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STATE OF MICHIGAN

IN THE SUPREME COURT

SPINE SPECIALISTS OF MICHIGAN, PC,

Plaintiff-Appellant,

v.

MEMBERSELECT INSURANCE COMPANY,
Defendant-Appellee

Supreme Court No. 165445

Court of Appeals No. 358296

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

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BRIEF AMICUS CURIAE OF THE COALITION PROTECTING AUTO NO-FAULT (CPAN)

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

More commonly known as CPAN, the Coalition Protecting Auto No-Fault was founded in 2003 by 26 professional associations to: (1) advance their strongly held belief that it was in the public interest to preserve Michigan's model No-Fault insurance system; and (2) ensure that the auto insurance industry kept the promise made to Michigan citizens when the No-Fault Act was passed.

Originally, CPAN membership consisted of 11 consumer groups and 15 major medical groups, representing constituencies with widely divergent political views. Despite their differences, these associations united behind the common objective of protecting the rights of no-fault patients and providers. In 2009, CPAN opened membership to the general public and now includes consumers, individual professionals, and private businesses, as well as professional organizations.

The members of CPAN now number over 1,000 and include the Michigan Association for Justice, Michigan State Medical Society, Michigan Osteopathic Association, Michigan Association of Chiropractors, Eisenhower Center, Michigan Brain Injury Provider Council, Michigan Dental Association, Michigan Home Care and Hospice Association, Michigan Rehabilitation Association, Spectrum Health System, Michigan Assisted Living Association, Michigan Orthotics, and Prosthetics Association, Brain Injury Association of Michigan, Mary Free Bed Rehabilitation Hospital, ATPA

[1] Pursuant to MCR 7.212(H)(4), no counsel for any party in this case authored this brief in whole or in part or contributed money to fund the preparation or submission of this brief.

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Michigan, Michigan Protection and Advocacy, Michigan Paralyzed Veterans of America, Michigan Disability Rights Coalition, Peckham, NeuroRestorative of Michigan, Special Tree, Origami Rehabilitation, PharmaScript, Hope Network Neuro Rehabilitation, Lighthouse Neuro Rehabilitation, Rehab Without Walls, Siporin & Associates, The Recovery Project, and other stakeholders, individuals, accident survivors, family members, and care providers. CPAN pursues its mission on all fronts, including public education (town halls, roundtable events, seminars, and information resources), working with the Legislature, monitoring regulatory activity, and advocating the views of its members in our appellate courts. CPAN has appeared as amicus curiae in approximately 40 appellate cases addressing a variety of No-Fault issues vital to its members. See https://protectnofault.org/legal-efforts.

This Court's decision in this case is of great importance to CPAN because it will answer the question of whether the one-year-back tolling amendments to MCL 500.3145(3) apply to all actions for no-fault benefits commenced after the June 11, 2019 effective date of those amendments, or only to those actions (or portions thereof) seeking to compel payment of benefit claims that accrued after that date. For the reasons set forth herein, it is the position of CPAN that the § 3145(3) tolling amendments apply to all benefits being sought in an action for PIP benefits filed after the effective date of those amendments; and that the Court of Appeals erred in holding to the contrary.

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INTRODUCTION AND REQUESTED RELIEF

This brief is being filed on behalf of the **Coalition Protecting Auto No-Fault (CPAN)** pursuant to this Court's Order dated November 22, 2023, in which this Court invited CPAN and other interested organizations to file briefs amicus curiae to address the issue of "*whether the Court of Appeals correctly held that the tolling provision of the one-year-back rule, MCL 500.3145(3), does not apply to claims for personal protection insurance no-fault benefits that accrued, MCL 500.3110(4), before the amendment to § 3145 took effect on June 11, 2019.*" With regard to this issue, it is CPAN's position for the reasons set forth herein that the Court of Appeals erred in reaching its holding below; and that the new tolling provisions of MCL 500.3145(3) should be interpreted to apply to all suits filed after the effective date of the newly amended no-fault act.

WHEREFORE, the Coalition Protecting Auto No-Fault (CPAN) requests for the reasons set forth herein that in deciding this case, this Court issue a decision clearly recognizing that: (1) the one-year-back tolling amendments of MCL 500.3145(3) apply to all lawsuits filed after the effective date of those amendments; and (2) the Court of Appeals erred in reaching a contrary conclusion in its decision below.

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LAW AND ARGUMENT

I. The one-year-back tolling amendments of MCL 500.3145(3) must be interpreted to apply to all benefits being sought in an action filed after the June 11, 2019 effective date of those amendments because when they were passed, they were given immediate effect by the Legislature.

A. It is well settled that the one-year-back rule is a statutory defense that limits the amount of benefits recoverable in a timely filed no-fault action.

Prior to the amendments of PA 21/22, the auto no-fault one-year-back rule was set forth in MCL 500.3145(1) of the Michigan Auto No-Fault Act, which provided:

> *Sec. 3145. (1) 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. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.*

This Court has long recognized that the first and second sentences of this provision create a general statute of limitations that governs the time for bringing suit. Whereas the third sentence containing the *"one-year-back"* rule distinctly operates as a statutory limitation on the amount of benefits that can be recovered should an action be timely

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commenced within the limitations period. Specifically, in *Welton v Carriers Ins Co*, 421 Mich 571, 576 (1984),[2] this Court explained that:

> *M.C.L. § 500.3145(1); M.S.A. § 24.13145(1) contains two limitations on time of suit* ***and one limitation on period of recovery****:*
>
> *(1) An action for personal protection insurance (PPI) benefits must be commenced not later than one year after the date of accident, unless the insured gives written notice of injury or the insurer previously paid PPI benefits for the injury.*
>
> *(2) If notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.*
>
> *(3) Recovery is limited to losses incurred during the one year preceding commencement of the action.*

Welton, supra, at 576 (emphasis added)

The third of these pronouncements is commonly referred to as the "*one-year-back*" rule, and it is a product of the third sentence in the pre-amended version of § 3145(1). This interpretation was later reaffirmed in the case of *Devillers v. Auto Club Ins Ass'n*, 473 Mich 562 (2005), where this Court stated, "*As we noted in Welton . . . § 3145(1) contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered.*" *Devillers, supra,* at 574.

After *Devillers* was decided, this Court again interpreted the provisions of § 3145(1) in the case of *Cameron v. Auto Club Ins. Ass'n,* 476 Mich 55 (2006), which overruled portions of the *Welton* decision. However, in doing so, the Court nevertheless reaffirmed that the third sentence of § 3145(1) operates as a damages limitation, not as a statute of limitations. Specifically, in its majority opinion, the *Cameron* Court reiterated:

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[2] overruled on other grounds in *Cameron v. Auto Club Ins. Ass'n*, 476 Mich 55 (2006)

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> *This Court has consistently interpreted MCL 500.3145(1) as containing three distinct periods of limitations: two limitations on the time for filing suit (one provided in the first half of the first sentence of MCL 500.3145[1] that starts on the date of the accident, and a second, later one provided in the second sentence of MCL 500.3145[1] that starts at the time of the most recent allowable expense if the insured has given notice of injury or the insurer has previously paid benefits), and one limitation on the period for which benefits may be recovered (the one-year-back rule contained in the third sentence of MCL 500.3145[1]).*

Cameron, supra, at 69.

Notably, the foregoing interpretations of § 3145(1) were again reaffirmed in the case of *Joseph v Auto Club Ins Ass'n,* 491 Mich 200 (2012), where this Court observed, "*As early as 1984, this Court explained that this statutory provision contains separate and distinct limitations periods that relate both to the timing in which an action may be brought and the damages that may be recovered." Id.* at 207. On this basis, the Court then instructed that under this provision:

> *[A] person filing a claim for PIP benefits must do so within a year of the accident unless the insured gives written notice of injury or previously received PIP benefits from the insurer. If notice was given or payment was made, the action can be commenced within one year of the most recent loss. In any case, though, recovery is limited only to losses that have been incurred during the year before the filing of the action.*

Id. at 208.

Given these repeated pronouncements, the Court of Appeals has aptly recognized that because the first two sentences in § 3145(1) set forth a statute of limitations, they are subject to certain tolling provisions contained in MCL 600.5851 of the Revised Judicature Act. Whereas, the one-year-back limitation contained in the third sentence (which is not a statute of limitations) is not. For example, in the case of *Linden v Citizens Ins Co of Am,* 308 Mich App 89, 97–98 (2014), the Court of Appeals held:

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> *"MCL 500.3145(1) contains two limitations on the time for commencing an action...." Cameron, 476 Mich. at 61, 718 N.W.2d 784. Accordingly, the first sentence is considered a "statute of limitations," to which MCL 600.5851(1) applies. See Joseph v. Auto Club Ins. Ass'n, 491 Mich. 200, 207–208, 214, 815 N.W.2d 412 (2012). However, MCL 500.3145(1) also contains a limitation on "the period for which benefits may be recovered." Cameron, 476 Mich. at 61, 718 N.W.2d 784. Specifically, the third sentence of MCL 500.3145(1) provides that a 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). This limitation on damages is commonly referred to as the "one-year-back rule." See Cameron, 476 Mich. at 62, 718 N.W.2d 784; Joseph, 491 Mich. at 214, 815 N.W.2d 412.*
>
> *Unlike the statute of limitations, the one-year-back rule is not subject to the minority/insanity tolling provisions of MCL 600.5851(1). Joseph, 491 Mich. at 203, 222, 815 N.W.2d 412. Further, the one-year-back rule "must be enforced by the courts of this state as our Legislature has written it...." Devillers v. Auto Club Ins. Ass'n, 473 Mich. 562, 586, 702 N.W.2d 539 (2005); see also Henry Ford Health Sys. v. Titan Ins. Co., 275 Mich.App. 643, 741 N.W.2d 393 (2007).*

When the decades of precedent dealing with the pre-amended version of § 3145(1) is properly applied, it dictates that we recognize that the one-year back rule is not a statute of limitations. Rather, it is a statutory defense that operates as a damages limitation. ***It is a purely procedural rule that only becomes operative "if" an action to compel payment of no-fault PIP benefits is timely commenced within the statute of limitations period also created by that provision.***

B. When the Legislature amended § 3145 of the no-fault act in 2019, it did not amend the one-year-back rule defense; it simply added a new provision that equitably tolls the running of the one-year-back period for that defense in the manner previously recognized by this Court in *Lewis v DAIIE*.

When it amended § 3145 in 2019, the Legislature did not eliminate the one-year-back defense. It simply added a provision that suspends the running of the one-year-back period from the time a claim is submitted until an insurer issues a formal claim

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denial—so long as the claim is pursued with reasonable diligence. This tolling amendment is set forth in § 3145(3) of the new no-fault act as follows:

> *(1) An action for recovery of personal protection insurance benefits payable under this chapter for an accidental bodily injury may not be commenced later than 1 year after the date of the accident that caused the injury unless written notice of injury as provided in subsection (4) 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.*
>
> *(2) Subject to subsection (3), 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.*
>
> *(3) A period of limitations applicable under subsection (2) to the commencement of an action and the recovery of benefits is tolled from the date of a specific claim for payment of the benefits until the date the insurer formally denies the claim. This subsection does not apply if the person claiming the benefits fails to pursue the claim with reasonable diligence.*

This tolling provision is nothing new. For nearly 20 years, the one- year-back period was considered to be equitably tolled until a no-fault insurer issued a formal denial so long as the claim was being pursued with reasonable diligence. This equitable tolling was first recognized by the Court of Appeals in the case of *Richards v American Fellowship Mutual Ins Co*, 84 Mich App 629 (1978). There, this Court held that the one-year-back rule was tolled from the date the claimant gave notice of the claim until the insurance company formally denied liability for the claim. In so holding, this Court recognized that tolling the one-year-back rule in this manner was predicated on grounds of equity. Specifically, the Court observed:

> *If we were to accept defendant's interpretation of the statutory provision, we would in effect be penalizing the insured for the time the insurance company used to assess its liability. To bar the claimant from judicial enforcement of his insurance contract*

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> *rights because the insurance company has unduly delayed in denying its liability would run counter to the Legislature's intent to provide the insured with prompt and adequate compensation.*

Richards, supra, at 634.

For many years, "*Richards*" tolling was universally accepted as a valid way to suspend the running of the one-year-back period of § 3145. Under *Richards*, if a claimant submitted an expense claim within the one-year-back period and the insurance company did not act on the expense for many months, the "*one year clock stopped ticking*" and did not resume ticking again until the insurer formally denied the claim. This allowed claimants more time to commence litigation without forfeiting the claim.

The *Richards* tolling rule was officially adopted by this Court in the case of *Lewis v DAIIE,* 426 Mich 93 (1986). In doing so, the Court recognized that the tolling of the one-year-back period was also important to advancing the no-fault act's fundamental purpose of reducing the need for formal litigation. In that regard, this Court recognized in *Lewis* that:

> *Most persons are confident that, in the event of a loss, their insurer will pay their claim without the necessity for litigation. It is only when an insurer denies liability that it is unequivocally impressed upon the insured that the extraordinary step of pursuing relief in court must be taken. A contrary result today would require the prudent claimant to file suit as a precautionary measure when the one-year deadline approached, regardless of the status of the claim. In addition to requiring a level of sophistication many claimants may not possess, such an approach would encourage needless litigation. One of the important reasons behind the enactment of the no-fault system was the reduction of automobile accident litigation.*

Lewis, supra, at 101–02.

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In formally embracing the *Richards* tolling doctrine, this Court in *Lewis* did so with the caveat that for the tolling to apply, the claim must be pursued with reasonable diligence. In particular, the *Lewis* Court held:

> *To the rule enunciated in Richards, we add the caveat that the insured must seek reimbursement with reasonable diligence or lose the right to claim the benefit of a tolling of the limitations period. Such a condition should alleviate the defendant's fear that adoption of the tolling principle will result in "open-ended" liability in cases in which the claimant, having made a specific claim for benefits, thereafter refuses to respond to the carrier's legitimate requests for more information needed to process the claim.*

Lewis, supra, at *102-03.*

In 2005, this Court later reversed its decision in *Lewis* in the case of *Devillers v Auto Club Ins Ass'n,* 473 Mich 562 (2005). In doing so, the Court reasoned that the tolling of the one-year-back rule is not provided for in the language of § 3145 and therefore cannot be judicially read into it. This Court's decision in *Devillers* effectively abrogated nearly 20 years of no-fault jurisprudence.

Notably, Justice Michael F. Cavanagh dissented from the majority in *Devillers* given the fact that *"equitable tolling is an equitable remedy that needs no basis in satutory language." Id.* at 594 (Cavanagh J, dissenting). In support of this conclusion, he aptly observed that:

> *The long-recognized equitable remedy of judicial tolling has been applied in a variety of circumstances. In fact,* ***"[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling [.]'*** *" Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), quoting Hallstrom v. Tillamook Co., 493 U.S. 20, 27, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989). This "break[s][no] new ground." American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 558, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).* ***Rather, equitable tolling operates to relieve the "strict command" of a legislatively prescribed limitation because of "considerations '[d]eeply rooted in our***

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> ***jurisprudence.' "*** *Id. at 559, 94 S.Ct. 756 quoting Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 232, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959).*

Devillers, supra, at 595 (Cavanagh J, dissenting)

The longstanding debate over whether the one-year-back rule can be equitably tolled was eventually put to rest by the Legislature in 2019 when it passed the tolling amendments of § 3145(3). Those amendments effectively codified the equitable tolling rule recognized in *Lewis*—under which, the running of the one-year back period is suspended upon the filing of a claim until the issuance of a formal claim denial by the insurer (so long as the claim is pursued with reasonable diligence).

C. The tolling amendments of § 3145(3) must be construed to apply to all suits that are timely filed after the June 11, 2019 effective date of those amendments—because they were given immediate effect when passed.

When the Legislature passed the no-fault amendments of PA 21/22, it gave the act immediate effect, with only certain limited exceptions that were expressly identified in the act itself. See e.g. MCL 500.3104(2) ("*For all motor vehicle accident policies issued or renewed before July 2, 2020 and for a motor vehicle accident policy issued or renewed after July 1, 2020 to which section 3107c(1)(d) applies, the association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts . . .*"); MCL 500.3107c(1) (setting forth PIP choice provisions that apply to policies "*issued or renewed after July 1, 2020*"); and MCL 500.3157a ("*By rendering any treatment, products, services, or accommodations to 1 or more injured persons . . . after July 1, 2020, a physician, hospital, clinic,*

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or other person is considered to have agreed to do both of the following . . . "). See also, MCL 500.3157; MCL 500.3107d; and MCL 500.3109a for numerous other examples.

Unlike these and many other provisions, however, the Legislature did <u>not</u> similarly provide for the delayed implementation of the one-year-back tolling amendments of § 3145(3), and it did not otherwise limit the applicability of those amendments to only those lawsuits seeking claims that accrued after the effective date of those amendments. Therefore, those amendments cannot be construed to contain such a limitation. See *McQueer v Perfect Fence Co*, 502 Mich 276, 286 (2018)("*[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.*"). See also, *Bay City v Bay Co Treasurer*, 292 Mich App 156, 166–167 (2011)("*[W]e may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.*"). When this is properly recognized, it can only follow that the tolling amendments of § 3145(3) apply to all suits filed after June 11, 2019 when those amendments became effective.

II. To the extent that the one-year-back tolling issue at bar is governed by this Court's decision in *Andary v USAA*, any relevant portions of that decision only further confirm that applying the tolling amendments of § 3145(3) to all suits filed after their effective date is <u>*not*</u> impermissibly retroactive.

Those opposed to applying the § 3145(3) tolling amendments to all suits filed after their June 11, 2019 effective date contend that doing so amounts to an impermissible retroactive application of those amendments under this Court's decision in *Andary v*

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USAA Cas Ins Co, 512 Mich 207 (2023). All arguments to that effect, however, are without merit.

At the outset, this Court's decision in *Andary* should not be viewed as controlling here. In *Andary* this Court narrowly considered whether the Legislature intended to retroactively limit the claimants' contractual right to claim certain legacy no-fault benefits. In the case at bar, there is no indication that the insurance policy issued by the defendant contained any provision imposing a one-year-back rule that is immune from the doctrine of equitable tolling. The distinction between a vested right created by contract versus a rule of equitable procedure pertaining to a statutory limitation on damages is crucial and one that was not in any way addressed by this Court in *Andary*. Therefore, this Court's decision in *Andary* should not be viewed as controlling here.

However, should this Court disagree, any potentially relevant portions of that decision only further support the conclusion that applying the tolling amendments of § 3145(3) to all suits filed after their effective date does not amount to an impermissible retroactive application of those amendments. Specifically, in deciding *Andary*, this Court recognized that a statute can only be considered to have an impermissible retroactive effect if it impairs a vested legal right. Specifically, this Court stated in *Andary*:

> *To determine whether the 2019 amendments of MCL 500.3175 of the no-fault act apply . . . , we must determine whether application of the amendments to them would be an issue of retroactive application of the law.* ***If [plaintiff's] possess vested rights to PIP benefits at pre-amendment levels and applying these amendments would impair those rights, then application of the changes would be retroactive.***

Andary, supra, at 231.

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Thus, if the application of the one-year-back tolling amendments does *not* impair a vested right, it does not amount to an impermissible retroactive application. As will be thoroughly established in the remainder of this brief, a review of this Court's precedent dealing with whether a right is considered to be "*vested*" confirms that applying the one-year-back tolling amendments of § 3145(3) to all suits filed after their effective date absolutely does *not* impair a vested right—***from either a statutory or contractual perspective***. Accordingly, applying those amendments in that manner is *not* impermissibly retroactive under *Andary*.

A. In *Andary*, this Court reaffirmed that the rights and obligations arising under a contract for no-fault insurance are both statutory and contractual in nature.

In *Andary*, this Court recognized that "*PIP benefits provided under a no-fault policy of insurance have both statutory and contractual characteristics.*" *Id.* at 231. Therefore, determining whether the tolling amendments of § 3145(3) impair a vested legal right requires analyzing this question from both a statutory and a contractual perspective.

B. The new tolling amendments of § 3145(3) do not impair a vested statutory right because a statutory defense has long been recognized by this Court as merely being a "*valuable*" right, not a "*vested*" right.

It is well settled that a person does not enjoy the right to rely on a statutory defense in perpetuity. Any rights associated with such a defense are subject to change pursuant to further legislative modifications. This Court's precedent therefore holds that a statutory defense is recognized as being merely a "*valuable*" right—not a "*vested*" right.

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This important distinction was recognized by this Court as early as 1954 in the case of *Rookledge v Garwood*, 340 Mich 444 (1954). There, this Court considered whether a tortfeasor could assert an election of remedies defense under the formerly applicable Workmen's Compensation Act in a lawsuit that was brought by an injured truck driver who, before bringing suit, claimed worker's compensation benefits from his employer for the same accident. At the time of the accident, the Workmen's Compensation Act provided that "*the employe may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both.*" *Rooklidge, supra,* at 448. After the accident occurred, however, the Workmen's Compensation Act was later amended by P.A.1952, No. 155 to allow an injured employee to also seek a recovery from the tortfeasor who caused the underlying accident.

After these amendments went into effect, the injured worker filed suit against the tortfeasor defendant, Garwood, who argued that he was entitled to a dismissal under the election of remedies provisions that existed under the pre-amended version of the statute. The trial court agreed with the defendant and dismissed the plaintiff's case. In doing so, the trial court reasoned:

> *It is defendant's contention that in view of the fact that the amendment was not in effect at the time of the accident, such amendment giving the plaintiff the right to bring suit against the defendant even though plaintiff elected to come in under the compensation act, that the plaintiff cannot follow both remedies. It is defendant's contention that the statute gave to the defendant a substantive right, and that the statute is not retroactive.*

Rooklidge, supra, at 457 (quoting the trial court's ruling).

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On further appeal, however, this Court rejected this reasoning and held that the tortfeasor defendant did not have a vested right to rely on the previous statute. Specifically, this Court clearly recognized:

> *[D]efendant Garwood did not have a vested right in the statutory defense accorded him under the prior provision of the Workmen's Compensation Act. His right then, as in the Wylie case, 'sprang from the kindness and grace of the legislature. And it is the general rule that that which the legislature gives, it may take away.'* ***A statutory defense, though a valuable right, is not a vested right and the holder thereof may be deprived of it after the cause of action to which it may be interposed has arisen.***

Rooklidge, supra, at 457 (emphasis added).

In so holding, this Court further emphasized that "*no right is destroyed when the law restores a remedy which had been lost.*" *Rooklidge, supra,* at 457.[3] The Court then observed that "*Rookledge, under the act as it existed prior to the amendment, lost his right to enforce his remedy for damages against the third party tortfeasor when he accepted compensation. The legislature had the authority to revoke this defense and restore to plaintiff his remedy for damages. This it saw fit to do.*" *Rooklidge, supra,* at 457-58.

Later in *Lahti v Fosterling*, 357 Mich 578 (1959), this Court again recognized that a statutory defense is not considered a vested legal right and therefore can be taken away by subsequent legislation. Indeed, this Court reiterated:

> *The right which defendants claim sprang from the kindness and grace of the legislature. It is the general rule that that which the legislature gives it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it.*

[3] quoting *Evans Products Co. v. State Board of Escheats*, 307 Mich. 506 (1943), where this Court quoted with approval the case of *Campbell v. Holt*, 115 U.S. 620, 6 S. Ct. 209, 29 L.Ed. 483 (1885).

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Lahti, supra, at 588-89.

Decades later, the foregoing principles were again reaffirmed by this Court in its *Andary* decision, where this Court relied on *Lahti* for the proposition that "*there can 'be no vested right in an existing law which precludes its change or repeal' and that '[t]he legislature had the authority to revoke [an employee's common-law] remedy and, therefore, certainly had the authority to restore it when it saw fit to do so.'" Andary, supra,* at 235.

When the foregoing principles are properly recognized, they establish that regardless of how, or whether, the tolling amendments of § 3145(3) affect an insurer's ability to assert a statutory one-year-back defense, the application of these tolling amendments does not impair a vested statutory right—i.e., because any right associated with that defense under the previous version of the no-fault law was not a "*vested*" right. It was merely a "*valuable*" right that could be modified at any time by future legislative enactments.

C. The tolling amendments of § 3145(3) do not impair a vested contractual right because those amendments merely codified equitable tolling principles that have long been recognized as applying in an insurance contract dispute.

In *Andary*, this Court reaffirmed the longstanding recognition that no-fault benefit disputes are, at their essence, contract disputes. Therefore, they are governed not only by the statutory provisions of the no-fault act, but also by the common law principles applicable to contract claims. Specifically, on page 237 of its majority opinion, this Court made it clear that:

> *[D]espite the relevance of the no-fault act, lawsuits against insurers seeking to enforce PIP benefits have long been litigated as contract actions. "[I]nsurers can*

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> *avail themselves of both statutory defenses and common-law defenses that the no-fault act has not displaced" in addition to contractual fraud defenses so long as a defense has "not been abrogated" by the no-fault act.*

Andary, supra, at 237, quoting *Meemic Ins Co v Fortson,* 506 Mich. 287, 300-303 (2020).

When the no-fault act was amended in 2019, this Court's decisions clearly recognized the continued viability of various equitable doctrines that may equitably toll the running of a limitations period. For example, in *McDonald v Farm Bureau Ins Co,* 480 Mich 191, 204 (2008), this Court clearly recognized that "*traditional contract doctrines of waiver and estoppel are still viable and that nothing in . . . Devillers changed basic contract law.*" *Id.* at 204. On this basis, the *McDonald* Court went on to recognize that "*[e]quitable tolling, unlike judicial tolling, has a legal basis arising out of our common law, and it may be invoked when traditional equitable reasons compel such a result.*"

The Court in *McDonald* went on to hold that the claims at issue in that case were not equitably tolled. ***However, its ultimate decision was based solely on the conclusion that the specific facts and circumstances of that case did not warrant such equitable relief.*** Specifically, the *McDonald* Court found that the "*[p]laintiff has not shown any reliance on the conduct of or statements by defendant, however, so estoppel does not relieve plaintiff of the duty to timely file suit.*" *McDonald, supra,* at 206.

Accordingly, there really is no debate over whether a contractual or statutory limitations period can be equitably tolled.[4] The decades-long debate ***over whether***

[4] See also *Fidelity & Guaranty Co v Amerisure Ins Co,* 195 Mich App 1, 6 (1992)(noting that "*Michigan and federal case law provides precedent for the principle that limitation statutes are not entirely rigid, allowing judicial tolling under certain circumstances[.]*"); see also *Bryant v. Oakpointe Villa Nursing Ctr., Inc.,* 471 Mich. 411, 432, 684 N.W.2d 864 (2004)(applying

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equitable tolling can suspend the running of the one-year-back period has always centered on whether the absence of a formal denial warrants this equitable relief.

Indeed, when this Court applied the doctrine of equitable tolling to the one-year-back rule in *Lewis,* it did so based on its belief that doing so was necessary to protect insured claimants from various inequities that can otherwise result. As previously noted, the *Lewis* Court observed on pages 101-02 of its majority opinion that:

> *Most persons are confident that, in the event of a loss, their insurer will pay their claim without the necessity for litigation. It is only when an insurer denies liability that it is unequivocally impressed upon the insured that the extraordinary step of pursuing relief in court must be taken. A contrary result today would require the prudent claimant to file suit as a precautionary measure when the one-year deadline approached, regardless of the status of the claim. In addition to requiring a level of sophistication, many claimants may not possess, such an approach would encourage needless litigation. One of the important reasons behind the enactment of the no-fault system was the reduction of automobile accident litigation.*

Lewis, supra, at 101-02

When the *Devillers* majority of this Court later overruled *Lewis,* it did so after coming to a completely different conclusion. In *Devillers* the majority candidly stated, "*[W]e are unable to perceive any sound policy basis for the adoption of a tolling mechanism with respect to the one-year-back rule.*" *Devillers, supra,* at 583.

This view, however, was not shared by all members of the Court who participated in deciding the *Devillers*. Other members of the Court passionately dissented from the majority's conclusion based on the strong belief that "*the judicial tolling rule established in Lewis was well-reasoned and necessary, and because the majority has not established a persuasive*

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principles of equitable tolling in a medical malpractice action without specifically referring to that doctrine).

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reason for disregarding twenty years of stare decisis." Devillers, supra, at 594 (Cavanagh, J., dissenting, with Kelly, J., concurring).

When the tolling amendments § 3145(3) are properly analyzed with this backdrop in mind, it is unavoidable that when the Legislature formally added these provisions to the no-fault act in 2019, it did *not* make new law. It simply ended the tortured debate over whether the absence of a formal denial of a diligently pursued claim warranted suspending the running of the one-year-back period on grounds of equity. In other words, the Legislature merely made the public policy decision that equitable tolling is appropriate under that circumstance and codified this Court's decision in *Lewis* – ***thereby ending the decades-long debate over whether Lewis tolling was sufficiently warranted in equity.***

Thus, applying the tolling amendments of § 3145(3) to all PIP benefit actions filed after the effective date of those amendments cannot be considered to impair a vested contractual right—i.e., ***for the simple reason that an insurer does not have a vested contractual right to avoid the application of common law equitable tolling.***

D. What is perhaps most fatal to any argument that the one-year back tolling amendments impair a vested right is the fact that had the Legislature not reinstated the equitable tolling recognized in *Lewis*, this Court could have nevertheless done so in a future decision that could more broadly apply to all existing no-fault contract disputes.

It is important to remain mindful of the fact that had the Legislature not stepped in and ended the decades long debate over whether one-year-back tolling is warranted on grounds of equity, there was nothing that prevented this question from making its way back up to this Court for further review in some future case. And as this Court's

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decision in *Devillers* demonstrates quite vividly, were the Court to have been presented with such a case, it would have been well within the Court's constitutional authority to overrule *Devillers* and reinstate the equitable tolling of *Lewis*.

Moreover, the Court could do so in a decision that has full retroactive effect despite the fact that *Devillers* has been precedential for over 19 years. ***Indeed, that is exactly what this Court did in Devillers when it overruled Lewis 19 years after it was decided.*** And as we know from *Devillers,* such a decision would then govern <u>all</u> existing PIP lawsuits whether commenced at the time or—not just the lawsuits filed after such a decision by this Court. Having benefited from such broad legal implications following *Devillers*, no-fault insurers are acutely aware of this possibility. Thus, there is simply no basis for a no-fault insurer to legitimately take the position that the legislative reinstatement of *Lewis* tolling has deprived them of a vested right to rely on *Devillers*.

To the contrary, because *Lewis* tolling was reinstated legislatively, as opposed to judicially, no-fault insurers have actually benefited (i.e. because the legislative tolling amendments of § 3145(3) apply only to those PIP lawsuits filed after the effective date of those amendments). Whereas a judicial reinstatement of *Lewis* tolling could ultimately apply not only to those suits, but also to all active lawsuits that were commenced before that time.

When the foregoing observations are faithfully made, they are fatal to any argument predicated on grounds of impermissible retroactivity.

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CONCLUSION

WHEREFORE, for the foregoing reasons, the Coalition Protecting Auto No-Fault (CPAN) requests for the reasons set forth herein that in deciding this case, this Court issue a decision clearly recognizing that: (1) the one-year-back tolling amendments of MCL 500.3145(3) apply to all lawsuits filed after the effective date of those amendments; and (2) the Court of Appeals erred in reaching a contrary conclusion in its decision below.

Respectfully submitted,

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Dated: September 6, 2024

Statement of Word Count Pursuant to MCR 7.212(B)(3)

This brief has a total word count of **7386 words**. This total is based on the word count calculated by the word processing software used to prepare this Brief, Microsoft Word.