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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 BRIEF IN REPLY TO THE SUPPLEMENTAL APPELLEE BRIEFS OF CHILDERS AND MPCGA

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RECEIVED by MSC 9/15/2023 11:44:04 PM

TABLE OF CONTENTS

Page

Index of Authorities. ii

Statement of the Questions Presented. iv

Reply Argument

I. Progressive's Rebuttal to the Arguments of Plaintiff Childers and Intervening Plaintiff MPCGA on the Statute of Limitations Issue.. 1

II. Progressive's Rebuttal to the Arguments of Plaintiff Childers and Intervening Plaintiff MPCGA on the Issue of Coverage Under MCL 500.3114(4).. 8

Relief Requested. 12

Certificate of Compliance. 13

RECEIVED by MSC 9/15/2023 11:44:04 PM

INDEX OF AUTHORITIES

Cases **Page(s)**

Amerisure Ins Co v Coleman,
274 Mich App 432; 733 NW2d 93 (2007). 8, 9

Auto Club Ins Assoc v Meridian Mut Ins Co,
207 Mich App 37; 523 NW2d 821 (1994). 1

Auto-Owners Ins Co v Churchman,
440 Mich 560; 489 NW2d 431 (1992). 9

Cameron v Auto Club Ins Assoc,
476 Mich 55; 718 NW2d 784 (2006). 7

DiBenedetto v West Shore Hospital,
461 Mich 394; 605 NW2d 300 (2000). 7

Frank v Linkner,
500 Mich 133; 894 NW2d 574 (2017). 5

Hunt v Drielick,
496 Mich 366; 852 NW2d 562 (2014). 9

Macomb Co Prosecutor v Murphy,
464 Mich 149; 627 NW2d 247 (2001). 3

Mathis v Auto-Owners Ins Co,
339 Mich App 471; 983 NW2d 447 (2021). 1

McGrath v Allstate Ins Co,
290 Mich App 434; 802 NW2d 619 (2010). 10

South Dearborn Environmental Improvement Assoc v Dep't of Environmental Quality, 502 Mich 349; 917 NW2d 603 (2018).. 3

Yetzke v Fausak,
194 Mich 414; 488 NW2d 222 (1992). 6

Statutes / Court Rules

2019 PA 21. 8

MCL 500.3113(b). 11
MCL 500.3114(4). 8, 11
MCL 500.3145(1). . . . . *passim*
MCL 500.7901, *et seq*. 1
MCL 500.7931(3). 2, 3, 6
MCL 500.7935(2). 2, 3, 4, 6
MCL 600.5827.. . . . . 4, 5

RECEIVED by MSC 9/15/2023 11:44:04 PM

RECEIVED by MSC 9/15/2023 11:44:04 PM

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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REPLY ARGUMENT

I. Progressive's Rebuttal to the Arguments of Plaintiff Childers and Intervening Plaintiff MPCGA on the Statute of Limitations Issue.

In its Supplemental Brief of August 24, 2023, Intervening Plaintiff-Appellee MPCGA introduces its argument by propounding three "foundational points." The following discussion responds to each of these propositions (although doing so out of order – second, third, and then first), while also addressing relevant assertions in Plaintiff-Appellee Childers' Supplemental Brief of August 25, 2023.

As its second "foundational" point, the MPCGA states that the Guaranty Act, MCL 500.7901, *et seq*., "changes the typical priority paradigm and *status quo*" as between insureds, claimants, and other insurers alike." (MPCGA Supp Brief, p 4). Both appellees insist that the MPCGA does not merely "replace an insolvent insurer" or "[step] in the shoes" of the insolvent insurer. Rather, the MPCGA must be regarded as the "insurer of last resort." (MPCGA Supp Brief, pp. 1-3; Childers Supp Brief, pp 11-12), citing *Mathis v Auto-Owners Ins Co*, 339 Mich App 471, 477; 983 NW2d 447 (2021), and *Auto Club Ins Assoc v Meridian Mut Ins Co*, 207 Mich App 37, 41-42; 523 NW2d 821 (1994).

Yet Progressive has never suggested that an order-of-priority defense exists or could ever apply as against the MPCGA. This is a classic strawman. Throughout the appellate process in this case the MPCGA has repeatedly argued that it is an "insurer of last resort" and does not merely "stand in the shoes" of the now insolvent insurer. Yet this point has been acknowledged by Progressive all along, and it does not impair in the slightest the fact that Progressive simply cannot be held liable when it provides *no* coverage to the injured claimant and, independently, that no-fault benefits are not "recoverable" by an injured claimant when

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precluded by MCL 500.3145(1). *See*, Progressive's Motion for Summary Disposition, 9/3/2015, pp 6-7, 14-15 (**Ex 7**, *Progressive Apx 179-180, 187-188*).

The MPCGA's next proffered "foundational point" is similar. Both the MPCGA and Childers argue that the rights and obligations of the MPCGA "are not synonymous with those of the insolvent insurer" (MPCGA Supp Brief, p 4) and that the MPCGA does not simply "replace an insolvent insurer" (Childers Supp Brief, p 11). Again, the appellees are swinging at windmills. Progressive does not dispute this general proposition. But the specific question presented in this case concerns what rights the MPCGA has to pursue reimbursement for the benefits it has paid to Childers; and those rights *are* synonymous–*not* with those of the insolvent insurer but with whatever rights *Childers* possessed when receiving benefits from the MPCGA. This is so, since it is the rights possessed by Childers as against Progressive, if any, that define the MPCGA's right to pursue reimbursement from Progressive, MCL 500.7935(2).[1] And likewise, it is the rights possessed by Childers as against Progressive that dictate whether, going forward, the MPCGA's obligations to Childers may be reduced – determined by whether benefits are "recoverable" *by the injured claimant* under the insurance policy of the other insurer. MCL 500.7931(3).

The MPCGA brief also refers to a later passage in §7931(3), which states that an amount paid by the MPCGA to the injured claimant "in excess of the amount authorized by this section may be recovered by an action brought by the association." (MPCGA Supp

[1] Under §7935(3), an injured claimant such as Childers "*shall be considered to have assigned to the association*, to the extent of any payment received from the association, ... [*whatever*] *rights* [*he*] *may have against any other person* [*i.e., Progressive*] for payment of the covered claim. . ." (Emphasis added).

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Brief, p 3). If the MPCGA means to imply that this clause qualifies as an independent statutory cause of action,[2] Progressive would submit otherwise.

Importantly, when interpreting different provisions within a statutory provision, the Court must construe them "as a whole to harmonize [the] provisions and carry out the intent of the Legislature." *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).[3] And here, in tying the amount the MPCGA may recover to payments it made in excess of "the amount authorized by this section," the provision refers specifically to the aforesaid credit clause, which conditions any credit on ***the injured claimant's*** *ability to recover* from the putative other insurer. ("***If*** ... benefits *are recoverable ...* ***by*** **[*the*] *claimant*...**, the damages or benefits *recoverable* shall be a credit[.]") §7931(3) (emphasis added). And again, §7935(2) directly addresses the MPCGA's ability to pursue reimbursement, stating that it is *the injured claimant's right of recovery* from the putative other insurer, as transferred by assignment to the MPCGA, that defines the extent of any reimbursement claim by the MPCGA.

Thus, it is indeed pertinent that MCL 500.3145(1) declares, "An action for recovery of [PIP] benefits ... may not be commenced later than 1 year after the date of the accident causing the injury[.]" As this edict is written in the passive voice, it indicates that such an

---

[2] No such assertion has been made by the MPCGA or by Childers; and the Court of Appeals' flawed conclusion that the MPCGA possesses an independent statutory cause of action was based on its erroneous understanding of what a "covered claim" means in the guaranty act. *See*, Progressive's Application for Leave to Appeal, 10/27/2022, pp 21-23.

[3] And in this regard, "the most reliable evidence of that intent is the plain language of the statute." *South Dearborn Environmental Improvement Assoc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). "[A]ny construction that would render portions of a statute surplusage or nugatory" should be avoided. *Id*, at 361.

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action may not be commenced by *anyone* later than 1 year after the accident; but it most assuredly applies to the accident victim himself. Any benefits purportedly available under the Progressive policy manifestly were *not* "recoverable" *by Childers* by the time he was receiving payments from the MPCGA. Accordingly, under §7935(), he had no right of recovery to "assign" to the MPCGA.

This leads back to the first foundational point articulated in the MPCGA supplemental brief: "First, the MPCGA's rights arise from the MPCGA Act, not the No-Fault Act." (MPCGA Supp Brief, p 4; *accord*, Childers Supp Brief, p 10 – "The Guaranty Association is not 'subject to' the no-fault act"). Once again, while this somewhat amorphous statement may not be inaccurate as a general proposition, it cannot, as it pertains specifically to the issue presented, overcome the fact that the MPCGA's right of reimbursement is expressly deemed, *by its own statutory provisions*, to be such right assigned to it by the injured claimant. It thus matters critically that Childers' right is indeed established by the No-Fault Act and by whatever right the claimant possessed against the allegedly responsible insurer under its allegedly applicable insurance policy. The arguments asserted in the supplemental appellee briefs fail to refute or even acknowledge this.

And as a consequence, both Childers and the MPCGA end up devoting large portions of their supplemental briefs to crafting suggestions as to when a cause of action in favor of the association should accrue (MPCGA Supp Brief, pp 4-10; Childers Supp Brief, pp 5-10), without any regard to the impact of MCL 500.3145(1). To be fair, the Court's MOAA order did specifically request briefing on the issue of when a claim accrues. Yet within this directive was the additional request that consideration be given to MCL 600.5827 and the

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opinion in *Frank v Linkner*, 500 Mich 133; 894 NW2d 574 (2017). This, Progressive submits, was a signal that some attention to the first sentence of §5827 was warranted:

> *Except as otherwise expressly provided*, the period of limitations runs from the time the claim accrues. . . .

MCL 600.5827.

Neither Childers nor the MPCGA have given any attention whatsoever to the potential import of this first phrase of the statute, nor to the discussion in *Frank* that differentiates a statute of limitations from a statute of repose, nor to the stark message articulated in the opening clause of MCL 500.3145(1). Instead, both Childers and the MPCGA proceed on the false premise that the time to have sued Progressive is determined by when a claim "accrued." But as envisioned by the first sentence in §5827, the period of limitations stated in §3145(1) expressly provides otherwise.

Progressive has answered the questions posed in the Court's MOAA order by showing that the limitation of actions provision applicable to the MPCGA's instant reimbursement claim, tied to whatever right Childers is deemed to have assigned to the MPCGA, is indeed the 1 year period running from the date of the accident in which Childers was injured (Progressive's Supplemental MOAA Brief, 7/20/2023, pp 1-7).

The MPCGA's only direct response to Progressive's argument is to assert that "obviously this is wrong," and "[i]f accepted, this argument would lead to an absurd result" because Childers would have had no reason to put an insurer like Progressive "on notice" and thus the MPCGA would end up having to pay his PIP claim. (MPCGA Supp Brief, p 18). Childers similarly responds only by blanching at the mere suggestion that the MPCGA might

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have to bear this loss: "If the one-year statute of limitations ... [were to] apply, however, many claims arising out of motor vehicle accidents that should be paid by lower-priority no-fault insurers will be shifted back to the Guaranty Association. ... [T]he Guaranty Association would be required to pay the claim." (Childers Supp Brief, p 12).

In advancing these rather hollow fears, however, both parties overlook the fact that the MPCGA's purpose is to assure that the claimant continues to receive benefits even though his or her insurer has become insolvent. "The purpose of the [MPCGA] is to protect the public against financial losses to either policyholders or claimants due to the insolvency of insurers." *Yetzke v Fausak*, 194 Mich 414, 418-419; 488 NW2d 222 (1992).[4]

The guaranty act is *not* primarily concerned with the MPCGA's ability to avoid this responsibility or shift it elsewhere. Of course, where another source of coverage *is* available, and benefits from that other source remain "recoverable," it is imminently reasonable both to require the injured claimant to exhaust that other source of coverage – §7931(3), and to allow the MPCGA, to the extent it has paid benefits, to pursue reimbursement from that other available source as the assignee or subrogee of the injured claimant – §7935(2). The MPCGA's statutory provisions do precisely this. Yet if, by operation of MCL 500.3145(1), there simply are no benefits "recoverable" by Childers, the legislative purpose of "... protect[ing] the public against financial losses to ... claimants due to the insolvency of [an] insurer[]" (*Yetzke*, *supra*) is not at all impaired.

---

[4] This statutory purpose is acknowledged by Childers and the MPCGA, but only in different sections of their briefs. (MPCGA Supp Brief, p 2; Childers Supp Brief, p 11).

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Appellees nevertheless advance their policy arguments and the specter of "absurd results" to insist that the clear terms of §3145(1) should not apply, as if their arguments are being presented not to this Court but to a legislative committee seeking an overhaul of the existing provisions of the MPCGA act. But the *existing* provisions of the act tie the association's ability to pursue reimbursement to the rights possessed by the injured claimant at the time he or she receives payments from the MPCGA. And the appellees' arguments utterly fail to take into consideration that, in creating a strict 1 year period of limitation for recovery of PIP benefits measured from the date of the accident, the Legislature made public policy decisions of its own to protect insurers, as part of an overall scheme of mandatory automobile no-fault insurance, from having to defend against stale claims. *See*, Progressive's Application for Leave to Appeal, pp 27-28, quoting *Cameron v Auto Club Ins Assoc*, 476 Mich 55, 65-66; 718 NW2d 784 (2006). The courts are required to honor those policy determinations. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 405; 605 NW2d 300 (2000).

For these reasons, the Court should reject the "accrual"-based arguments advanced by Plaintiff Childers and Intervening Plaintiff MPCGA. Instead, the Court should conclude that, since by operation of §3145(1) benefits from Progressive were not "recoverable" by Childers at the time he filed suit, the MPCGA likewise was precluded from any such recovery. The Court should reverse the Court of Appeals' holding against Progressive on the statute of limitations issue.

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II. Progressive's Rebuttal to the Arguments of Plaintiff Childers and Intervening Plaintiff MPCGA on the Issue of Coverage Under MCL 500.3114(4).

The remaining question posed by the Court in its MOAA order of May 26, 2023, is "whether the appellant [Progressive] is an *insurer* in the chain of priority insurers" (emphasis added) for purposes of MCL 500.3114(4), as it existed prior to the amendments of 2019 PA 21, effective June 11, 2019. The question is based on the actual text of §3114(4):

> ... [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 "occupant" in this instance was Justin Childers; and the vehicle occupied was the uninsured 1988 Oldsmobile owned and being operated by Shaina Groulx. The question, then, is whether the appellant, Progressive, was the "*insurer*" of Shaina Groulx.

The recognized authority on the issue is *Amerisure Ins Co v Coleman*, 274 Mich App 432; 733 NW2d 93 (2007). Relying on *Coleman*, Progressive has shown that an insurance company will be regarded as one's "insurer" if it has "agree[d], by contract, to assume the risk of another's loss and to compensate for that loss." *Id*., at 435. And whether or not the insurance company has indeed assumed such a risk is determined by "the terms of the [] insurance policy." *Id*., at 435-436. (*See*, Progressive's Supplemental MOAA Brief, pp 9-10).

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Appellees Childers and the MPCGA do not address the question in terms of whether Progressive was Shaina Groulx's "insurer." Instead, they make a subtle shift to inquire whether she is referred to as an "insured" in the policy. (MPCGA Supp Brief, p 18 – "the parties disagree on whether Shaina Groulx is deemed a contractual 'insured' under the PMIC policy"; Childers Supp Brief, pp 14-15 – arguing that Shaina Groulx "met the definition of 'insured person"). The MPCGA dismisses as "some amorphous rule" the question of whether risk of any sort was assumed, suggesting that the cases instead "focus[] their analysis on the words and plain meaning of the underlying policies." (MPCGA Supp Brief, p 19). The distinction purportedly made here by the MPCGA is not immediately clear, but what becomes apparent is that the MPCGA does not believe that *all* of the words of the policy actually should be considered.

Progressive agrees that the terms of the policy contract must be examined – but not merely to see whether they ever refer to Shaina Groulx (whether by name or description, such as a "relative") as an "insured," but rather, to determine whether, under the circumstances, Progressive agreed "to assume the risk of [Shaina Groulx's] loss and to compensate for that loss." *Coleman*, at 435. Progressive provides that examination here.

When analyzing a contract of insurance as to whether protection against a risk of loss is provided, the parties' contractual intent is ascertained by determining (1) whether the policy provides coverage to the insured, and (2) whether the coverage is negated by an exclusion. *Hunt v Drielick*, 496 Mich 366, 373; 852 NW2d 562 (2014). And to determine the intent of the parties an insurance policy must be read as a whole. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992) ("[T]he court must look at the

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[insurance policy] contract as a whole and give meaning to all terms"); *accord*, *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010) ("The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase.")

A review of all pertinent provisions of the Progressive policy clearly reveals that, in this case, Shaina Groulx had no protection whatsoever under the policy – Progressive was *not* her "insurer."

In pertinent part, the "INSURING AGREEMENT" in Part II of Progressive's policy (Personal Protection Insurance Coverage) states as follows:

> If you pay the premiums for this coverage, we will pay Personal Protection Insurance Benefits ... to an **eligible injured person** ... *subject to the exceptions, exclusions and limitations specified herein* and as additionally provided by the law of the State of Michigan.

(**Ex 6** – Progressive Michigan Auto Policy, *Progressive Apx 134*).

> 2. "**Eligible injured person**" means:
>   a. **you** [the named insured person] or any **relative** who sustains bodily injury in an **accident** involving a **motor vehicle**.

(**Ex 6**, *Progressive Apx 134*). Under the policy, Shaina Groulx qualified as a "relative" since she was residing in the same household as her brother, the named insured on the policy (*id*., *Progressive Apx 130*) and, accordingly, having suffered an injury in the subject accident, she would qualify as an "eligible injured person" under this definition. Yet the inquiry does not end there, since any acceptance of risk on the part of the insurer requires examination of

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"exceptions, exclusions and limitations" in the policy, as well. Relevant here, Shaina was *excluded* from coverage under three different policy exclusions:

> EXCLUSIONS . . .
>
> Coverage under Personal Protection Insurance does not apply to accidental bodily injury:
>
> * * *
>
> 8. sustained by the owner or registrant of a **motor vehicle** or motorcycle involved in an accident which is not covered by security as required by the Michigan No-Fault Law, Chapter 31of the Michigan Insurance Code, as amended;
>
> * * *
>
> 11. sustained by a **relative** while occupying ... a **motor vehicle**, other than a **covered auto**, which is:
>
> a. owned or registered by that **relative,** and
>
> b. not covered by security as required ...
>
> * * *
>
> 15. excluded by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, or the law of the State of Michigan [e.g., MCL 500.3113(b)].

(**Ex 6** – Progressive Michigan Auto Policy, *Progressive Apx 135-137*). (Similar provisions barred any coverage of Shaina under other parts of the policy. *See*, Progressive's Application for Leave to Appeal, p 35 n 13.)

The trial court's analysis of this issue, Progressive submits, was entirely correct (*see*, **Ex 2** – Opinion and Order, 3/29/2021, pp 33-35, *Progressive Apx 50-52*). It held that Progressive does not qualify as "the insurer of" Shaina Groulx; she *had* no insurer in this case. In holding to the contrary, the Court of Appeals reversibly erred in narrowly focusing (like the appellees here) on Shaina's potential status as an "insured" rather than on whether, after considering all the policy's relevant provisions, Progressive qualified as her "insurer" within the meaning of MCL 500.3114(4).

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RELIEF REQUESTED

For all the foregoing reasons, and those detailed in its previous application briefs, 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(G) that this reply brief contains 3,179 words, including headings, footnotes and quotations, but excluding caption, tables and signature.

GARAN LUCOW MILLER, P.C.

/s/ Daniel S. Saylor

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PROOF OF SERVICE

DANIEL S. SAYLOR, on behalf of Defendant-Appellant, Progressive Marathon Insurance Company, certifies that on **September 15, 2023**, he electronically filed said Defendant-Appellant's **Brief in Reply to the Supplemental Appellee Briefs of Childers and MPCGA**, together with 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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