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STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS, as Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 164953

Court of Appeals No. 356914

Genesee County Circuit Court No. 13-101626-NF

SUSAN CHILDERS, as Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 164954

Court of Appeals No. 356915

Genesee County Circuit Court No. 13-101626-NF

DEFENDANT-APPELLANT PROGRESSIVE'S SUPPLEMENTAL (MOAA) BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT OF THE QUESTIONS PRESENTED

I. Childers' claim for PIP benefits was subject to the expired 1-year statute of limitations of MCL 500.3145(1), and any claim the MPCGA might have had was explicitly derivative of the injured claimant's rights. On the statute of limitations issue, therefore, should this Court review and reverse the published opinion of the Court of Appeals, where the erroneous conclusions reached in that opinion (a) are the direct result of its demonstrably false premise that the guaranty act provides the MPCGA with a statutory cause of action, and (b) flow from the court's failure to apply or even consider the text of the act's statutory provisions that correctly resolve the question?

Defendant-Appellant Progressive answers, "Yes."

Intervening Plaintiff-Appellee MPCGA has answered, "No."

Plaintiff-Appellee Childers has answered, "No."

II. Should the Court grant review and reverse the Court of Appeals' holding that PMIC is liable under MCL 500.3114(4) for payment of PIP benefits to Childers as the occupant of the uninsured vehicle owned and operated by Shaina Groulx, where PMIC assumed no risk of loss whatsoever on behalf of Groulx when she was operating her own uninsured vehicle, and thus did not qualify as her "insurer" within the meaning of MCL 500.3114(4)?

Defendant-Appellant Progressive answers, "Yes."

Intervening Plaintiff-Appellee MPCGA has answered, "No."

Plaintiff-Appellee Childers has answered, "No."

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ARGUMENT

I. A claim against a no-fault insurer for payment of PIP benefits accrues as each economic loss is incurred, §3110(4); but subject to two inapplicable exceptions, an action for such benefits may not be commenced against the insurer more than a year after the injury-causing accident occurred. §3145(1). These provisions apply to the MPCGA when it assumes the "covered claims" of an insolvent insurer and identifies another potentially responsible insurer, since its rights are no greater than those assigned to it by the injured claimant. §7935(2).

In granting oral argument on Defendant-Appellant Progressive's application for leave to appeal, the Court has asked the parties to brief three questions, the first two of which concern Defendant-Appellant's statute of limitations issue. The two questions are as follows:

> (1) [A]t what point does a claim for recovery of personal protection insurance benefits payable under the no-fault act accrue when an insurer providing those benefits is declared insolvent and another insurer is identified by the Michigan Property and Casualty Guaranty Association[?] [S]ee generally MCL 600.5827; *Frank v Linkner*, 500 Mich 133 (2017); *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339 (2006);
>
> (2) [W]hat statute of limitations period would apply to such a claim[?] [S]ee MCL 500.3145(1); MCL 600.5813[.]

(Order, May 26, 2023, Supreme Court Nos. 164953 and 164954).

The first of these two questions posed by the Court asks when the claim accrues, but does not ask the ultimate question of when an MPCGA claim against an identified insurer would be barred by the applicable statutory period of limitations. That issue appears to be the focus of the Court's second question posed to the parties. As the following will show, however, the answer to the first question does not necessarily impact the answer to the second question. Because the two questions are interrelated, they are analyzed here together.

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Initially, Progressive observes that the first of the two questions itself has two components: first, at what point does a claim for recovery of no-fault PIP benefits accrue generally, as in the typical case when the claimant is the injured person; and second, whether the answer is any different in the atypical case in which the insurer already paying benefits is declared insolvent, the MPCGA steps in and accepts responsibility for that insurer's "covered losses," then identifies another no-fault insurer potentially responsible for the injured person's benefits. As the following will show, the first component–the typical case–is directly answered by statute, MCL 500.3110(4). And the answer to the second component is "no," the analysis is no different when the MPCGA has stepped in to pay benefits and is seeking potential reimbursement from another insurer; this, too, is directly answered by statute, MCL 500.7935(2).

According to §3110(4) of the no-fault act, a claim for recovery of no-fault PIP benefits accrues as each economic loss underlying the claim is incurred:

> Personal protection insurance benefits payable for accidental bodily injury *accrue* not when the injury occurs but *as the allowable expense, work loss or survivors' loss is incurred*.

MCL 500.3110(4) (emphasis added); *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 483-484; 673 NW2d 739 (2003). Importantly, however, while a claim for recovery of PIP benefits "accrues" as each "allowable expense" or other economic loss is "incurred," these accrual dates are not always material to whether an action is barred.

On this issue, the Court's order directs that the parties consider MCL 600.5827 – which was cited by the Court of Appeals in its opinion (**Exh. 1** – *Childers v Progressive Marathon Ins Co*, __ Mich App __ (Sept 15, 2022), slip op at 9, *Apx. 10*) but was misapplied,

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as explained in Defendant Progressive's Application for Leave to Appeal, pp. 26-27. In full, §5827 states as follows:

> *Except as otherwise expressly provided*, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections [MCL 600.]5829 to [MCL 600.]5838 and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

MCL 600.5827 (emphasis added). By its terms, the statute treats the date on which a claim accrues as the default date for when an action's period of limitations begins to run, but the opening phrase subjects the general rule to an explicit exception. The no-fault act provides such an explicit exception.

As it existed prior to the amendments enacted by 2019 PA 21, §3145(1) stated as follows:

> *An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury* unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.

MCL 500.3145(1) (as it existed prior to the amendments of 2019 PA 21) (emphasis added).

By its terms, the opening sentence of §3145(1) provides a strict 1 year limitation period that runs from the date of the injury-accident. This 1 year period of limitations does

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not apply, however, if during the first year post-accident the insurer is given notice of injury and/or has already made a payment of benefits for the injury. In that event, the date on which a claim for PIP benefits accrues *does* establish the starting point on a 1 year statute of limitations: "If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred." §3145(1) (mirroring the language of §3110(4) for when a claim accrues).[1]

In this case, where Progressive received no notice of injury at anytime during the 1 year period following the accident, the 1 year statute of limitations triggered by the accrual of a claim (i.e., the date on which an allowable expense, work loss or survivors' loss is incurred) *is inapplicable*. Instead, the strict 1-year limitation period running from the date of the accident applies.

In *Frank v Linkner*, 500 Mich 133; 894 NW2d 574 (2017), at issue were two different limitation periods contained within the Michigan Limited Liability Company applicable to an LLC member's action against the managers or other members of the LLC. In its analysis of the three-year limitation provision, the Court had occasion to distinguish a statute of limitations from a statute of repose.

Citing Black's Law Dictionary, the Court in *Frank* said that a statute of limitations is a law that bars claims after a specified period based on the date when the claim accrued,

---

[1] In such an action that is timely filed by virtue of a prior payment or notice given in the first year, the statute imposes a 1-year-back rule that limits the benefits eligible for recovery to those expenses or losses incurred within 1 year preceding commencement of the action. §3145(1) (third sentence). This provision is not at issue here.

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while a statute of repose is a statute that bars any suit brought after a specified time from a particular event, such as the date on which the defendant acted. "That is, a statute of limitations is generally measured from the date a claim accrues, while *a statute of repose is measured from some other particular event*, such as the date of the last culpable act or omission of the defendant. ... Moreover, a statute of repose cuts off the liability of a defendant, and it may thereby prevent a cause of action from ever accruing." *Frank*, 500 Mich at 142 (internal quotation marks and citations omitted) (emphasis added).

Based on the clarification provided by the Court in *Frank*, *supra*, the no-fault act's period of limitation set forth in the first sentence of §3145(1) operates as a statute of repose, since it cuts off an insurer's potential liability for payment of benefits and is measured not from the date of a claim's accrual but "from some other particular event" – the date on which the accident that caused the injury occurred. By its unambiguous terms, this limitation of action provision applied here to preclude "[a]n action for recovery of [PIP] benefits" from being commenced against Progressive.

Accordingly, because §3145(1) "expressly provides" otherwise, the general rule in MCL 600.5827 that "the period of limitations runs from the time the claim accrues" does *not* apply to an action against a no-fault insurer seeking recovery of PIP benefits where, as here, the insurer made no previous payments and received no notice of injury during the first year. Childers, therefore, possessed no viable claim against Progressive by the time his suit was commenced against Progressive. The lower courts erred in concluding otherwise.

Nor does the insolvency of Childers' primary insurer and the consequent involvement of the MPCGA alter the analysis. Contrary to the Court of Appeals' assumption, the

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guaranty act does *not* bestow upon the MPCGA a statutory cause of action, and thus MCL 600.5813 (default six-year statute of limitations) has no application to this case. (*See*, Defendant-Appellant Progressive's Application for Leave to Appeal, pp. 21-23, identifying the Court of Appeals' mistaken references to a "covered claim" under the guaranty act as if it were a right of action enjoyed by the MPCGA as opposed to a covered *obligation* of the insolvent insurer assumed by the MPCGA) (see MCL 500.7925).

Rather, as set forth in MCL 500.7935(2), the MPCGA, to the extent it has made payments on behalf of the injured person, is statutorily deemed to have received by *assignment* from the injured person whatever rights he or she possessed to pursue payment of the "covered claim" from any other source. As an assignee, the MPCGA possessed rights no greater or lesser than those possessed by the assignor and was subject to the same defenses as those that could have been asserted by the assignor. *Jawad A Shah, MC, PC v State Farm Mut Auto Ins Co*, 342 Mich App 182, 204; 920 NW2d 148 (2006); *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343; 715 NW2d 324 (2006). This point is reinforced by the guaranty act's "credit" provision on which the appellees base so much of their argument. Under MCL 500.7931(3), the MPCGA's right to a "credit" for benefits available under any other insurance policy applicable to the subject loss is wholly dependent on whether those benefits are "recoverable" by the underlying claimant. (See, Defendant-Appellant Progressive's Application for Leave to Appeal, pp. 17-19).

Therefore, in answer to the Court's first two questions presented in its Order granting oral argument on Progressive's application, the point at which a claim for payment of PIP benefits accrues, per §3110(4), is the date on which each economic loss is incurred, but any

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action for such benefits is precluded (subject to inapplicable exceptions) if not brought within 1 year of the injury-causing accident, §3145(1); and the fact that the MPCGA has become involved by assuming the "covered claims" of an insolvent insurer and identifies another potentially responsible insurer does not alter these statutory edicts, since its rights are no greater than those assigned to it by the injured claimant.

In short, while §3110(4) establishes when a claim for PIP benefits accrues, in this case the accrual date(s) did not trigger an applicable statute of limitations against Progressive because Progressive had made no previous payments and no notice of injury was provided anytime during the first year after the accident. Accordingly, under the first sentence of §3145(1), the action commenced more than 1 year after the accident was barred.

II. Since Progressive assumed no risk of loss on behalf of Shaina Groulx when she was operating her own uninsured motor vehicle, it did not qualify as her "insurer" within the meaning of §3114(4) of the no-fault act.

As its third question posed to the parties in its Order granting oral argument on Progressive's application for leave to appeal, the Court asks "(3) whether the appellant is an insurer in the chain of priority insurers," citing MCL 500.3114(4) (as it existed prior to the amendments enacted by 2019 PA 21), *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 432; 527; 740 NW2d 503 (2007), and *Amerisure Inc Co v Coleman*, 274 Mich App 423; 733 NW2d 93 (2007). Progressive submits the answer to this question is "No," and accordingly, independent of the statute of limitations issue raised in this case, Progressive was properly

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granted summary disposition by the trial court and the Court of Appeals erred in reversing that order.

The Progressive auto insurance policy in this case was issued to Matthew Groulx, who had no involvement in this case or the motor vehicle accident giving rise to it. Under MCL 500.3114(1), a policy of no-fault personal protection insurance ordinarily applies to the named insured, his or her spouse, and a resident of either domiciled in the same household. As it pertains to the Progressive policy, of course, claimant Justin Childers qualified as none of these. If he was included anywhere in the no-fault statutory order of priorities for entitlement to coverage, it would have been under MCL 500.3114(4). As it existed prior to the amendments enacted under 2019 PA 21, §3114(4) stated as follows:

> ... [A] person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> a. *The insurer of the owner* or registrant of the vehicle occupied.
>
> b. *The insurer of the operator* of the vehicle occupied.

MCL 500.3114(4) (emphasis added). The vehicle occupied by Justin Childers at the time of his accident was neither owned nor being operated by Progressive's policyholder, Matthew Groulx. The occupied vehicle, it is undisputed, was uninsured; and it was both owned and operated by Shaina Groulx. And Progressive was *not* her "insurer."

Plaintiff Childers and Intervening Plaintiff MPCGA, however, contend that Shaina's potential coverage under §3114(1) as Matthew's sister residing in his home, and her resulting ability to claim benefits from the Progressive policy under other circumstances not present

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in the case at bar, rendered Progressive the "insurer" of Shaina Groulx for purposes of §3114(4). Similarly, the Court of Appeals construed §3114(4) as requiring an inquiry into whether Shaina was an "insured person" under the Progressive policy (equating her potential status as an "eligible injured person" with "insured person") (**Exh. 1**, slip op at 11, *Apx. 12*), regardless if, under the circumstances presented, she would actually possess any coverage under the policy.

Yet at no time while occupying her own uninsured motor vehicle could Shaina Groulx have qualified as "insured" or "eligible" for PIP benefits under §3114(4), even if she was injured in an accident. She was disqualified from any such eligibility under both the statute, MCL 500.3113(b), and the terms of the Progressive policy (see Defendant-Appellant Progressive's Application for Brief on Appeal, p 35, n 13, quoting applicable exclusions from coverage). The Court of Appeals' reasoning, Progressive submits, and the analysis offered by Appellees Childers and MPCGA, is fatally flawed. The opinion of the Court of Appeals fails to come to terms with the fact that the dispositive inquiry is *not* whether the Progressive policy ever identifies Shaina in any context as an "insured person" but, rather, whether, *Progressive* qualified as *her "insurer"* – §3114(4) – which is determined by *whether Progressive bore any insured risk on her behalf*. And here, Progressive did not.

The controlling test for whether an insurance company will be deemed "the insurer" of the owner or operator of a particular motor vehicle, for purposes of §3114(4), is provided in *Amerisure Ins Co v Coleman*, 274 Mich App 432; 733 NW2d 93 (2007), as limited by *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527; 740 NW2d 503 (2007). Under *Coleman*, the inquiry for determining whether §3114(4) imposes coverage on an insurer to

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pay an injured passenger's PIP benefits focuses on whether, "at the time of the accident," the occupied vehicle's owner or operator was being protected by the insurer – whether that insurer, in other words, had assumed a risk of loss for that owner or operator:

> The term "insurer" [as it appears in §3114(4)] is not defined in the no-fault act. Black's Law Dictionary (7th ed.) defines "insurer" as "[o]ne who agrees, by contract, **to assume the risk of another's loss and to compensate for that loss**. Accordingly, we must determine whether, under the terms of the Titan insurance policy, Titan was the insurer of Bernard, who was the operator of the vehicle at the time of the accident.

Coleman, 274 Mich App at 435-436 (emphasis added). Here, since Shaina Groulx was operating her own uninsured motor vehicle, Progressive bore no risk whatsoever on her behalf and, accordingly, it was not her "insurer."

In *Dobbelaere*, the Court confirmed that merely qualifying as a resident relative of a named insured policyholder and thus potentially eligible for PIP coverage under other circumstances does *not* render the issuer of that policy "the insurer" of the resident relative: "[T]he fact that an individual might derivatively claim PIP benefits through a named insured under MCL 500.3114(1) *does not render the policy issuer the 'insurer' of that individual* for purposes of MCL 500.3114(4)." *Dobbelaere*, 275 Mich App at 532 (emphasis added).

Shaina's status as a resident relative of Progressive's named insured might have enabled her to claim benefits or seek coverage from Progressive *in other circumstances*. For instance, while driving her brother's car, Shaina would have the protections of Progressive's BI liability coverage and the policy's UM/UIM coverage. Indeed, *in other circumstances*, she likewise could have claimed benefits under the policy's no-fault PIP coverage ("Part II – Personal Protection Insurance Coverage") (*See*, **Exh. 6** – Progressive Michigan Auto

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Policy, pp. 7-12, *Apx. 134-139*). For instance, if she were injured as a passenger in someone else's vehicle or even if struck as a pedestrian by another car, she would have qualified for benefits under her brother's policy in accordance with MCL 500.3114(1) and MCL 500.3115(1) (again, as it existed prior to the 2019 PA 21 amendments).

But in accord with *Coleman* and *Dobbelaere*, this *potential* right to benefits under these inapplicable circumstances did not render Progressive her "insurer" for all times and all circumstances–any more than Progressive would be deemed the "insurer," for purposes of §3114(4), of every unknown future occupant of his vehicle or every unknown pedestrian that might *potentially* be injured by Matthew Groulx's covered vehicle. Under the circumstances of *this* case and the accident in which Childers was injured, where Shaina Groulx was operating her own uninsured vehicle, Shaina *had no coverage whatsoever* under the Progressive policy. Progressive assumed no risk with respect to Shaina Groulx–which is the operative test under *Coleman*, 274 Mich App 435–so Progressive was not her "insurer."

Had Ms. Groulx insured her own car as she was required to do under the law, MCL 500.3101(1), *that* insurer would have been "the insurer of the owner [and] operator" of the vehicle occupied by Justin Childers, and he could have looked to that insurer as a next-in-priority source of benefits under §3114(4). But where Ms. Groulx did not maintain any such insurance, there is no principled basis for concluding that Progressive became her "insurer" when it neither insured her car nor insured Ms. Groulx herself with respect to her use of that car. This was not a "risk" "assume[d]" by Progressive.

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RELIEF REQUESTED

For all the foregoing reasons, and those detailed in its principal application brief, Defendant-Appellant, PROGRESSIVE MARATHON INSURANCE COMPANY, respectfully requests that the Court *reverse* the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition in favor of Defendant Progressive on either or both of the grounds raised in this appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Defendant-Appellant, Progressive Marathon Insurance Company, certifies pursuant to MCR 7.312(A) and MCR 7.212(B)(1) that this supplemental appellant's brief contains 3,420 words, including headings, footnotes and quotations, but excluding caption, tables and signature.

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PROOF OF SERVICE

DANIEL S. SAYLOR, on behalf of Defendant-Appellant, Progressive Marathon Insurance Company, certifies that on **July 20, 2023**, he electronically filed said Defendant-Appellant's **Supplemental (MOAA) Brief in Support of Its Application for Leave to Appeal**, together with the **Appellant's Appendix** and this **Proof of Service**, with the Clerk of the Supreme Court using the *MiFile* TrueFiling system, which will notify and send copies of same by e-service to Plaintiff-Appellee Childers' attorney, **Richard F. Burns, Jr., Esq.**,

Law Offices of Richard F. Burns, Jr., P.C., 30150 Telegraph Rd., Ste. 300, Bingham Farms, MI 48025, at **richard@richardburnslaw.com**; and to Intervening Plaintiff-Appellee MPCGA's attorney, **Benjamin W. Jeffers, Esq.**, Hickey, Hauck, Bishoff, Jeffers & Seabolt, PLLC, One Woodward Avenue, Ste. 2000, Detroit, MI 48226, at **bjeffers@hhbjs.com**.

/s/ Daniel S. Saylor
DANIEL S. SAYLOR

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