STATE OF MICHIGAN
IN THE SUPREME COURT

PROGRESSIVE MARATHON INSURANCE COMPANY,

Plaintiff-Appellee,

v

JOHN PENA, KRYSTLE SEWELL, and BRITTNEY GIDDINGS,

Defendants/Appellants.

Supreme Court No. _____

Court of Appeals No. 358849

Tuscola County Circuit Court
Case No. 2020-031393-CZ
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APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANTS/APPELLANTS JOHN PENA AND KRYSTLE SEWELL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Index of Authorities. iv

Jurisdiction vi

Question Presented vi

Grounds for Appeal vii

Standard of Review viii

Introduction 1

Factual Background 3

Argument 11

I. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT PROGRESSIVE MARATHON DID NOT OWE ITS INSURED THE STATUTORY MINIMUM LIABILITY COVERAGE OF $250,000/$500,000 THAT THE LEGISLATURE REQUIRED AFTER JULY 1, 2020. 11

A. In Michigan, auto policies must not be “delivered or issued for delivery” on vehicles “registered or principally garaged” in Michigan under MCL 500.3009(1) unless ALL of the limits under its subsections are provided. 11

B. MCL 500.3009(5)-(8) do not support the Court of Appeals’ holding that less coverage was owed than the statutory minimum liability coverage of $250,000/$500,000 that was required in Michigan after July 1, 2020. 13

C. Statutory changes to PIP coverage have no bearing on the amount of liability coverage mandated for policies issued on motor vehicles in Michigan after the No-Fault Act was amended on June 11, 2019 other than justifying the need for higher liability coverage after July 1, 2020. 14

TABLE OF CONTENTS, Continued

D. The trial court correctly concluded that the auto policy that Progressive issued to Giddings must conform to the statutorily mandated minimum liability coverage of $250K/$500K that was required after July 1, 2020. 16

E. The statutory minimum liability coverage of $250,000/$500,000 is owed if MCL 500.3009(1) is ambiguous as to the amount of coverage required. 18

II. APPLYING MCL 500.3009(1) AS WORDED SO THAT LIABILITY COVERAGE OF $250,000/$500,000 WAS REQUIRED AFTER JULY 1, 2020 DOES NOT VIOLATE THE CONTRACTS CLAUSE OF THE STATE OR FEDERAL CONSTITUTION BECAUSE NO VESTED RIGHT WAS IMPAIRED WHERE THE LAW CHANGED ON JUNE 11, 2019, AND PROGRESSIVE CONTINUED TO WRITE LESS THAN THE STATUTORILY MANDATED MINIMUM COVERAGE UNTIL JULY 2, 2020. 19

Conclusion 21

Relief Requested 22

INDEX OF AUTHORITIES

Cases

Allstate Ins Co v State Farm Mut Auto Ins Co, 321 Mich App 543, 909 NW2d 495 (2017) viii

Auto-Owners Ins Co v Martin, 284 Mich App 427, 773 NW2d 29 (2009) 17

Corwin v DaimlerChrysler Ins Co, 296 Mich App 242, 819 NW2d 68 (2012). . . . 2, 16-17

Giles v St Paul Fire & Marine Ins Co, 405 F Supp 719 (ND Ala, 1975) 15

Gobler v Auto-Owners Ins Co, 428 Mich 51, 61, 404 NW2d 199 (1987) 19

Koski v Allstate Ins Co, 213 Mich App 166, 170, 539 NW2d 561 (1995), rev'd on other grounds 456 Mich 439, 572 NW2d 636 (1998) 15

Maiden v Rozwood, 461 Mich 109, 597 NW2d 81, 461 Mich 109, 597 NW2d 817 (1999) viii

Putkamer v Transamerica, 454 Mich 626, 631, 563 NW2d 683 (1997) 19

RPF Oil Co v Genesee Co, 330 Mich App 533, 950 NW2d 440 (2019) viii

Rowland v Detroit Auto Inter-Ins Exch, 34 Mich App 267, 191 NW2d 56 (1971), aff'd 388 Mich 476, 201 NW2d 792 (1972).. 20

Sharper Image Corp v Dep't of Treasury, 216 Mich App 698, 550 NW2d 596 (1996) viii

Wells v Detroit Auto Inter-Ins Exch, 29 Mich App 235, 185 NW2d 147 (1970) 20

Statutes

MCL 500.3009(1) .. . . . . passim

MCL 500.3009(5) 2, 10, 13, 15, 21

MCL 500.3009(5)-(8) 2, 10, 13, 21

MCL 500.3009(8) 8

INDEX OF AUTHORITIES, Continued

Statutes, Continued

MCL 500.3107c 3

MCL 500.3107d 3

MCL 500.3135(3)(c) 4

Public Acts

2019 PA 21/22 .. . . . . vii, 3-4, 16

Court Rules

MCR 2.116(C)(10) . . . . . viii, 8-9

MCR 2.116(I)(2) .. . . . . viii, 8-9

MCR 7.215(C)(2) 1

MCR 7.303(B)(1) vi

MCR 7.305(B)(3) . . . . . vii, viii

MCR 7.305(B)(5)(a) vii

MCR 7.305(C)(2) vi

JURISDICTION

This Court is entitled to exercise its jurisdiction to review a case after a decision in the Court of Appeals. MCR 7.303(B)(1). In a civil case, an application for leave to appeal must be filed with this Court within 42 days of the Court of Appeals' decision or its subsequent ruling on a timely motion for reconsideration. MCR 7.305(C)(2). Here, the Court of Appeals issued its published opinion on January 26, 2023. Appx at 266-270. Pena and Sewell filed a timely motion for reconsideration, but it was denied on March 8, 2023. Appx at 271. As leave is now requested within 42 days after the motion for reconsideration was denied, this Court has discretion to exercise jurisdiction in this case under MCR 7.303(B)(1).

QUESTION PRESENTED

I. Whether leave should be granted to address whether the Court of Appeals erred by reversing the trial court's holding that Progressive Marathon owed its insured, i.e., Giddings, the statutory minimum liability coverage of $250,000/$500,000 required after July 1, 2020, where the policy issued to Giddings provided only $20,000/$40,000, Progressive did not inform Giddings that her exposure to tort liability would increase after July 1, 2020 and she caused the motor vehicle accident that badly injured Pena and Sewell on August 5, 2020?

Plaintiff-Appellee Progressive Marathon says "No".

Defendants/Appellants Pena and Sewell say "Yes".

Brittney Giddings presumably would also say "Yes".

The trial court would say "Yes".

This Court should say "Yes."

GROUNDS FOR APPEAL

The issue on appeal in this case is a question of statutory interpretation that "involves a legal principle of major significance to this state's jurisprudence" under MCR 7.305(B)(3). As the Court of Appeals correctly noted, it is also one of first impression in Michigan as it concerns recent changes made to the No-Fault Act. Appx 270, slip op at 5.

In 2019, the Michigan Legislature amended the No-Fault Act to allow auto insureds to opt out of unlimited PIP coverage after July 1, 2020. See 2019 PA 21/22. It also permitted them to sue for allowable expenses not covered by PIP benefits after July 1, 2020. Id. To offset that added risk, the statutory minimum for liability coverage was simultaneously increased from $20,000/$40,000 to $250,000/$500,000. Id; see current MCL 500.3009(1).

The amended No-Fault Act was effective immediately on June 11, 2019. See 2019 PA 21/22. Yet, Progressive Marathon continued to issue auto policies up until July 2, 2020 that provided its insureds with only $20,000/$40,000 for periods long after July 1, 2020. It did so without informing them that more liability coverage was needed after July 1, 2020.

The trial court held that Progressive was statutorily required under the amended No-Fault Act to provide its insured, i.e., Giddings, with $250,000/$500,000 in liability coverage for the motor vehicle accident that seriously injured Pena and Sewell on August 5, 2020. But, the Court of Appeals reversed that holding in a published decision. It concluded instead that Progressive only owed $20,000/$40,000 in liability coverage even after July 1, 2020.

In so holding, the Court of Appeals ignored the clear, unambiguous language that the Legislature used when it amended the No-Fault Act to require more liability coverage after July 1, 2020 in order to address the added risk of being sued in tort for medical bills.

This Court should grant leave to appeal under MCL 7.305(B)(3). Leave also should be granted under MCL 7.305(B)(5)(a) because the Court of Appeals' published holding "is clearly erroneous and will cause material injustice" by undermining the Legislature's intent that more liability coverage be provided for all auto insureds in Michigan after July 1, 2020.

STANDARD OF REVIEW

The standard of review on appeal is de novo as Progressive Marathon moved for summary disposition in this declaratory relief action under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118, 597 NW2d 81, 461 Mich 109, 597 NW2d 817 (1999). Questions of statutory interpretation are also reviewed de novo on appeal. *Allstate Ins Co v State Farm Mut Auto Ins Co*, 321 Mich App 543, 550, 909 NW2d 495 (2017). That same de novo standard applies to a request for judgment as a matter of law under MCR 2.116(I)(2). *RPF Oil Co v Genesee Co*, 330 Mich App 533, 537, 950 NW2d 440 (2019); *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701, 550 NW2d 596 (1996).

INTRODUCTION

Progressive Marathon argued below that it did nothing wrong by continuing to sell auto policies up until July 2, 2020 that provided only $20,000/$40,000 in liability coverage for motor vehicle accidents occurring after July 1, 2020, even though it clearly did so, knowing that the Legislature mandated higher liability coverage, i.e., $250,000/$500,000, because exposure to tort liability would be increasing dramatically starting on July 2, 2020.

Effectively, Progressive argued that it was free to issue policies that did not comply with the statutory requirement for $250,000/$500,000 in coverage after July 1, 2020, despite the clear, unambiguous mandate that the Legislature provided to insurers like Progressive when it enacted MCL 500.3009(1). Progressive also contended below that it had no obligation to inform its insureds that tort liability would increase after July 1, 2020 when it issued policies that provided only $20,000/$40,000 in coverage after July 1, 2020.

The trial court rejected Progressive's argument and required that the statutorily mandated minimum coverage of $250,000/$500,000 be provided to its insured, i.e., Giddings, for the motor vehicle accident that injured Pena and Sewell on August 5, 2020. But, the Court of Appeals reversed that holding in a published opinion that is now binding on all subsequent cases pending in either the trial courts of the Court of Appeals under MCR 7.215(C)(2). By publishing its opinion, the Court of Appeals effectively mandated reversal in at least 2 other currently pending cases – both against Progressive Marathon.[1]

In framing the issue in this case, Progressive Marathon has misleadingly claimed that the trial court concluded that liability coverage in Michigan "automatically increased"

[1] See *Bonter v Progressive Marathon*, Genesee Circuit Court Case No. 2021-115568-CK, now on appeal as Michigan Court of Appeals Case No. 360411; and *Elliott v Progressive Marathon Ins Co*, St. Clair Circuit Court Case No. 2022-001311-CK.

on July 2, 2020 from $20,000/$40,000 to $250,000/$500,000. But, that is not what the trial court actually said. It is instead a mere "sound-bite" that defense counsel employed successfully in arguing this case on appeal. See slip op at 2 and 4-5. It is misleading because it ignores Progressive's role in leaving its own insureds exposed to added risks in 2020 that resulted from changes that the Legislature made to the No-Fault Act in 2019.

Here, the trial court simply held that Progressive Marathon owed the statutory minimum liability coverage of $250,000/$500,000 because the auto policy that it issued to Giddings was required to comply with the amended No-Fault Act. In support of that holding, the trial court relied on well-established precedent in Michigan by citing the published decision in *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 819 NW2d 68 (2012).

The no-fault law changed nearly 9 months before Progressive Marathon issued an auto policy to Giddings that provided only $20,000/$40,000, not the $250,000/$500,000 required after July 1, 2020. As such, there was nothing "automatic" about what happened. Instead, it was a direct result of Progressive's decision to sell a policy with a six-month term that did not comply with the statutory requirements for liability coverage after July 1, 2020.

The clear, unambiguous wording of MCL 500.3009(1) supports the position argued below by Pena and Sewell. MCL 500.3009(1) unequivocally states that auto polices "must not be delivered or issued for delivery" in Michigan for "any motor vehicle registered or principally garaged" in Michigan, unless the liability coverage is subject to all of the following limits", which limits are defined as $20,000 per person/$40,000 per accident before July 2, 2020, and $250,000 per person/$500,000 per accident after July 1, 2020.

Contrary to the Court of Appeals' published decision in this case, the opt-out provisions under MCL 500.3009(5)-(8) do not support a different reading of MCL

500.3009(1). None of those subsections was intended to create an exception to the amended statute's requirement that auto policies provide more coverage after July 1, 2020.

Moreover, no constitutional contracts clause violation is created by reforming the policy that Progressive Marathon issued to Giddings so it complies with statutory mandate that more liability coverage be provided after July 1, 2020. Here, Progressive was aware that the law changed and it continued writing non-compliant, deficient, liability coverage.

This Court should grant leave to appeal or otherwise review the Court of Appeals' published decision to reverse the trial court's holding that the auto policy that Progressive Marathon issued to Giddings must be reformed so that she had the statutorily mandated $250,000/$500,000 in liability coverage when she caused the motor vehicle accident that seriously injured Pena and Sewell on August 5, 2020. Here, the statute's clear, unambiguous wording compels that result because it ensures that Progressive has not left its insureds exposed, without warning, to an increased risk of tort liability after July 1, 2020.

FACTUAL BACKGROUND

In 2019, the Legislature made significant changes to the No-Fault Act in Michigan. See generally, 2019 PA 21/22. Those changes included provisions permitting insureds to opt for limited PIP coverage (or in some instances, no PIP coverage at all). See MCL 500.3107c (limited PIP coverage options) and MCL 500.3107d (no PIP required if there is available qualified health coverage). It also included provisions that permitted those injured in a motor vehicle accident to bring a tort action for expenses not covered by PIP benefits. See MCL 500.3135(3)(c) (damages recoverable in tort where PIP coverage was limited).

As a result, exposure for tort liability in Michigan greatly increased after July 1, 2020. Accordingly, the Legislature increased the statutorily mandated minimum coverage for tort

liability in Michigan after July 1, 2020 from $20,000/$40,000 to $250,000/$500,000. See MCL 500.3009(1). It did so for all auto policies "delivered or issued for delivery" in Michigan based on motor vehicles "registered or principally garaged" in Michigan, and not just auto policies secured or renewed after July 1, 2020. Those changes made to the No-Fault Act and MCL 500.3009(1) were effective immediately on June 11, 2019. See 2019 PA 21/22.

Nearly nine months later, on March 9, 2020, Brittney Giddings secured an auto policy with Progressive Marathon with a six-month term running from March 11, 2020 to September 11, 2020. Appx at 25. It provided Giddings with only $20,000/$40,000 in liability coverage even though the policy term extended more than 2 months after July 1, 2020. Appx at 25. The policy expressly provided that its terms would conform to the governing statutes in Michigan. Appx at 59. Specifically, it stated that "[i]f any provision of this policy fails to conform to the statutes of the state listed on your application as your residence, the provision shall be deemed amended to conform to such statutes." Appx 59. It also stated that "[a]ny disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on your application as your residence." Appx at 59.

Although 273 days had passed since 2019 PA 21/22 was enacted, Giddings was not informed by Progressive Marathon that significant changes had been made to No-Fault Act and her exposure for tort liability would increase after July 1, 2020. She also was not told by Progressive that her liability coverage after July 1, 2020 would be far less than what the Legislature had mandated to protect insureds by amending the law on June 11, 2019.

On August 5, 2020, Giddings rear-ended a motor vehicle that was then propelled into the on-coming travel lane where it collided with Pena and Sewell while motorcycling.

Appx at 73-76. Both Pena and Sewell sustained devastating personal injuries as a result of the collision. Both were transported by airlift to a hospital emergency room. Appx at 75.

Subsequently, on August 17, 2020, Progressive mailed information to Giddings so that she could renew her policy for another six months starting on September 12, 2020. Appx at 127-137. In so doing, Progressive warned Giddings (for the first time) that she could be held personally responsible for excess economic loss that now also included medical bills not covered by PIP benefits if the injured person did not buy enough PIP coverage (as permitted under the amended No-Fault Act after July 1, 2020). Appx at 135.

As part of the renewal information provided to Giddings, Progressive included a form she was required to sign confirming that she understood her options given the "increased risks with lower bodily injury liability coverage limits". Appx at 130. It stated the following:

> If you are responsible for injuries to another person, you may be liable for damages for their pain and suffering, as well as the costs of their medical and other care that exceed their coverage under their auto insurance policy. The bodily injury liability limit of your policy will pay for such damages, but only up to the amount of the limit you choose. You will be required to pay any amount over the limit you choose. This amount could be substantial and may lead to severe financial consequences, such as:
>
> - Your assets may be seized, or a lien may be placed on your home;
> - Your wages may be garnished; or
> - Your driver's license may be suspended. [Appx at 130].

In order to choose liability coverage less than the statutorily mandated minimum of $250,000/$500,000, Progressive asked Giddings to acknowledge that she understood "the potentially severe risks described" which now included liability for medical bills not covered

by PIP benefits. Appx at 130. No similar such information was provided when Giddings first secured her policy on March 9, 2020 even though its term extended beyond July 1, 2020.

After the motor vehicle accident occurred on August 5, 2020, Progressive was informed about the serious personal injuries that Pena and Sewell had sustained in the crash. Because Pena and Sewell were motorcycling when the motor vehicle accident occurred, Progressive was responsible for paying PIP benefits under MCL 500.3114(5).

Knowing full well the magnitude of the losses that Pena and Sewell sustained in the collision (and thus, the exposure for Giddings as its insured), Progressive's adjuster tried to resolve the bodily injury claims quickly by offering Pena and Sewell $20,000 each and claiming that sum was the full extent of the liability coverage that was owed to Giddings.

Both Pena and Sewell sought advice from legal counsel. Pena was informed by his counsel that liability coverage in this case would not be limited to $20,000 person as the motor vehicle accident occurred after July 1, 2020 and the amended statute required $250,000/$500,000. That was communicated by his counsel to the Progressive adjuster handling the bodily injury claim when the offer to settle his claim for $20,000 was rejected.

Pena filed a tort action against Giddings in Tuscola County where the motor vehicle accident occurred. It was assigned to the same judge that heard this declaratory relief action. Progressive assigned counsel to defend Giddings. Subsequently, Sewell retained the same legal counsel as Pena and she was added as a plaintiff in the pending tort action.

Pena's counsel also advised the bodily injury adjuster at Progressive that he would be filing a declaratory action to establish the amount of coverage owed to Giddings for causing the motor vehicle accident on August 5, 2020. Before that happened, however,

Progressive filed this declaratory relief action, initially against Pena and Giddings, but then subsequently against Pena, Sewell, and Giddings after Sewell was added to the tort action.

As part of its complaint in this declaratory relief action, Progressive asserted that the trial court had jurisdiction over the parties and issues in this case and that venue was proper in the county where its lawsuit was filed. Appx at 79. It further alleged that there was "a case of actual controversy" between the parties as required by MCR 2.605(A)(1). Appx at 83. Progressive also asserted that the trial court's "assistance in declaring the rights and obligations of the parties is necessary to properly adjudicate these claims." Id.

Substantively, Progressive alleged that Giddings was entitled to $20,000/$40,000 only based on the policy that it issued to her on March 11, 2020. Appx at 81. Progressive did not allege that $20,000/$40,000 was all the coverage required under the No-Fault Act. In fact, its complaint identified no statutory provisions that supported its claim that coverage was limited to $20,000/$40,000. It simply alleged that $20,000/$40,000 was all that Giddings was owed contractually. It did not allege that its constitutional rights under the contracts clause would be violated if it was required to provide more than $20,000/$40,000.

Progressive did not assign legal counsel to defend Giddings in this declaratory relief action. Consequently, she was not represented by counsel below even though Progressive hired counsel to defend her in the pending tort action. In fact, she was served with the motion for summary disposition only after counsel for Pena and Sewell informed Progressive that it needed to do so before it could be heard. She did not file an answer to the complaint or the motion for summary disposition, but she was present at the hearing.

Progressive moved for summary disposition under MCR 2.116(C)(10). In short, Progressive argued that it was not required to provide the coverage statutorily mandated

after July 1, 2020 because it issued the policy to Giddings before July 1, 2020 – regardless of whether the six month term of her auto policy extended beyond July 1, 2020. In support, Progressive relied primarily on the policy that it issued to Giddings and MCL 500.3009(6).

In response, Pena and Sewell requested judgment as a matter of law in favor of their position under MCR 2.116(I)(2). In sum, they argued that the clear, unambiguous wording of MCL 500.3009(1) established that $250,000/$500,000 was owed to Giddings as that was statutorily mandated for motor vehicle accidents occurring after July 1, 2020. They also argued that MCL 500.3009(6) did not support Progressive's position as it clearly applied only to situations where the insured opted for less coverage after July 1, 2020. In short, they requested that the trial court hold that the Progressive policy issued to Giddings must conform to the statutory requirements that applied after July 1, 2020. Appx at 112.

Progressive filed a reply brief to support its position. In its reply briefing, Progressive raised new claims including that the constitutional contracts clause would be violated if the policy that it issued to Giddings was reformed so that it provided the statutorily mandated minimum coverage in Michigan of $250,000/$500,000. Progressive also contended for the first time in its reply that MCL 500.3009(8) also supported its position. Appx at 199-200.

Pena and Sewell sought permission to file a sur-reply brief in order to address the untimely constitutional claim. The trial court graciously permitted Pena and Sewell to do so. In that brief, Pena and Sewell noted that Progressive had nearly 9 months to address the change to the statutorily mandated minimum coverage so as to comply with the amended law. Appx at 203-206. But, it instead issued Giddings a policy that was not in compliance with the statutory requirements for more than two months of its six month term.

At the summary disposition hearing, counsel for both Progressive and Pena/Sewell argued at length before the trial court issued its ruling. Giddings was also present at that hearing. She was not represented by counsel. Before the trial court issued its ruling, Gidding was given a chance to speak if she wanted to do so. She declined. Appx at 259.

The trial court denied Progressive's motion summary disposition under MCR 2.116(C)(10) and granted Pena and Sewell's request for judgment as a matter of law in this declaratory relief action under MCR 2.116(I)(2). Before doing so, the trial court summarized the parties' respective positions about how much liability coverage was owed to Giddings. The trial court then stated that it was "convinced that Ms. Gidding's [sic] policy would have to be reformed to reflect the changes to the statute, which came into effect [on July 2, 2020]. Appx at 262. It also further observed that "the changes to the no-fault [act] were enacted sometime prior to July 2, 2020" and "certainly [Progressive] was on notice that there were going to be policies that did not conform to the statutory scheme as set forth under MCL 500.3009, specifically subsection 1." Appx at 262. Lastly, the trial court stated that "certainly Ms. Giddings should not bear, nor should the other two Defendants bear the burden of Progressive's failure to conform the policy to reflect the statutory changes to the no-fault scheme". Appx at 262. Accordingly, the trial court granted judgment as a matter of law for Pena and Sewell, as well as Giddings, under MCR 2.116(I)(2). Appx at 262-0263.

Subsequently, a final order was entered in the declaratory relief on action, denying Progressive's summary disposition motion under MCL 2.116(C)(10) and granting judgment as a matter of law for Pena and Sewell (and Giddings) under MCR 2.116(I)(2). Appx at 6-7. That final order also expressly provided that the liability coverage owed to Giddings by Progressive under its policy was $250,000 per person/$500,000 per accident." Appx at 7.

Progressive Marathon appealed and the Court of Appeals reversed the trial court's ruling that Giddings was owed the statutory minimum coverage required after July 1, 2020. In sum, the Court based its published holding on its conclusion that subsections (1)(a) and (1)(b) "regulate the minimum liability limits according to a calendar date" and are "clearly conditioned on when a policy was 'delivered or issued for delivery' under subsection (1)." Appx 269, slip op at 4. Consistent with what Progressive argued, it concluded that "[t]o hold that the coverage limitations in preexisting policies automatically increased on July 2, 2020, would ignore the statute's plain language distinguishing coverage between dates." Id at 4.

In support of that holding, the Court also relied upon language found only in the opt-out provisions that apply to polices issued or renewed after July 1, 2020. MCL 500.3009(5)-(8). Appx 268. It also cited the changes allowing insured to sue in tort for expenses not covered by PIP as additional support for its holding. Id. Oddly, there was no mention of the fact that Progressive had long known of those changes but did nothing to inform Gidding of the increased risks posed by those changes if more liability coverage was not secured.

Pena and Sewell moved for reconsideration, arguing that the Court's holding was "palpable error" because MCL 500.3009(1) clearly states that the coverage provided must include all limits identified under its subsections and that is as true for policies issued (or delivered) before July 2, 2020 as it is for policies issued (or delivered) after July 1, 2020. Alternatively, they argued that the provision was ambiguous as different judges read it differntly, and therefore, it should have been construed in favor of Giddings as the insured.

The Court of Appeals denied reconsideration of its published decision on March 8, 2023. Appx at 271. Pena and Sewell seek leave in order to challenge that published ruling.

ARGUMENT

I. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT PROGRESSIVE MARATHON DID NOT OWE ITS INSURED THE STATUTORY MINIMUM LIABILITY COVERAGE OF $250,000/$500,000 THAT THE LEGISLATURE REQUIRED AFTER JULY 1, 2020.

A. In Michigan, auto policies must not be "delivered or issued for delivery" on vehicles "registered or principally garaged" in Michigan under MCL 500.3009(1) unless ALL of the limits under its subsections are provided.

MCL 500.3009(1) states that a policy "must not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state **unless the liability coverage is subject to all of the following limits**". [Emphasis added]. It is a mandatory provision. It is not optional. Accordingly, all coverages required under subsection (1)(a) and (1)(b) must be provided. That is as true for auto policies issued (or delivered) before July 2, 2020 as it is for auto policies issued (or delivered) after July 1, 2020. Under subsections (1)(a) and (1)(b), the statutory minimum coverages that must be provided are $20,000/$40,000 for motor vehicle accidents that occurred before July 2, 2020 and $250,000/$500,000 for all motor vehicle accidents occurring after July 1, 2020.

The fundamental problem with the Court of Appeals' reading of MCL 500.3009(1) is that it is not grammatically sound. It ignores the amended statute's clear, unambiguous wording and renders nugatory the requirement that "all of the following limits" be provided. It then concludes, without any textual support, that the bifurcated limits under subsections (1)(a) and (1)(b) "are clearly conditioned on when a policy was "delivered or issued for delivery" under subsection (1)". In actuality, the bifurcated limits ensure that motorists in Michigan have additional coverage after July 1, 2020 to offset the address the added risk of being sued in tort for allowable expenses not covered by PIP benefits like medical bills.

Presumably, if the Legislature had wanted to differentiate the statutory minimum liability coverage owed under auto policies issued before July 2, 2020 from the minimum coverage owed under policies issued after July 1, 2020, it would have said so clearly under MCL 500.3009(1). It would have been simple to do that! But, it would require language different than the "unless the liability coverage is subject to all the following limits" wording.

To accomplish that result, subsection (1)(a) would need language that clearly provided for statutory minimum liability coverage of $20,000/$40,000 for all auto policies issued before July 2, 2020. Subsection (1)(b), in turn, would need similarly clear language that provided for $250,000/$500,000 in coverage for all policies issued or delivered after July 1, 2020. Effectively, that is how Progressive wants MCL 500.3009(1) to be read even though that is not the language the Legislature used when the No-Fault Act was amended. The Court of Appeals erred by reading MCL 500.3009(1) as Progressive wanted it read.

The Court of Appeals further erred by framing the operative question in this case as whether the Legislature intended for liability coverage to "automatically" increase from $20,000/$40,000 to $250,000/$500,000 on July 2, 2020. The question is actually whether the Legislature intended for auto insurers to write all the coverages required under the amended No-Fault Act. If so, that coverage was $20,000/$40,000 before July 2, 2020 and $250,000/$500,000 after July 1, 2020, based on the statute's clear, unambiguous wording.

Simply put, Progressive Marathon did not do what was clearly mandated by the Legislature when it increased the statutory minimum liability coverage that is now required in Michigan to protect insureds from the increased risk of being sued for medical bills. Instead, Progressive issued a policy with a six-month term to Giddings even though that policy would only be in compliance with the amended law's requirements through July 1,

2020. Progressive's policy violated MCL 500.3009(1) because it did not provide the higher coverage that was statutorily required after July 1, 2020. It provided only $20,000/$40,000.

Moreover, Progressive Marathon never informed Giddings that her potential liability would increase after July 1, 2020, even though it understood that the financial consequences could be devastating if she caused a motor vehicle accident that seriously injured another person. Effectively, Progressive opted to keep Giddings in the dark about the fact that her coverage would do less to protect her from tort liability after July 1, 2020.

With its published ruling, the Court of Appeals basically rewarded Progressive for misleading its own insured about the statutory minimum liability coverages that the Legislature required to protect auto insureds in Michigan. In so holding, it denied Giddings (and all other similarly situated insureds) statutorily mandated protection from the increased risk of being sued in tort for medical bills not covered by PIP after July 1, 2020.

B. MCL 500.3009(5)-(8) do not support the Court of Appeals' holding that less coverage was owed than the statutory minimum liability coverage of $250,000/$500,000 that was required in Michigan after July 1, 2020.

Lacking textual support for its reading of MCL 500.3009(1) within the language used in that provision and its subsections, the Court of Appeals turned to subsections (5)-(8). As the Court correctly noted, MCL 500.3009(1) expressly provides that its requirements are "[s]ubject to subsections (5) to (8)". The problem with the Court's analysis is that subsections (5)-(8) apply only to policies issued or renewed after July 1, 2020. Here, the policy was issued on March 20, 2020. Accordingly, none of those subsections have any application in this case. In short, none of them should inform how MCL 500.3009(1) is interpreted in cases where the policy, as in this case, was issued long before July 2, 2020.

Furthermore, subsections (5) to (8) all pertain to opting out of the statutory minimum liability coverage of $250,000/$500,000 that was required after July 1, 2020 by selecting coverage not lower than $50,000/$100,000. That is not an option that Giddings had because Progressive did not inform her that No-Fault Act changed before the motor vehicle accident occurred. It did not do so when she secured coverage with Progressive on March 11, 2020 and it did not do so even when her exposure to liability changed on July 2, 2020.

Support for a reading of the amended No-Fault Act that would deny Giddings the statutory minimum liability coverage of $250,000/$500,000 that was required after July 1, 2020 cannot be found in opt-out provisions. By definition, those subsections did not apply to her efforts to secure coverage as the policy that she had with Progressive Marathon when the motor vehicle accident occurred was not issued or renewed after July 1, 2020.

C. Statutory changes to PIP coverage have no bearing on the amount of liability coverage mandated for policies issued on motor vehicles in Michigan after the No-Fault Act was amended on June 11, 2019 other than justifying the need for higher liability coverage after July 1, 2020.

The Court of Appeals further erred by seeking support for its reading of MCL 500.3009(1) and its subsections from the changes made to PIP coverage in 2019. While the Court was correct that "[t]he Legislature made across the board reforms to the no-fault act explicitly for policies issued or renewed after July 1, 2020" and those reforms included the ability to select less than unlimited PIP coverage, it erred by holding that those options were limited to policies "issued or renewed after July 1, 2020". Appx 270. In a bulletin issued the following week, the DIFS director confirmed that insurers were required to make changes to existing policies. Appx 272, DIFS Bulletin 2020-31-INS, issued on July 8, 2020.

The Court of Appeals misunderstood the significance of the PIP changes that became effective on July 1, 2020. The fact that changes to PIP coverage had the same effective date as changes to the statutorily mandated minimum liability coverage in Michigan demonstrated only that unlimited PIP coverage continued to be mandated until the insured opted out of such coverage – just as the statutory minimum of $250,000/$500,000 applied unless the insured opted out under MCL 500.3009(5). Simply stated, the PIP coverage changes adopted under the amended No-Fault Act can only be read as consistent with a holding that more liability coverage was owed after July 1, 2020.

Like unlimited PIP coverage, the statutorily mandated minimum liability coverage, i.e., $250,000/$500,000 after July 1, 2020, could only be changed if the insured opted for less coverage. After July 1, 2020, the baseline for PIP coverage in Michigan remained unlimited PIP medical coverage, unless less coverage was selected. After July 1, 2020, the minimum liability coverage was $250,000/$500,000, unless less coverage was selected.

In Michigan, it is well-established that insurance coverage cannot be reduced without notifying insureds. See generally, *Koski v Allstate Ins Co*, 213 Mich App 166, 170, 539 NW2d 561 (1995), rev'd on other grounds 456 Mich 439, 572 NW2d 636 (1998), affirming “[t]he rule that attention must be called” to coverage reductions and that an "insurer should be able to enforce only those changes in coverage as to which the insured has been reasonably informed.". Id, citing *Giles v St Paul Fire & Marine Ins Co*, 405 F Supp 719, 724 (ND Ala, 1975). Here, Progressive wrote liability coverage for Giddings knowing that it was not consistent with what the Legislature mandated after July 1, 2020, and that it would not protect her against the increased risk of tort liability after July 1, 2020.

Effectively, Progressive reduced coverage for Giddings to levels below the statutorily mandated amounts after July 1, 2020. It did so without informing Giddings of the changes made to the law in Michigan. It did so by writing her policy as if the law had not changed.

The changes that the Legislature made to the No-Fault Act and MCL 500.3009 when it passed 2019 PA 21/22 were effective immediately on June 11, 2019. Here, Giddings secured coverage with Progressive 9 months after the law changed in Michigan. Progressive knew the law changed. Giddings, in contrast, had no knowledge that the law had changed or that the financial risks for her would increase before her policy term ended.

Notwithstanding this fact, Progressive's position remains that Giddings is owed only the coverage that she secured on March 11, 2020, even though the law changed on July 1, 2020. The Court of Appeals agreed. But, if that holding is correct, policies issued as late as July 1, 2020, were required to provide only $20,000/$40,0000 in liability coverage to insureds for the next 6 months. Such a result is not consistent with the Legislature's intent to ensure that more coverage was available to protect insureds from increased exposure to liability that resulted from its decision to no longer require unlimited PIP medical benefits.

D. The trial court correctly concluded that the auto policy that Progressive issued to Giddings must conform to the statutorily mandated minimum liability coverage of $250K/$500K that was required after July 1, 2020.

Progressive argued below that its policy limits are controlling. But, in Michigan, it is well-established that insurance policies must conform to statutory requirements. See *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 819 NW2d 68 (2012) (affirming that insurance policies are "subject to regulation, and mandatory statutory provisions must be

read into them" and"[i]nsurance policy provisions that conflict with statutes are invalid"), at pp 260-261, citing *Auto-Owners v Martin*, 284 Mich App 427, 434, 773 NW2d 29 (2009).

In *Martin*, supra, the trial court held that the statutory minimum liability coverage in Michigan was all that was owed because the policy had an exclusion that precluded liability coverage completely under the circumstances. Id at 432-433. The Court of Appeals reversed because Auto-Owners "knew or should have known" that excluding liability coverage was not valid and that its exclusion could not be enforced as it contradicted the statute's requirements. Id at 446. Based on that holding, Auto-Owners owed $1 million in liability coverage to its insured, not simply the statutory minimum amount required in Michigan which was $20,000/$40,000. Id at 452. Auto-Owners challenged that published decision by seeking leave to appeal to this Court but this Court was "not persuaded that the questions presented should be reviewed". Id, 486 Mich 905, 780 NW2d 830 (2010).

Similarly, in *Corwin*, the defendant insurer sought to avoid its obligation to pay PIP benefits by issuing a so-called "fronting" policy that provided that its PIP coverage would be secondary to any coverage available to the owner/operator of the motor vehicle insured. The Court of Appeals, however, rejected the defendant insurer's position because its policy clearly contravened the No-Fault Act's requirement that it provide PIP benefits. Here, Progressive's policy similarly negates the Legislature's intent in statutorily mandating that auto policies in Michigan provide $250,000/$500,000 in liability coverage after July 1, 2020. Thus, the trial court was correct in relying upon *Corwin* to support its holding that the policy that Progressive issued to Giddings must conform to the statutorily mandated minimum liability coverage of $250,000/$500,000 that was required in Michigan after July 1, 2020.

E. The statutory minimum liability coverage of $250,000/$500,000 is owed if MCL 500.3009(1) is ambiguous as to the amount of coverage required.

Speaking of MCL 500.3009(1) in its published opinion, the Court of Appeals concluded that "[w]hen the statute is read in its grammatical context, no ambiguity exists." Slip op at p 4. All three circuit court judges that have reviewed MCL 500.3009(1) agreed. But, all three judges also read MCL 500.3009(1) differently than the Court of Appeals did. See *Pena*, supra; *Bonter*, supra, and *Elliott*, supra. Unlike the Court of Appeals in its published decision in this case, all three circuit court judges concluded that the statute's clear, unambiguous language mandated that the higher statutory minimum amount of liability coverage in Michigan, i.e., $250,000/$500,000, must be provided after July 1, 2020.

In fact, just one week before the Court of Appeals issued its published opinion in this case, St. Clair County Circuit Court Judge Michael L. West issued a written opinion rejecting Progressive Marathon's position that only $20,000/$40,000 in liability coverage was owed to its insured. In that case, the auto policy was reissued for a six month period with only $20,000/$40,000 and the motor vehicle accident occurred on August 25, 2020.

In his opinion, Judge West agreed "with Plaintiff's interpretation and application of MCL 500.3009 and concluded that "Progressive's argument, which focuses only on`the issue date of the policy, is unpersuasive." Appx at 275, slip op at p 2. He also concluded that "[n]othing in the statutory scheme suggests that the legislature intended the [tort liability] coverage changes to be phased in over time as policies expired and reissued before July 1, 2020 continued with applicable coverage dates after July 1, 2020." Id at 2.

Genesee Circuit Court Judge Mark Latchana reached a similar holding by likewise concluding that the statutory minimum liability coverage of $250,000/$500,000 was owed

where the policy was issued on June 20, 2020, the accident occurred on July 25, 2020, and the motor vehicle involved in the collision was not added until July 6, 2020. Appx 278.

Pena and Sewell maintain that MCL 500.3009(1) clearly and unambiguously supports a holding that the statutory minimum liability coverage of $250,000/$500,000 was owed to Giddings for causing the collision that seriously injured them on August 5, 2020. But, if this Court concludes that MCL 500.3009(1) is ambiguous on this point, Giddings should then be afforded the statutory minimum liability coverage of $250,000/$500,000.

If there is more than one plausible interpretation of MCL 500.3009(1)'s meaning, its wording is then ambiguous and it must be construed in favor of Giddings as the insured and against Progressive Marathon as the insurer that was required to protect its insured. "The no-fault act is remedial in nature and is to be liberally construed in favor of persons who are intended to benefit from it." *Putkamer v Transamerica*, 454 Mich 626, 631, 563 NW2d 683 (1997); *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 61, 404 NW2d 199 (1987).

II. APPLYING MCL 500.3009(1) AS WORDED SO THAT LIABILITY COVERAGE OF $250,000/$500,000 WAS REQUIRED AFTER JULY 1, 2020 DOES NOT VIOLATE THE CONTRACTS CLAUSE OF THE STATE OR FEDERAL CONSTITUTION BECAUSE NO VESTED RIGHT WAS IMPAIRED WHERE THE LAW CHANGED ON JUNE 11, 2019, AND PROGRESSIVE CONTINUED TO WRITE LESS THAN THE STATUTORILY MANDATED MINIMUM COVERAGE UNTIL JULY 2, 2020.

The Court of Appeals did not address Progressive Marathon's claim that the trial court's holding violated the contracts clause of both the state and federal constitution. The trial court also did not address that claim. Nonetheless, Pena and Sewell will address it briefly now as it is likely to surface again when Progressive responds to this application.

At the outset, it should be noted that Progressive Marathon did not allege a constitutional violation of the contracts clause in its declaratory relief action. Appx at 78-84.

It similarly did not claim that the contracts clause would be violated when it moved for summary disposition in this case. Appx 8-22. It was only when it filed its reply briefing on summary disposition that the contracts clause claim was suddenly discovered. Appx 200.

Fundamentally, Progressive Marathon had no vested right in providing Giddings with only $20,000/$40,000 in liability coverage for the motor vehicle accident that she caused. That is true because it issued the policy to Giddings, knowing the law had changed and that more coverage was required after July 1, 2020. No similar statement can be made about the cases that Progressive relied upon below to support its contracts clause claim.

In *Wells v Detroit Auto Inter-Ins Exchange*, 29 Mich App 235, 237, 185 NW2d 147 (1970), for example, this Court held that a statutory change that required uninsured motorist coverage in Michigan could not be applied to auto policies issued before the law changed. But, unlike this case, in *Wells*, the law changed only after the policy was written. In other words, there was no advance notice that Michigan law would be changing soon.

Here, Progressive was aware that the law had changed for 9 months before higher liability coverage was required in Michigan. And yet, Progressive opted to write coverage to insureds like Giddings that provided only $20,000/$40,000 in liability coverage even after July 1, 2020, despite the clear statutory mandate that $250,000/$500,000 was required after July 1, 2020, and the fact that everyday after July 1, 2020, the tort liability risk increased as more and more motorists in Michigan chose to go without the unlimited PIP medical coverage. The same is true of *Rowland v Detroit Auto Inter-Ins Exch*, 34 Mich App 267, 269, 191 NW2d 56 (1971), aff'd 388 Mich 476, 201 NW2d 792 (1972), which followed *Wells* on similar facts where the policy likewise was issued before the law had changed.

Progressive made no attempt below to satisfy the test for establishing a violation of the contrast clause in seeking summary disposition. It similarly has not established on appeal that it actually has a valid constitutional contracts clause claim in this case. Accordingly, this Court need not address its untimely, undeveloped constitutional claims, especially as the cases relied upon by Progressive are so easily distinguished in this case.

CONCLUSION

MCL 500.3009(1) provides that motor vehicle liability policies "must not be delivered or issued for delivery" in Michigan for motor vehicles "registered or principally garaged" in Michigan, "unless the liability coverage is subject to all of the following limits", and it then states that those limits are $20,000 per person/$40,000 per accident before July 2, 2020; and $250,000 per person/$500,000 per accident after July 1, 2020. [Emphasis added]. It does not say that greater coverage of $250,000/$500,000 is required only if the policy is issued or renewed after July 1, 2020. It says that the coverage must satisfy ALL of the limits stated. It then defines the limits before July 2, 2020 and the limits after July 1, 2020.

Here, the Court of Appeals erred by reading the auto policy that Progressive Marathon issued to Giddings as providing her with only $20,000/$40,000 in liability coverage for the motor vehicle accident that injured Pena and Sewell on August 5, 2020. The policy that Progressive issued to Giddings must conform to MCL 500.3009(1)'s clear, unambiguous requirement that $250,000/$500,000 be provided for motor vehicles accident that occurred after July 1, 2020. The Court of Appeals erred by reading MCL 500.3009(1) as requiring less coverage than statutorily required act simply because the policy was issued before July 2, 2020, especially where, as in this case, Progressive never informed

Giddings that her exposure to tort liability would increase dramatically after July 1, 2020. This Court should grant leave to appeal to address whether the Court of Appeals erred by reversing the trial court's holding that the higher statutory minimum coverage was owed.

RELIEF REQUESTED

Defendants/Appellants, John Pena and Krystle Sewell, respectfully request that this Court grant leave to appeal from the Court of Appeals' published opinion reversing the trial court's holding that the liability coverage that Progressive Marathon owed to Giddings for the injuries that she caused them is $250,000/$500,000, as that is what the Legislature clearly intended for motor vehicle accidents after July 1, 2020, and not $20,000/$40,000.

Respectfully submitted,

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