the motorcycle. Witt responded that he had permission to take the motorcycle, though his *use* may have been unlawful. The trial court denied Auto-Owners' motion, finding that plaintiff did not unlawfully take the motorcycle because he had Vaughn's permission to take it.

The Court of Appeals affirmed the decision of the trial court, finding that the result was controlled by *Monaco*. "*Monaco* controls the outcome of this case. It is undisputed that Vaughn owned the motorcycle involved in the collision and allowed plaintiff to take it. This means that plaintiff's taking of the motorcycle was not unlawful, even if his subsequent use of the motorcycle was. *Witt*, slip op at 6. The Court of Appeals in *Witt* distinguished *Swoope* from the facts in *Witt* in much the same way as the court did in *VHS*, *supra.* In *Swoope,* a question of fact exists as to whether Ms. Swoope "should have known" that she did not have the authority to use her friend's vehicle in the face of her mother's medical emergency and believed

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that she had permission to use her friend's vehicle on the date of the accident. The *Witt* panel of the Court of Appeals overstated the evidence of *Swoope* and again characterized the *Swoope* facts as universally cutting against Ms. Swoope, which is not consistent with the record.

IV. CONCLUSION

The Court of Appeals in *Swoope* ignored the prior binding precedent of *Monaco,* and conflated "unlawful taking" and "unlawful use" into one category, "Unlawful Operation". This conflation has led to confusion of the issues. The question is not whether Ms. Valentine's vehicle was *used* unlawfully by Ms. Swoope, but rather whether the vehicle was *taken* unlawfully by Ms. Swoope, and given the facts and circumstances of Ms. Swoope's family medical emergency, a genuine question for the jury to determine still remains. The trial court was correct, and the Court of Appeals was incorrect and ought to be reversed.

If the *Swoope* panel is correct, and "unlawful taking" with "unlawful use" should be conflated into "unlawful operation", then the proper action for the panel in *Swoope* would have been to follow the dictates of MCR 7.215(C)(2) and MCR 7.215(J)(1) and recognize that *Monaco* was

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precedentially binding. If the *Swoope* panel was of the view that *Monaco* was wrongly decided, it had to follow the dictates of MCR 7.215(J), declare its disagreement with the holding in *Monaco* and request a vote of the entire Court on the impaneling of a special panel of the court to resolve this conflict. Not to unilaterally overturn Michigan caselaw. The opinion of the Court of Appeals in *Swoope* was in error, and should be overturned by this Court.

RELIEF REQUESTED

For the foregoing reasons, the Plaintiff/Appellee, Carlonda Naishe Swoope, respectfully requests that this Honorable Court overturn the Court of Appeals' erroneous decision, and reinstate the holding of the trial court denying defendant's motion for summary disposition, for the reasons stated above.

Respectfully submitted,

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Dated: June 3, 2025

CERTIFICATION PURSUANT TO MCR 7.312(A)(1) and 7.212(B)(1)

E. Jason Blankenship, attorney for plaintiff-appellant, hereby certifies pursuant to MCR 7.312(A)(1) and 7.212(B)(1) that this brief was typed using the OpenOffice word processing program. That program has a function which can calculate the total number of words contained in a document. According to that program function, there are **9,721** words in this brief.

Signed,

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