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STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH CANTY,	MSC: 167772
Plaintiff-Appellant,	COA: 365327 TC: 21-004799-NI
-v-	
MICHAEL MASON,	
Defendant-Appellee,	

Defendant-Appellant Michael Mason's Answer to the Application

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Dated: December 16, 2024

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Jurisdictional Statement

Defendant-Appellee Michael Mason agrees that this Court has jurisdiction to consider Plaintiff-Appellant Joseph Canty's application for leave to appeal.

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Questions Presented

I.

The no-fault act did not abrogate the common-law duty to mitigate damages that applies in both contract and tort claims.

Plaintiff Joseph Canty opted out of PIP benefits under the act because he had Medicare. But after his accident he didn't use his Medicare. Instead, he sued defendant Michael Mason under the no-fault act for unlimited allowable expenses.

Can Canty recover from Mason the damages he could have mitigated had he used his Medicare?

Mason answers:	No.
The Court of Appeals answered:	No.
This Court should answer:	No.
The trial court answered:	No, then yes.
Canty answers:	Yes.

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II.

When interpreting a statute, courts must read the provision in question not in isolation but with reference to the entire act.

Reading MCL 500.3135(3)(c) with reference to the entire no-fault act reveals that the Legislature uses the phrase "allowable expenses" in a consistent manner and treats allowable expenses in both first-party and third-party cases the same.

Do the same limitations and exceptions that contour allowable expenses in a first-party case also contour allowable expenses in a third-party case?

Mason answers:	Yes.
The Court of Appeals answered:	Yes.
This Court should answer:	Yes.
The trial court answered:	No.
Canty answers:	No.

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Introduction

Plaintiff Joseph Canty had Medicare parts A and B and, before the accident at issue in this case, received medical care through a VA provider. Because Canty had Medicare, when Canty purchased a Michigan no-fault insurance policy, he elected not to carry personal protection insurance (PIP). But after Canty got in a car accident with defendant Michael Mason, he didn't want to use his Medicare or treat with the VA. Instead, he treated with well-known no-fault providers who, although they accepted Medicare, didn't bill Medicare or tether their rates to what Medicare would pay.

Canty sued Mason, alleging negligence and seeking allowable expenses (PIP benefits) unlimited by cost or necessity. Canty said that the statutory limitations on allowable expenses, like reasonableness, necessity, the fee schedule, and the federal setoff, that govern first-party actions against insurers didn't apply because this was a third-party action against another driver. Canty thought the phrase "without limit" in MCL 500.3135(3)(c) granted him a greater recovery than he would have been able to recover had he purchased personal protection insurance. He also said that no case law or statute required that he mitigate his damages and bill Medicare. Canty was wrong.

First, this Court has already held that the no-fault act did not abrogate the common-law duty to mitigate damages—a duty that applies in both contract and tort cases alike. So even in cases brought under the no-fault act, an injured person has a duty to mitigate damages and can't recover damages they could have avoided.

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Thus, Canty had a duty to mitigate his damages by using his Medicare and getting the insurance discounts that came with it. For example, even if a Medicare lien accrued under the Secondary Payer Act, the providers still couldn't balance bill Canty (passed through to Mason) for the difference between the lien amount and the amount the providers charged. Had Canty used his Medicare, it would have cut down on excess economic waste for which he now wants to recover from Mason. The Court of Appeals correctly applied binding Michigan jurisprudence and reversed the trial court on this issue.

Second, the Legislature's phrase "without limit" didn't authorize carte blanche economic damages in third-party cases. The grammatical structure and plain language of MCL 500.3135(3)(c) reveal that the Legislature intended an injured person to exhaust the PIP **coverage limit** that they selected under MCL 500.3107c before seeking excess allowable expenses from the tortfeasor. The Legislature then expressed that if the injured person opted out PIP under MCL 500.3107d, like Canty did, they could seek allowable expenses from the tortfeasor from the outset without having to exhaust **a policy limit**—meaning that they essentially had no deductible to satisfy first. The Court of Appeals properly allowed the statute's plain language and grammatical structure to reveal the Legislature's intent.

Finally, under the rules for statutory interpretation, identical words in the same act should receive identical treatment. Here, the Legislature, when it added MCL 500.3135(3)(c) in 2019, expressly stated that allowable expenses recoverable in third-party cases are those **as defined in** MCL 500.3107. When it did so, the Legislature incorporated the standards for

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reasonableness and necessity that govern allowable expenses in first party cases. The Legislature was presumably aware of its own language in MCL 500.3107(1) stating that allowable expenses are subject to "the exceptions and limitations in this chapter[.]" That would include the fee schedule in MCL 500.3157.

The Court of Appeals properly applied the rules for statutory construction. It harmonized the Legislature's use of the phrase *allowable expense* in different provisions of the no-fault act. And it effectuated the Legislature's intent of treating economic damages in first and third party cases with an even hand.

This Court should deny leave.

Statement of Facts

A. Canty opted out of PIP under MCL 500.3107d.

Plaintiff Joseph Canty opted out of PIP benefits because he had Medicare.[1] When he needed medical care, he apparently treated with a Veterans Affairs' provider, such as the VA clinic.[2]

On February 15, 2021, Canty and Defendant Michael Mason got in a car accident.[3] After the accident, Canty treated with well-known no-fault providers.[4] Those providers accepted Medicare, but they didn't bill

[1] **Attachment 6.B**, Canty's Insurance Policy, appx 77-127; **Attachment 6.D**, Canty's PIP opt-out form, appx 138-143.

[2] **Attachment 6**, Defendant's MPSD, appx 56 (□7); **Attachment 7**, Plaintiff's Amended MPSD Response, appx 146 (□7).

[3] **Attachment 5**, Complaint, appx 42-53.

[4] **Attachment 6.C**, Medical Bills, appx 128-137.

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Medicare or charge Medicare rates.[5] And they didn't align their rates with the fee schedule in MCL 500.3157.[6]

B. Canty sued Mason for unlimited allowable expenses.

Canty sued Mason under MCL 500.3135(3)(c) for unlimited allowable expenses.[7] Mason sought summary disposition on the portion of the bills that Medicare would have covered.[8] He argued that Canty had a common-law duty to mitigate his damages and use his Medicare.[9] He also argued that Canty's recovery was limited to allowable expenses as defined in MCL 500.3107,[10] which required applying the fee schedule in MCL 500.3157.[11]

C. The trial court agreed on two issues, but later backtracked on one of them.

At the hearing on Mason's motion for summary disposition, the trial court agreed that Canty had a duty to mitigate his damages.[12] But the trial court found that Canty's providers weren't bound by the fee schedule in MCL 500.3157 because it was a third-party case.[13]

Mason submitted an order under the 7-day rule.[14] Canty objected.[15] The trial court held a hearing on Canty's objections.[16] During that hearing,

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[5] *Id.*; **Attachment 8.E**, Participating Insurers, appx 164.
[6] **Attachment 6.C**, Medical Bills, appx 128-137.
[7] **Attachment 5**, Complaint, appx 42-53.
[8] **Attachment 6**, Defendant's MPSD, appx 54-64.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] **Attachment 3**, January 4, 2023 Hearing Transcript, appx 13.
[13] *Id.* at 23.
[14] **Attachment 2**, Register of Actions, appx 6-8.

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the trial court reversed its ruling regarding Canty's common-law duty to mitigate damages.[17] The trial court held that Canty had no duty to use his Medicare.[18] The trial court reaffirmed its holding that MCL 500.3107 defines allowable expenses as stated in MCL 500.3135(3)(c) but that the fee schedule in MCL 500.3157 didn't apply in third-party cases.[19]

D. The Court of Appeals affirmed in part and reversed in part.

Mason sought interlocutory appellate review, which the Court of Appeals granted.[20] After full briefing and argument, the Court of Appeals issued a published opinion.[21] The Court of Appeals unanimously agreed with Mason that the no-fault act did not abrogate the common-law duty to mitigate damages. It reversed that part of the trial court's decision.[22]

Next, it unanimously agreed with Mason that the Legislature's reference to "limits" in MCL 500.3135(3)(c) referred to the coverage limits enumerated in MCL 500.3107c.[23] The Legislature's use of the phrase "without limit" meant that there was no underlying PIP policy to exhaust

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[15] **Attachment 9**, Plaintiff's objections to Defendant's proposed 7-day order, appx 193-198.

[16] **Attachment 2**, Register of Actions, appx 6-8; **Attachment 4**, February 7, 2023 Hearing Transcript, appx 27-41.

[17] **Attachment 4**, February 7, 2023 Hearing Transcript, 32.

[18] *Id.*

[19] *Id.* at 37.

[20] **Attachment 11**, COA order granting leave to appeal, appx 208-209.

[21] **Attachment 12**, COA published decision, appx 210-218; **Attachment 13**, COA partial dissent, appx 220.

[22] *Id.*

[23] *Id.*

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before the injured person could seek economic damages from the tortfeasor.[24]

Finally, the majority held that an *allowable expense* in MCL 500.3135(3)(c) should receive the same treatment and be subject to the same parameters as an *allowable expense* under MCL 500.3107, including being subject to the requirements for reasonableness and necessity, the federal setoff, and the fee schedule in MCL 500.3157.[25] It arrived at this conclusion because the Legislature expressly defined allowable expense under MCL 500.3135(3)(c) as those in MCL 500.3107.[26] In doing so, the Legislature necessarily incorporated all of MCL 500.3107 into MCL 500.3135(3)(c), including its language in MCL 500.3107(1) that stated that personal protection insurance benefits are "subject to the exceptions and limitations in this chapter[.]"[27]

The dissent mostly agreed with this last holding, except that it didn't think that the Legislature incorporated all of MCL 500.3107.[28] It believed that the Legislature omitted MCL 500.3107(1)'s language that allowable expenses were subject to all exceptions and limitations in the no-fault act and only meant to refer to MCL 500.3107(1)(a).[29] As a result, the dissent didn't think that the fee schedule in MCL 500.3157 applied to economic damages in third party cases.[30]

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] **Attachment 13**, COA partial dissent, appx 220-222.
[29] *Id.*
[30] *Id.*

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Standard of Review

This Court reviews a trial court's decision to grant or deny summary disposition de novo. *Meemic Ins Co v Fortson*, 506 Mich 287, 296; 954 NW2d 115 (2020). This Court also reviews issues of statutory construction de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002). De novo review means that an appellate court can review the legal issues "with fresh eyes, without any required deference to the courts below." *Thiel v Goyings*, 504 Mich 484, 495; 939 NW2d 152 (2019).

Argument

I.

Canty opted out of PIP because he had Medicare. But after his accident he didn't use his Medicare. Instead, he sued Mason under the no-fault act for unlimited allowable expenses. But, like any other contract or tort plaintiff, Canty was subject to the common-law duty to mitigate damages. It follows that Canty cannot recover from Mason the damages he could have mitigated had he used his Medicare.

A. Certain common-law defenses apply to the no-fault act

PIP benefits are not purely statutory in nature. *Andary v USAA Casualty Ins Co*, 512 Mich 207, 236-237; 1 NW3d 186 (2023). And Michigan recognizes that common-law defenses not abrogated by the no-fault act can still bar otherwise mandatory coverage. See *Meemic Ins Co v Fortson*, 506 Mich 287, 304; 954 NW2d 115 (2020); *Titan Ins Co v Hyten*, 491 Mich 547, 571-572; 817 NW2d 562 (2012) (recognizing the common-law defense of fraud in the procurement as a bar to mandatory PIP coverage).

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The common-law duty to mitigate prevents an injured party from recovering economic damages that the injured party could have avoided. *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). Because the no-fault act did not abrogate it, the duty to mitigate applies in no-fault cases, too. *Bak v Citizens Ins Co of America*, 199 Mich App 730, 739; 503 NW2d 94 (1993).

In *Bak*, the plaintiff couldn't return to her job as a nurse after her accident. *Id.* at 732. But she made no effort to obtain other suitable work. *Id.* She then sued her insurer for three years' worth of work-loss damages. *Id.* She claimed she didn't have to mitigate her damages under the no-fault act. *Id.* at 732-733.

Bak observed that the no-fault act did not abrogate the common-law duty to mitigate damages and thus held that the defense remained available. *Id.* at 738. "In both contract and tort actions, an injured party must make every reasonable effort to minimize damages . . . . To relieve an insured of the duty to mitigate would place the goals of § 3107(1)(a) at odds with those of § 3107(1)(b)." *Id.* at 736, 739.

This Court adopted *Bak*'s holding in *Marquis v Hartford Acc & Indem*, 444 Mich 638, 651; 513 NW2d 799 (1994). *Marquis* considered the plaintiff's efforts in finding suitable post-accident work. *Id.* at 650. *Marquis* ratified the rule that the common-law duty to mitigate damages applied in no-fault cases. Yet, *Marquis* went further to announce that the common-law duty to mitigate damages served the overall goal of the no-fault act to provide timely redress through *affordable* insurance coverage:

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> A primary goal of the no-fault act is to 'provid[e] an equitable and prompt method of redressing injuries in a way which made the mandatory insurance coverage *affordable* to all motorists.' (Emphasis added). *This policy promotes cost savings for consumers as well as insurers*. . . . [*Id.* at 654-655 (emphasis added).]

Thus *Marquis* and *Bak* teach that the common-law duty to mitigate damages applies in no-fault cases and support the goals of the no-fault act.[31] That doctrine applies here, too.

B. Canty had a duty to mitigate damages

Canty had a duty to mitigate his damages on claims for any post-accident treatment under the no-fault act. That duty required Canty to use his Medicare insurance or function as an offset if he didn't. Canty didn't. So he cannot recover from Mason the damages he could have avoided had he used his Medicare. *Marquis*, 444 Mich at 654; *Bak*, 199 Mich App at 739.

Like the unavailing plaintiff in *Bak*, Canty argued below, and the trial court agreed, that he had no duty to mitigate his damages. He was wrong. *Marquis*, 444 Mich at 654; *Bak*, 199 Mich App at 739. Therefore, the Court of Appeals correctly found that common-law principles of mitigation applied here. This Court should deny leave.

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[31] In fact, the no-fault act even contains a mitigation mechanism for insurers in first-party cases that require insureds with coordinated policies to bill their health insurance first. See MCL 500.3109a(1); *Tousignant v Allstate Insurance Co*, 444 Mich 301, 308; 506 NW2d 844 (1993).

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C. Canty's "purely circular" argument fails.

Canty argues that he didn't have a duty to mitigate because, he says, mitigation would be "circular." He thinks that Medicare is never a primary insurer in an auto accident under the Secondary Payer Act and that a Medicare lien would be inevitable. (Application at 24). Not so.

Even if—for the sake of argument—Canty's providers billed Medicare and a lien accrued under the Secondary Payer Act (more on this Act later on), Canty still would have reduced his overall economic waste. Federal law prohibits providers who contract with CMS (Medicare) from balance billing the patient for the difference between the amount Medicare paid and the amount the provider charged for the service. 42 USC 1396a(n)(2)-(3).

If a provider who contracts with Medicare balance bills a Medicare patient, federal law immunizes the patient from liability for the excess charges and allows the state to sanction the provider:

> **42 USC 1396a – State plans for medical assistance**
>
> **(n) Payment amounts**
>
> [...]
>
> (2) . . . [A] State is not required to provide any payment for any expenses incurred . . . to the extent that payment under subchapter XVIII for the service would exceed the payment amount that otherwise would be made under the State plan under this subchapter for such service if provided to an eligible recipient other than a medicare beneficiary.

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> (3) In the case in which a State's payment for medicare cost-sharing for a qualified medicare beneficiary with respect to an item or service is reduced or eliminated through application of paragraph (2)—
>
> […]
>
> (B) the beneficiary shall not have any legal liability to make payment to a provider or to an organization described in section 1396b(m)(1)(A) of this title for the service; and
>
> (C) any lawful sanction that may be imposed upon a provider . . . for excess charges under this subchapter or subchapter XVIII shall apply to the imposition of any charge imposed upon the individual in such case. [42 USC 1396a(n)(2)-(3).]

Here, it's undisputed that Canty's no-fault providers took Medicare. (Application at 2). Had Canty used his Medicare, federal law would have forbidden his providers from recovering the excess, or the balance of the bill, from Canty. As a consequence, Canty would have no claim for damages against Mason for that amount.

Yet by not using his Medicare, Canty caused economic waste by allowing his providers to avoid their contracts with Medicare and charge excess amounts for their services. Common-law mitigation forbids Canty from recovering from Mason those avoidable damages. Therefore he must accept an offset. *Marquis*, 444 Mich at 651.

D. Canty's "choice of doctors" argument fails.

Canty says he shouldn't be made to show that his expenses were reasonable and that asking him to account for his failure to mitigate the

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damages impermissibly shifted the burden onto him. He says that the jury should have answered whether his choice of doctors was reasonable. (Brief at 14-18). Canty's argument fails under his own admissions and the standards for summary disposition.

To begin with, Canty bore the burden to take reasonable steps to avoid unnecessary damages. *Morris*, 459 Mich at 263. Canty also had the obligation, when faced with Mason's motion for summary disposition, to come forward with specific facts to establish the existence of a material factual dispute if he wanted to survive that motion. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Failing to produce sufficient evidence that would create a factual dispute required summary disposition in favor of Mason. *Bernardoni v Saginaw*, 499 Mich 470, 472; 886 NWd 109 (2016).

Here, Canty didn't use his Medicare when he could have easily done so. After all, his providers accepted Medicare.[32] And it would have been very simple for him to put down his Medicare card at check-in. So he didn't keep with his duty to avoid unnecessary damages. *Morris*, 459 Mich at 263.

Seeing this, Mason moved for summary disposition seeking an offset.[33] *Maiden*, 461 Mich at 121. To his motion briefing, Mason attached

[32] **Attachment 8.E**, Participating Insurers, appx 162-173.

[33] **Attachment 6,** Defendant's MPSD, appx 54-64

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the bills from Canty's providers and a list of their participating insurers.[34] MCR 2.116(G)(5).

In response, Canty didn't present any evidence to the trial court that he tried to mitigate his damages by using his Medicare.[35] When asked by the trial court for an exhibit showing that he tried to mitigate his damages by using his Medicare, Canty couldn't say and had nothing attached to his motion response.[36] So Canty didn't create a genuine issue for trial. MCR 2.116(G)(4); *Bernardoni*, 499 Mich at 473.

Moreover, Canty **admits** on appeal in his statement of facts that he treated with doctors who accepted Medicare: "After the accident, Canty treated with no-fault providers. Those providers accepted Medicare, but they didn't bill Medicare or charge Medicare rates." (Brief at 2). This admission on appeal confirms that there wasn't anything left for the jury to decide. MCR 2.116(G)(4); *Bernardoni*, 499 Mich at 473.

Thus, the Court of Appeals properly found that Mason was entitled to a setoff for expenses covered by Medicare.[37]

E. Canty's argument about uncertainty in payment fails.

Canty says that if he had mitigated his damages by using his Medicare, his providers would have faced more uncertainty in receiving

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[34] **Attachment 6.C**, Medical Bills, appx 128-137; **Attachment 8.E**, Participating Insurers, appx 162-173.
[35] **Attachment 7**, Plaintiff's Amended MPSD Response, appx 144-154.
[36] *Id.*; **Attachment 3**, January 4, 2023 Hearing Transcript, appx 15.
[37] **Attachment 12**, COA published opinion, appx 218.

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reimbursement than in a first-party case. (Application at 21-23). This argument doesn't make sense.

If Canty's providers wanted prompt payment and no uncertainty in their recovery, they could have billed Medicare for their charges and recovered immediately, albeit at Medicare rates. After all, by contracting with Medicare, they agreed to accept those rates for patients like Canty who was a qualified Medicare beneficiary. 42 USC 1396a(n)(2)-(3). Medicare, in turn, would then have the option of filing a lien in Canty's third party case against Mason. And if Canty succeeded in his case against Mason, Medicare could have recovered its lien. *Id.*; *Greer v Advantage Health*, 305 Mich App 192, 212-213; 852 NW2d 198 (2014) (holding that the lien applies to all benefits that were paid or payable by the legal entity entitled by contract to a lien). But the providers, for their part, would have already been made whole under their contracts.

Canty actually imposed more uncertainty into the process by not using his Medicare and tying his providers' reimbursement with establishing liability against Mason, which he may not be able to do. Thus Canty's argument fails, and the Court should reject it.

II.

When interpreting a statute, courts must read the provision in question not in isolation but with reference to the entire act.

Reading MCL 500.3135(3)(c) with reference to the entire no-fault act reveals that the Legislature uses the phrase "allowable expenses" in a consistent manner and treats allowable expenses in both first- and third-party cases the same. So the same limitations and exceptions that contour

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allowable expenses in a first-party case also contour allowable expenses in a third-party case.

A. Statutes have to be read together and taken as a whole.

A court's role in construing statutory language is to ascertain the intent of the Legislature. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019).

When interpreting the statutory language, courts must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012).

The provision in question should not be isolated but must be read with reference to the entire act. *State Conservation Dep't v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976) (holding that the act in question must be read as a whole).

With this principle in mind, courts must then interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory. *Esurance Prop & Casualty Ins Co v Mich Assigned Claims Plan*, 507 Mich 498, 508-509; 968 NW2d 482 (2021). And "[i]dentical language should certainly receive identical construction when found in the same act." *People ex rel Simmons v Munising Tp*, 213 Mich 629, 633; 182 NW 118 (1921); *Empire Iron Min P'ship v Orhanen*, 455 Mich 410, 426; 565 NW2d 844 (1997).

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B. MCL 500.3107 defines allowable expense and later provisions in the no-fault act further contour that definition.

"[T]he public policy of this state is that 'the existence of no-fault insurance shall not increase the cost of health care.'" *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 407-408; 526 NW2d 12 (1994), quoting *Dean v Auto Club Ins Ass'n*, 139 Mich App 266, 274; 362 NW2d 247 (1984). Michigan's no-fault act is just as concerned with the rising cost of health care as it is with providing an efficient system of automobile insurance. *Id.* at 408.

MCL 500.3107(1)(a) defines an allowable expense as reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. *Douglas v Allstate Ins Co*, 492 Mich 241, 277-278; 821 NW2d 472 (2012) held that under this provision an allowable expense required four things: (1) the expense must be for an injured person's care, recovery, or rehabilitation; (2) the expense must be reasonably necessary; (3) the expense must be incurred; and (4) the charge must be reasonable.

Yet, section 3107(1)(a) is subject to 3107(1) under which it falls. Section 3107(1) explicitly commands that personal protection insurance benefits are "subject to the exceptions and limitations of this chapter, and subject to chapter 31A[38]:"

> (1) Subject to the exceptions and limitations in this chapter, and subject to chapter 31A,

[38] Chapter 31A is the managed care statute in MCL 500.3181 *et seq*.

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> personal protection insurance benefits are payable for the following:
>
> > (a) Allowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. [*Id.*].

So, integral to the definition of the an allowable expense under MCL 500.3107(1)(a) is the limiting language hovering over it in MCL 500.3107(1) and out from which it flows.

One of those limitations is the federal setoff provision in MCL 500.3109(1). That provision holds that benefits either provided or required to be provided under federal or state law must be subtracted from no-fault benefits otherwise payable under section 3107:

> Benefits provided *or required to be provided* under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury under this chapter. [*Id.* (emphasis added).]

The Medicare Secondary Payer provision of the Omnibus Budget Reconciliation Act of 1980, 42 USC 1395y(b)(2)(A)(ii), provides that Medicare benefits are not payable where the medical expense is covered under an automobile insurance policy or plan or under no-fault insurance:

> **(2) Medicare Secondary Payer**
>
> **(A)** In general Payment under this subchapter may not be made, except as

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> provided in subparagraph (B), with respect to any item or service to the extent that—
>
> > **(ii)** payment has been made or *can reasonably be expected* to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance. [*Id.* (emphasis added).]

See also *John Hancock Prop & Cas Ins Companies v Blue Cross Blue Shield of Mich*, 437 Mich 368, 373; 471 NW2d 541 (1991) (acknowledging the rule).

But the Michigan Legislature drafted the 2019 no-fault amendments to avoid the Medicare Secondary Payer provision. MCL 500.3107d(1) allows drivers to opt out of carrying personal protection insurance, if they are a qualified person, i.e., they have Medicare parts A and B. MCL 500.3107d(7)(b)(ii); see also House Fiscal Agency Report (stating "Qualified health coverage would mean health or accident coverage that does not exclude or limit coverage for injuries related to motor vehicle accidents, including Medicaid and Medicare coverage.").[39] The bipartisan legislation sought to shift medical expenses from auto accidents onto the federal government as a way to lower insurance rates for Michigan drivers.[40]

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[39] **Attachment 8.F**, Michigan House Fiscal Agency Report, appx 175.

[40] See https://www.michigan.gov/difs/industry/insurance/faq/no-fault-faq.

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The 2019 no-fault reform highlights another limitation that contours the meaning of an allowable expense under MCL 500.3107. That provision is MCL 500.3157, which limits the amount a medical provider can recover by implementing a provider fee schedule. The fee schedule caps medical treatment rendered after July 1, 2021 at a percentage of what Medicare would pay for that treatment. *Id.*; *Andary*, 512 Mich at 218-219.

Other exceptions and limitations also shape what constitutes an allowable expense. For example, MCL 500.3107b explains that certain chiropractic, optometry, and physical therapy services don't qualify as an allowable expense. So an allowable expense is one that meets the four factors in *Douglas* and also survives the contouring of the other enumerated exceptions or limitations in the no-fault act.

C. An allowable expense in a third-party case is subject to *Douglas* and the other enumerated exceptions and limitations in the no-fault act.

The 2019 no fault amendments added a new paragraph to MCL 500.3135, which governs actions for third-party tort claims. That new paragraph allows those who opted out of PIP benefits, e.g., qualified persons with Medicare, to recover allowable expenses from an at-fault driver from the outset:

> (c) Damages for allowable expenses, work loss, and survivor's loss **as defined in sections 3107 to 3110**, including all future allowable expenses and work loss, **in excess of any applicable limit under section 3107c** or the daily, monthly, and 3-year limitations contained in those sections, **or without limit for allowable expenses if an election to not maintain that**

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> **coverage was made under section 3107d** or if an exclusion under section 3109a(2) applies. [MCL 500.3135(3)(c) (emphasis added).]

Under the rules for statutory construction, this provision must be read together with the other provisions of the no-fault act to ascertain the Legislature's intent. *State Conservation Dep't*, 396 Mich at 309.

When reading the act's provisions together, it's evident that an allowable expense in MCL 500.3135(3)(c) receives the same treatment as an allowable expense in MCL 500.3107. For one thing, MCL 500.3135(3)(c) expressly defines an allowable expense as an allowable expense in MCL 500.3107: "Damages for allowable expenses, work loss, and survivor's loss ***as defined in sections 3107*** to 3110, including all future allowable expenses and work loss. . . ." MCL 500.3135(3)(c) (emphasis added). The Legislature's expressed definition controls. *In re Receivership of 11910 South Francis Rd*, 492 Mich at 222 (defined words get their defined meaning).

This means that an allowable expense recoverable in a third-party action under MCL 500.3135(3)(c) is subject to the parameters in *Douglas*. It also means that an allowable expense in MCL 500.3135(3)(c) is governed by the opening command in MCL 500.3107(1), which subjects allowable expenses "to the exceptions and limitations of this chapter." Those exceptions and limitations include the federal setoff in MCL 500.3109, the fee schedule in MCL 500.3157, and all of the other exceptions or limitations bearing on allowable expenses.

In fact, when the Legislature enacted MCL 500.3135(3)(c) in 2019 and chose to define allowable expenses in that provision as those defined

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MCL 500.3107, it was presumably aware of the prefatory language in MCL 500.3107(1) that subjected allowable expenses to all of the exceptions and limitations in the no-fault act. *Wallen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.")

The Legislature, in drafting MCL 500.3135(3)(c), could have easily limited its definition of allowable expense to only certain paragraphs in MCL 500.3107. For example, it could have said "[d]amages for allowable expenses, work loss, and survivor's loss as defined in sections 3107(1)(a) to 3110." Or, it could have added some other language to exclude MCL 500.3107(1). But it didn't. And its omission reveals that the Legislature intended to treat allowable expenses in both first- and third party cases alike. *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011) (it's presumed that the Legislature's omissions are intentional).

This is where the dissent got off track.[41] It impermissibly read a limitation into the definition of allowable expenses under MCL 500.3135(3)(c) where the Legislature indicated none. It read MCL 500.3135(3)(c) as stating "as defined in sections 3107**(1)(a)**" when the statute actually stated "as defined in sections 3107 . . . ." As a consequence it impermissibly rewrote the plain statutory language and engrafted a limit into the statute that the Legislature did not intend. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 585-586; 702 NW2d 539 (2005) (holding that because the statute did not include a tolling mechanism, none could be engrafted).

[41] **Attachment 13**, COA partial dissent, appx 221-222.

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D. "Without limit" means there is no underlying PIP policy to exhaust.

Finally, MCL 500.3135(3)(c) refers to the limitations in MCL 500.3107c. MCL 500.3107c provides various coverage limits for allowable expenses that limit no-fault insurance payout based on the coverage limit that the insured selected. Reading these two provisions together reveals two things. It first reveals that the Legislature intended that the new third-party provision work in concert with first-party provisions. It also reveals that an injured person must exhaust their PIP coverage before seeking excess allowable expenses from the tortfeasor.

For example, an injured person who purchased $50,000 in PIP coverage must exhaust their $50,000 from their own insurer before coming after the tortfeasor for excess allowable expenses. If the injured person opted out of PIP, that person may seek allowable expenses from the tortfeasor from the outset without having to satisfy a coverage limit listed in MCL 500.3107c.

So the phrase "without limit" in MCL 500.3135(3)(c) simply means there's no underlying PIP policy limit to exhaust first—essentially there's no deductible for the third-party claim—because the injured person opted out of PIP. The phrase "without limit" doesn't redefine what constitutes or contours an allowable expense.

For Canty, who opted out of PIP because he had Medicare, this means he can seek allowable expenses from Mason from the outset. But it doesn't mean he's entitled to a greater recovery than what he would have received had he purchased PIP coverage. It simply means that Mason is standing in the shoes of the PIP insurer and that the same rules governing

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PIP benefits apply, such as the parameters in *Douglas*, 492 Mich at 277-278, the federal setoff in MCL 500.3109, the fee schedule in MCL 500.3157, and the exclusions in MCL 500.3107b.

If the Legislature meant that an injured person could recover truly unlimited expenses from a tortfeasor, it could have simply used the word "expenses." But it didn't. By using the modifier "allowable," and referring to the first-party definition, the Legislature denoted that restrictions apply. *Empire Iron*, 455 Mich at 426; *In re Receivership of 11910 South Francis Rd*, 492 Mich at 222.

Those restrictions are the same restrictions that apply to allowable expenses in a first-party claim. Subjecting allowable expenses in a third-party case to the same limitations and exceptions in first-party cases comports with Michigan's public policy that the no-fault scheme mustn't increase the cost of health care. *McGill*, 207 Mich App at 407-408. And it accounts for Michigan's concern with the rising cost of health care, *id.* at 208, and bipartisan willingness to shift the burden of medical payments from auto accidents onto the federal government.[42]

The Court of Appeals unanimously gave proper effect to the grammatical structure and cross-references to MCL 500.3107c and MCL 500.3107d when interpreting the phrase "without limit" in MCL 500.3135(3)(c). *In re Receivership of 11910 South Francis Rd*, 492 Mich at 222; *People ex rel Simmons*, 213 Mich at 633; *Empire Iron Min P'ship*, 455 Mich at 426.

[42] See https://www.michigan.gov/difs/industry/insurance/faq/no-fault-faq.

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In doing so, it correctly refrained from rewriting the plain statutory language or substituting its own policy decisions for those already made by the Legislature. *Mich Ass'n of Home Builders*, 504 Mich at 212-213.

E. Canty's statutory interpretation arguments fail.

Canty says that Mason "glazes over" the phrase in MCL 500.3107(1) stating that personal protection insurance (PIP) benefits are subject to all of the limitations and exceptions in the no-fault act. He says that, since MCL 500.3107(1) expressly refers to PIP benefits, it doesn't apply to third-party claims. Not so.

MCL 500.3107(1) defines personal protection insurance benefits as allowable expenses, work loss, and replacement services. And, as explained above, it subjects all three types of insurance benefits to the limitations and exceptions in Chapter 31:

> (1) Subject to the exceptions and limitations in this chapter, and subject to chapter 31A, personal protection insurance benefits are payable for the following:
>
> > (a) Allowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.
> >
> > […]
> >
> > (b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured.

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[…]

> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [MCL 500.3107(1)].

As explained earlier, because the Legislature subjected allowable expenses to the restrictions and limitations in the entire chapter, those limitations are integral part of the definition of an allowable expense. So when the Legislature later added MCL 500.3135(3)(c) and defined allowable expenses as those in MCL 500.3107, it necessarily imported the full definition of an allowable expense under MCL 500.3107.

Canty also says that since the Legislature didn't specifically list MCL 500.3157 (the fee schedule) in MCL 500.3135(3)(c), it doesn't apply. But the Legislature didn't have to expressly list MCL 500.3157 in MCL 500.3135(3)(c) to make the fee schedule apply to economic damages in third-party claims. The Legislature necessarily imported the fee schedule when it broadly defined allowable expenses in MCL 500.3135(3)(c) as those in MCL 500.3107.

F. Canty attacks a straw man.

Canty closes his brief by saying that Mason "seems to engage in [an] 'absurd results' argument to suggest that the phrase 'without limit' should mean something other than it says." (Application at 35). He then

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says that Mason should lose because Michigan has rejected the absurd-result doctrine. (*Id.)*

But that's not Mason's argument. Mason never argued or implied that the absurd-results doctrine applies here. As shown above, Mason has relied on the rules of statutory construction and made a plain-language argument throughout this litigation. The Court of Appeals properly applied those rules and arrived at the correct result.

Conclusion and Relief Requested

Canty treated with Medicare providers and had a duty to mitigate his damages against Mason by using his Medicare—irrespective that his claims implicated the no-fault act. Following binding case law, the Court of Appeals agreed and correctly reversed the trial court.

The Court of Appeals also properly applied the rules for statutory construction. Its reading harmonized the Legislature's use of the phrase *allowable expense* in different provisions of the no-fault act. And it effectuated the Legislature's intent of treating economic damages in first and third party cases with an even hand.

This Court should deny leave.

Respectfully submitted,

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