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STATE OF MICHIGAN
IN THE SUPREME COURT

C-SPINE ORTHOPEDICS, PLLC,

Plaintiff-Appellee,

v.

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellant.

SC Docket No. 165537
COA Docket No. 358171
MCCC Case No. 20-000368-NF
Hon. Jennifer Faunce

Consolidated with:

C-SPINE ORTHOPIEDICS, PLLC

Plaintiff-Appellee,

v.

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellant

SC Docket No. 165538
COA Docket No. 358170
MCCC Case No. 20-001710-NF
Hon. Jennifer Faunce

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

RECEIVED by MSC 11/14/2023 4:05:22 PM

TABLE OF CONTENTS

COUNTER-STATEMENT OF JURISDICTION 1

COUNTER-STATEMENT OF QUETSIONS PRESENTED.....2

STANDARD OF REVIEW 3

INTRODUCTION 4

STATEMENT OF FACTS 11

LAW AND ARGUMENT 14

MCR 2.116(C)(5) is not implicated by the arguments presented in this appeal.....14

Regardless of any transfer of rights, both Plaintiff and any factoring assignee remain real parties in interest entitled to pursue the claims at issue in this case 14

To the extent that Plaintiff transferred away any rights to any factoring company, regardless of when the transfer was effective, the transfer was merely of "Accounts Receivable," which is a beneficial interest only while Plaintiff maintains ownership of the cause of action.....17

The agreements between Plaintiff and any factoring company vest Plaintiff with the sole cause of action to collect PIP benefits, and in fact requires it to pursue litigation when necessary to collect 18

The Court of Appeals has issued several inherently contradictory opinions, though none of those opinions have addressed the proper analysis that the Court of Appeals applied in this case.....19

RELIEF REQUESTED.....26

RECEIVED by MSC 11/14/2023 4:05:22 PM

INDEX OF AUTHORITIES

Court Rules

MCR 2.116(C)(5).....14

MCR 2.202(B).....14

MCR 7.215(C)(2).....20

Statutes

MCL 500.3110(4).....9

MCL 500.3112.....5, 7

MCL 500.3145.....7

MCL 600.2041.....14

Case Law

C-Spine Orthopedics, PLLC v. Progressive Michigan Ins. Co., __ Mich.App. __, *4 (December 8, 2022).....17, 19, 22

C-Spine Orthopedics, PLLC v. Progressive Marathon Insurance Company, unpublished *per curiam* opinion, docket number 358773 (February 9, 2023).....19

C-Spine Orthopedics, PLLC v. Allstate Ins. Co., unpublished *per curiam* opinion, docket number 360887 (March 30, 2023).....19

Cannon Township v. Rockford Public Schools, 311 Mich.App. 403, 875 N.W.2d 242 (2015)16, 17, 20, 21

Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co., 895 N.W.2d 490 (2017)..... 6-7

Encompass Healthcare, PLLC v. Citizens Ins. Co., __ Mich.App. __, docket #357225 (November 17, 2022).....7

Farrar v. Suburban Mobility Authority for Regional Transport, ___ Mich App ___ (February 9, 2023).....20

RECEIVED by MSC 11/14/2023 4:05:22 PM

George Poy v. Allan, 247 Mich. 385, 225 N.W. 532 (1929) 15

Hagerman v. Nationstar Mortgage, L.L.C., unpublished *per curiam* Court of Appeals opinion, docket #319271 (2015), citing *Bowles v. Oakman*, 246 Mich. 674, 678; 225 N.W. 613 (1929) ..18

Lakeland Neurocare Ctrs v. State Farm Mut. Auto. Ins. Co., 250 Mich. App 35; 645 NW2d 59 (2002) 5

LaMothe v. Auto Club Ins. Ass'n, 214 Mich.App. 577, 543 N.W.2d 42 (1995).....5

Mecosta Cnty. Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co., 509 Mich. 276, 983 N.W.2d 401 (2022) 9

Michigan Chiropractic Council v. Commissioner of Office of Financial and Ins. Services, 475 Mich. 363, 374 n. 25; 716 N.W.2d 561 (2006).....14

Miller v. Citizens Ins. Co., 490 Mich. 905, 804 N.W.2d 740 (2011).....5

Miller v. State Farm Mut. Auto. Ins. Co., 410 Mich. 538, 302 N.W.2d 537 (1981).....8

Muci v. State Farm Mut. Auto. Ins. Co., 478 Mich. 178, 732 N.W.2d 88 (2007) 8

Munson Med. Ctr. v. Auto Club Ins. Ass'n, 218 Mich.App. 375, 554 N.W.2d 49 (1996).....5

Rite-Way Refuse Disposal, Inc v. Vanderploeg, 161 Mich.App. 274, 409 N.W.2d 804 (1987)....15

Robinson v. Detroit, 462 Mich. 439, 463 n. 20; 613 N.W.2d 307 (2000) 19

Robinson v. Szczotka, unpublished *per curiam* Court of Appeals opinion, docket #359646 (April 6, 2023) 20, 21

Sanchez v. Eagle Alloy Inc., 254 Mich.App. 651, 665-666; 658 N.W.2d 510 (2003), quoting *Groulx v. Carlson*, 176 Mich.App. 484, 491; 440 N.W.2d 644 (1989).....18

Shavers v. Attorney General, 402 Mich. 554, 267 N.W.2d 72 (1978) 8

Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 28; 528 N.W.2d 681 (1995) 8

Wallace v. Suburban Mobility Authority for Regional Transport, ___ Mich App ___ (June 22, 2023) 22, 23

RECEIVED by MSC 11/14/2023 4:05:22 PM

COUNTER-STATEMENT OF JURISDICTION

Contrary to Defendant-Appellant's statement, the Court of Appeals denied its Motion for Reconsideration on February 28, 2023. However, Defendant-Appellant's Application for Leave to Appeal was nonetheless timely filed on April 11, 2023. Plaintiff-Appellee agrees that this Court has jurisdiction over the instant appeal pursuant to MCR 7.303(B)(1).

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did Plaintiff-Appellant, as a matter of law, remain a real party in interest with respect to the cause of action for PIP benefits despite assignments of rights to other entities?

   Plaintiff-Appellee: Yes.

   Defendant-Appellant: No.

   Trial Court: No.

   Court of Appeals: Yes.

2. Did Plaintiff, as a matter of fact, retain at least the legal cause of action even if the beneficial interest in accounts receivable had been effectively assigned away?

   Plaintiff-Appellee: Yes.

   Defendant-Appellant: No.

   Trial Court: No.

   Court of Appeals: Yes.

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STANDARD OF REVIEW

Rulings on summary disposition are reviewed *de novo*. *McCormick v. Carrier*, 487 Mich. 180, 188; 795 N.W.2d 517 (2010); *In re Smith Trust*, 480 Mich. 19, 23-24; 745 N.W.2d 754 (2008); *Saffian v. Simmons*, 477 Mich. 8, 12; 727 N.W.2d 132 (2007). Rulings on motions for reconsideration are reviewed for an abuse of discretion. *Woods v SLB Property Management, LLC*, 277 Mich.App. 622, 629; 750 N.W.2d 228 (2008).

Summary disposition is proper where "[t]he party asserting the claim lacks the legal capacity to sue." MCR 2.116(C)(5). "In reviewing a grant of a motion for summary disposition pursuant to MCR 2.116(C)(5), we must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Rohde v. Ann Arbor Public Schools*, 265 Mich.App. 702, 705; 698 N.W.2d 402 (2005).

Summary disposition is proper where "except as to the amount of damages, there is no genuine issue as to any material fact." MCR 2.116(C)(10). "Under MCR 2.116(C)(10), the motion tests the factual support for a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence." *Maiden v. Rozwood*, 461 Mich. 109, 120; 597 N.W.2d 817 (1999). "A court properly grants the motion when the proffered evidence, viewed in the light most favorable to the nonmoving party, fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003).

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INTRODUCTION

The issues at bar are more pervasive than one might expect at first glance. While this action involves unchallenged assignments of rights by No-Fault Act ("NFA") "injured persons" (i.e. human beings involved in a motor vehicle accident) or "claimants" (i.e. any person or other entity making a claim for benefits under the NFA) and subsequent assignments by Plaintiff-Appellee ("Plaintiff") to medical factoring companies which gave rise to the issues presented in this case, the outcome will necessarily impact the dynamic of injured person assignments to provider claimants as well.

Having a high volume personal protection insurance ("PIP") benefits practice for both injured persons and provider claimants, the undersigned is acutely aware of the gamesmanship employed by no-fault insurers to circumvent liability for otherwise compensable benefits due to a practically non-existent perceived potential harm where there exists an extremely simple procedural vehicle to entirely eliminate any such potential harm. Rather than simply seek joinder where an insurer believes a non-party to the action could have an interest in the same claim, they frequently sit on their hands to create limitation period, and only thereafter challenge the standing of the party asserting the claim despite having notice well prior.

This tactic frequently results in the insurer paying nothing for a claim that was never substantively challenged, leaving the injured person liable to pay for her own medical treatment that would otherwise have been covered by insurance. As a practical matter, provider claimants rarely pursue injured persons directly, but the result without collection causes provider claimants to leave the PIP market, which will inevitably render PIP insurance illusory where no medical facility will accept that form of insurance.

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Plaintiff implores this Court to coalesce indisputably contradictory yet binding precedent from the Court of Appeals, apply black letter law and this Court's own instruction in the court rules, while furthering the purpose of the No-Fault Act as the legislature intended.

For decades, medical providers were acknowledged as having direct claims for no-fault benefits against the applicable payer, whether a private insurer or through the Michigan Assigned Claims Plan. See, e.g., *LaMothe v. Auto Club Ins. Ass'n*, 214 Mich.App. 577, 586; 543 N.W.2d 42 (1995); *Munson Med. Ctr. v. Auto Club Ins. Ass'n*, 218 Mich.App. 375, 381; 554 N.W.2d 49 (1996); *Lakeland Neurocare Ctrs v. State Farm Mut. Auto. Ins. Co.*, 250 Mich. App 35; 645 NW2d 59 (2002).

Conspicuously absent from Michigan jurisprudence in the 20 years that claimants and providers were deemed to share a single cause of action are any significant issues caused by that duality. Perhaps the most notable case is *Miller v. Citizens Ins. Co.*, 490 Mich. 905, 804 N.W.2d 740 (2011), which involved a dispute between a provider that had not pursued its own legal action and a claimant who recovered damages related to the provider's treatment. While the claimant recovered the full amount owed to the provider, she was contractually obligated to pay her attorney a fee for representation. This Court held that the settlement was only between the claimant, her attorney, and the insurer, noting that the claimant was still liable personally to the provider for the reduction in payment due the attorney fee.

There simply were no significant issues that arose from the duplicity of a single cause of action. This is likely due to the legislature's anticipatory instruction on how to handle any dispute regarding the proper party to pay, being that any interested party may apply for equitable apportionment of benefits. See MCL 500.3112. In the 12 years this writer has practiced no-fault litigation, motions colloquially called "3112s" became standard practice.

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Where a provider pursued its [subsequently determined illusory] direct cause of action, that provider and the insurer would resolve the dispute, which invariably included a waiver of the claimant's personal liability for any unpaid portion of the balance. Where a provider submitted bills on the claim but did not file its own action, insurers protected themselves from any subsequent lawsuit that could cause duplicative payment by moving for equitable apportionment as provided by the NFA and discharging its liability for the paid benefits.

Anecdotally, the provider's separate action not only permits it to choose its own attorney and litigate as it sees fit, but it is also affords the most protection to the claimant, who does not have to pay a fee to pursue those benefits and is ultimately absolved of *all* liability, not just for the amount the insurer pays. On the other hand, providers who are apportioned part of a settlement still possess a cause of action against the claimant for any remaining balance after the payment is issued. This comes into play below when discussing the purpose of the NFA.

In fact, this procedure benefits the insurers as well. With provider claimants as parties to litigation, the insurer has much better access to any information it seeks in discovery and can conduct depositions without paying expert witness fees that would otherwise be required where the provider claimant was a non-party.

Through MCL 500.3112, insurers were (and are) protected from duplicative payment where a settlement amount was reached, all interested parties were put on notice, and the trial court held a hearing and ultimately decided which party received what portion of the settlement amount, thereby discharging the insurer's liability per the statute.

For 20 years, this was standard practice and created very few, if any, legitimate issues due to the seemingly overlapping claims owned by different parties. Then, in *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 895 N.W.2d 490 (2017), this Court analyzed MCL

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500.3112 as well as the entirety of the NFA, concluding that providers never actually had a right to file direct actions.

However, the Opinion expressly acknowledges that the decision did not alter the claimant's ability to assign her rights to past or presently due benefits. *Id.*, at 505, fn 40. This ruling caused medical providers to almost universally obtain assignments as a condition of treating no-fault claimants, as those providers were not willing to rely on the claimant to properly prosecute an action for unpaid benefits.

On June 11, 2019, the legislature implemented sweeping amendments to the NFA, including an express statutory cause of action in medical providers' favor. See MCL 500.3112. This particular change was presumably directly related to the decision in *Covenant*, with the legislature evincing its intent to circumvent that ruling and restore the *status quo*.

As an ancillary note, the Court of Appeals has interpreted a separate amendment – the "tolling" addition to MCL 50.3145 – to have been just that: a legislative change that intentionally side-steps a series of decisions from this Court, intended to provide the black letter law support to return to prior appellate court interpretation. In *Encompass Healthcare, PLLC v. Citizens Ins. Co.*, __ Mich.App. __, docket #357225 (November 17, 2022), a unanimous Court of Appeals panel held:

> Therefore, we take this opportunity to conclude that these amendments to MCL 500.3145, particularly the addition of Subsection (3), act to supersede our Supreme Court's ruling in *Devillers* and return the state of law to that provided in *Lewis* and its progeny. *Id.*, at *7.

That *Encompass, supra* involved a separate amendment pertaining to limitation periods is a distinction without a difference; the legislature certainly intended to restore Michigan no-fault litigation to "pre-*Covenant*" status through the addition of a direct statutory cause of action in providers' favor.

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Unfortunately, in the two years between the issuance of *Covenant, supra* and the NFA amendments, no-fault litigation shifted in essence from simple claims under a concise statutory framework to disputes over anti-assignment clauses, "claim splitting," Uniform Commercial Code provisions, and various other considerations that utterly bastardized the purpose of the NFA and claims brought thereunder. No longer did insurers evaluate and pay claims as they saw fit, protecting themselves from duplicative payment via MCL 500.3112 and protecting their insureds through releases with providers wherein the provider's claim against the injured person was also waived.

Instead, insurers universally attempted to obliterate provider litigation by leveraging procedural issues created in the *Covenant, supra* fallout, not merely to the detriment of the providers claimants without regard to the substantive merits of those claims, but also to the detriment of their very own insureds who remained liable to their providers and could no longer attempt to collect those benefits personally by operation of MCL 500.3145.

Was this the way the NFA was intended to be employed and enforced? Decidedly not.

> The purpose of Michigan's no-fault insurance system is to provide victims of automobile-related accidents with assured, adequate, and prompt payment for economic losses. *Shavers v. Attorney General*, 402 Mich. 554, 578-579; 267 N.W.2d 72 (1978).
>
> The No-Fault Act is designed to achieve the expeditious compensation of damages resulting from motor vehicle accidents and to minimize administrative delays and factual disputes. *Miller v. State Farm Mut. Auto. Ins. Co.*, 410 Mich. 538, 568; 302 N.W.2d 537 (1981).
>
> [W]hen courts interpret the no-fault act in particular, they are to remember that the act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it. *Turner v. Auto Club Ins. Ass'n*, 448 Mich. 22, 28; 528 N.W.2d 681 (1995).
>
> From our first handling of this statute in an advisory opinion issued in 1973, *Advisory Opinion re Constitutionality of 1972 Pa. 294*, 389 Mich. 441, 208 N.W.2d 469 (1973), we have, without exception, emphasized the act's comprehensive nature.3 What is unmistakable about this first-party payment

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> scheme is that it was designed to cover contingencies that could arise, including, as relevant here, the process for making a claim, the procedures for investigation by the insurer, and the range of available enforcement tools. All of which are found within the four corners of the act. *Muci v. State Farm Mut. Auto. Ins. Co.* , 478 Mich. 178, 732 N.W.2d 88 (2007).

Plaintiff posits that the overwhelming practical issues were created by the need for assignments for providers to maintain direct actions, but this speculation is admittedly irrelevant to the analysis. The simple fact is that the legislature clearly intended to return no-fault litigation to the 20 years of pre-*Covenant* practice where both injured persons and provider claimants maintained the right to sue for unpaid benefits. This is consistent not only with the express amendment in direct response to this Court's ruling, but also due to the stated purpose of the NFA and its intended effect.

This Court might wonder, "Well, why not just stop getting assignments?" The unfortunate reality is that providers will generally not treat no-fault claimants without them due to the protections they afford. A prime example of assignment benefit is explained in *Mecosta Cnty. Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co.*, 509 Mich. 276, 983 N.W.2d 401 (2022), where this Court concluded that privity does not exist between a no-fault claimant/assignor and a medical provider/assignee for the purposes of *res judicata* and collateral estoppel between their separate actions for benefits related to the same motor vehicle accident. Providers were already obtaining assignment for the purpose of pursuing their own claims, and are now further protected from losing their rights against the applicable insurer due to the claimant's folly.

Yet another concern is the NFA's intent to reduce or eliminate litigation arising from no-fault insurance claims. In many cases brought by injured persons, providers forego filing their own lawsuits when they are comfortable with the injured person's attorney, and have a prior relationship where the provider is comfortable not retaining its own counsel. Should this Court rule that both assignees and assignors have standing to bring NFA claims in their own names,

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every single provider will be forced to file its own separate lawsuit in every single instance, creating an entirely unnecessary multiplicity of actions.

Plaintiff's sweeping declaration of the two possible outcomes of failing to acknowledge assignor standing should be much clearer at this point, if not crystal clear. Providers are going to continue to require assignments as a condition to treating no-fault claimants. Disallowing assignors from maintaining their own actions even for transferred rights is going to create either an exponential increase in litigation where the numerous provider claimants and the numerous subsequent factoring companies all file separately, or expose those assignors to contractual liability to applicable assignee without any ability to protect themselves by attempting to collect the benefits personally.

To reiterate, this issue cannot be circumvented by simply doing away with assignments. Provider claimants cannot operate without medical factoring to sustain it for the first two years that it exists, given the overly litigious nature of these claims; they need funding to operate, but insurers will delay, deny, and defend especially as against new facilities. Injured persons will be required to transfer benefits at almost every medical facility that will even treat an individual entitled to PIP benefits and a refusal to do so will render their insurance coverage *de facto* illusory.

None of these outcomes are desirable, and they are all directly contradictory to the purpose of the NFA. On the other hand, ruling that both assignor and assignee constitute real parties in interest simply reverts the analysis back to the 20 years of uneventful, simple, no-fault litigation as the legislature always intended and has now attempted to reinstitute.

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STATEMENT OF FACTS

Plaintiff-Appellant C-SPINE ORTHOPEDICS, PLLC ("Plaintiff") commenced this action against Defendant-Appellee PROGRESSIVE MICHIGAN INSURANCE COMPANY ("Defendant") on May 11, 2020 seeking unpaid personal protection insurance ("PIP") benefits. In addition to the direct statutory cause of action provided by amendment to MCL 500.3112, effective June 11, 2019, the cause of action was premised on various assignments by an injured person named Jose Cruz-Muniz to Plaintiff after Plaintiff provided motor vehicle accident related medical treatment.

Specifically, Plaintiff provided medical services to the injured person on various dates from August 7, 2019 through October 2, 2019. (**Exhibit 1 – Billing Ledger**). After his last appointment on October 2, 2019, the injured person transferred his rights against Defendant to collect payment for those services to Plaintiff. (**Exhibit 2 – Assignment**). Notably, the beneficiary of these contracts is "C-Spine Ortho" (i.e. Plaintiff).

On August 2, 2019, an entity called Sea Spine Orthopedic, LLC ("Sea Spine") transferred rights to certain "Accounts Receivable" to two medical funding entities: Medfinance Servicing, LLC ("Medfinance") and Well States Healthcare, LLC ("Well States"). (**Exhibit 3 – Original Sale Agreement**). By way of three separate amendments, Sea Spine incorporated dates of service from August 21, 2019 through October 2, 2019 into the Original Sale Agreement. (**Exhibit 4 – Amendments**).

Plaintiff is a Michigan PLLC, organized in Michigan on August 29, 2017 with its official address of 29255 Northwestern Highway, Suite 201, Southfield, Michigan. (**Exhibit 5 – Michigan LARA Confirmation**). Sea Spine Orthopedics Institute, LLC is a Florida entity created as of January 20, 2010 with its official address 3107 West Hallandale Beach Boulevard,

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Unit 100, Pembroke Park, Florida. (**Exhibit 6 – Florida Division of Corporations Confirmation**).

In addition to conflating legal entities, it appears that there is no record evidence regarding any transfer between Plaintiff or Sea-Spine and the third medical factoring company at issue, Apogee Capital Fund 5, LLC. While Defendant provided "Exhibit A" to a referenced "Agreement dated August 30, 2019," the original agreement was seemingly never produced. (**Exhibit 7 – Apogee Agreement Exhibit A**). Plaintiff does not dispute that the two remaining dates of service – August 7, 2019 and August 15, 2019 – are implicated by this transaction, but the terms of that transaction remain unknown.

In response to Defendant's first challenge to Plaintiff's standing to pursue the cause of action asserted in this case, Plaintiff produced a Counter-Assignment of Accounts Receivable ("Counter-Assignment") for Patient Jose Cruz-Muniz, the terms of which vest Plaintiff with the legal cause of action and oblige it to pursue collection against Defendant through litigation or otherwise despite any prior agreements with Medfinance and Well States. The Counter-Assignment is dated May 4, 2020 – prior to commencement of this action – which is expressly listed as its "Effective Date." However, Plaintiff does not dispute that this document was not actually executed until after commencement of this action. (**Exhibit 8 – Counter-Assignment**).

Similarly, Plaintiff provided a First Amendment to Bulk Purchase and Sale Agreement for Account Receivable ("First Amendment") between Plaintiff and Apogee, memorializing the agreement between those entities that Plaintiff be vested with any legal cause of action to collect on the Accounts Receivable and again obliging it to pursue legal action in pursuit of collection. Though the First Amendment was dated July 1, 2020, it clearly is a reformation of the initial contract, which was dated August 16, 2019. (**Exhibit 9 – First Amendment**).

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More importantly, Plaintiff produced affidavits from Plaintiff's CEO, Mark Seda; Medfinance and Well States' president, Nate Ormond; and Managing Member of Apogee, Peter Rood explaining through sworn testimony that Plaintiff is exclusively vested with the legal cause of action to collect all applicable accounts receivable. (**Exhibit 10 – Affidavits**).

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LAW AND ARGUMENT

I. MCR 2.116(C)(5) is not implicated by the arguments presented in this appeal.

> We note that some recent Court of Appeals cases have erroneously equated standing with capacity to sue for the purposes of dispositive motions under MCR 2.116(C)(5). [citations omitted] However, as this Court previously noted in *Leite v. Dow Chemical Co.*, 439 Mich. 920, 478 N.W.2d 892 (1992), the two concepts are unrelated. Our courts are admonished to avoid conflating the two. *Michigan Chiropractic Council v. Commissioner of Office of Financial and Ins. Services*, 475 Mich. 363, 374 n. 25; 716 N.W.2d 561 (2006).

Defendant has not proffered any argument challenging Plaintiff's *capacity* to sue, but instead challenges only its *standing*. Accordingly, MCR 2.115(C)(5) has no bearing on the issues at bar.

II. Regardless of any transfer of rights, both Plaintiff and any factoring assignee remain real parties in interest entitled to pursue the claims at issue in this case.

The analysis begins with the applicable statute requiring all actions to be brought by a real party in interest:

> Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, **a party with whom or in whose name a contract has been made for the benefit of another**, or a party authorized by statute **may sue in his own name without joining with him the party for whose benefit the action was brought**… MCL 600.2041 (emphasis added).

Simply stated, both the assignor and assignee remain real parties in interest when rights have been assigned. This is mirrored in procedural court rules:

> Transfer or Change of Interest. If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity. Notice must be given as provided in subrule (A)(1)(c). MCR 2.202(B).

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In other words, even if the trial court had been correct that Plaintiff effectively transferred its rights to the benefits at issue, the appropriate remedy is merely to join any other entity that supposedly or allegedly has a duplicative interest in the cause of action.

As a brief pontification, Defendant's only legitimate interest at issue is avoiding duplicate payment for the same claims. Joinder fully protects that interest without providing an inequitable windfall that would ultimately make the injured person liable to pay either Plaintiff or the factoring companies when there was never any dispute that there was no-fault insurance coverage for the allowable expenses at issue.

Case law dating back almost 100 years confirms this analysis. The Supreme Court has explained the purpose of the real party in interest requirement and that it only operates to preclude duplicative recovery:

> Statutes requiring every action to be prosecuted in the name of the real party in interest are enacted to protect defendant from being repeatedly harassed by a multiplicity of suits for the same cause of action, but, so long as the defendant's rights are fully protected in the litigation, he cannot complain. He is entitled to be protected against vexatious litigation by different parties claiming to assert the same cause of action, but, so long as the final judgment, when and if obtained, is a full, final, and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party, the defendant is not harmed. *George Poy v. Allan*, 247 Mich. 385, 388; 225 N.W. 532 (1929).

More recently, the this Court explained precisely what this writer suggested based on the plain language of the applicable statute and court rule; to wit, that the issue is one of joinder, not dismissal:

> The real party in interest rule is concerned only with the power of the plaintiff before the court to bring suit upon the claim stated. Whether additional parties also have an interest, such that their joinder is required or the plaintiff is prohibited from proceeding without them, is not a question of real party in interest, but of necessary joinder of parties under MCR 2.205. *Rite-Way Refuse Disposal, Inc v. Vanderploeg,* 161 Mich.App. 274, 278; 409 N.W.2d 804 (1987).

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Accordingly, the only relief that was available to Defendant under Michigan law would be to join all assignee providers to this action. Dismissal is not implicated by any authority whatsoever under the circumstances at bar.

In this case, joinder is unnecessary and ultimately inappropriate for any factoring company, given the instruction above that joinder is only necessary where a judgment would not serve as a complete adjudication of the issues asserted or possibly asserted against a defendant. Here, all purported transfers of PIP benefits were executed more than a year ago. To the extent that the factoring companies ever had any interest, it has since extinguished pursuant to MCL 500.3145.

Defendant's reliance on *Cannon Township v. Rockford Public Schools*, 311 Mich.App. 403, 875 N.W.2d 242 (2015) is misplaced. There is no dispute that an assignor becomes **one of** the real parties in interest. Nowhere in that opinion does the Court of Appeals state that the assignor is the **only** real party in interest.

Also germane to the issue at bar, *Cannon Twp., supra* ruled that standing can be retroactively "cured." As the Court of Appeals acknowledged here, that case involved a plaintiff that indisputably lacked standing at the time the action was filed. It was only during discovery that this defect was noticed, and the real party in interest – a non-party to the action – transferred its rights to the plaintiff. Standing was retroactively applied; the fact that the plaintiff did not have standing at the time it commenced the action did not prevent it from subsequently obtaining it. *Id.*, at 412.

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III. To the extent that Plaintiff transferred away any rights to any factoring company, regardless of when the transfer was effective, the transfer was merely of "Accounts Receivable," which is a beneficial interest only while Plaintiff maintains ownership of the cause of action.

Perhaps the most instructive precedent on this particular issue is again *Cannon Township*, *supra*:

> A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy. In addition, the doctrine protects a defendant from multiple lawsuits for the same cause of action. A defendant is not harmed provided the final judgment is a full, final, and conclusive adjudication of the rights in controversy that may be pleaded to bar any further suit instituted by any other party. *Cannon Township v. Rockford Public Schools*, 311 Mich.App. 403, 412; 875 N.W.2d 242 (2015), citing *Barclae v. Zarb*, 300 Mich.App. 455, 483; 834 N.W.2d 100 (2013).

The Court of Appeals explained both that an assignment of a beneficial interest does not preclude the assignor from suing to recover PIP benefits and that the purpose of the real party in interest doctrine is merely to preclude duplicative payment for a single claim. This concept was reiterated and adopted in the factual context of this case below.

> C-Spine is "vested with the right of action" against Progressive based on the assignments from the Cruzes, and is "authorized by statute" to sue in its own name under the plain language of MCL 500.3112. That the "beneficial interest" resided with the factoring companies did not eliminate C-Spine as a real party in interest. *C-Spine Orthopedics, PLLC v. Progressive Michigan Ins. Co.*, __ Mich.App. __, *4 (December 8, 2022).

In this case, any assignment of Plaintiff's rights were limited to "Accounts Receivable." That term is defined as "a balance due from a debtor on a current account."[1] Neither Plaintiff nor any other entity sold the actual claim for benefits, which would vest the assignee with the legal cause of action. An account receivable is thus merely a beneficial interest; transferring only the "balance due" does not also transfer the legal cause of action.

[1] https://www.merriam-webster.com/dictionary/account%20receivable

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IV. The agreements between Plaintiff and any factoring company vest Plaintiff with the sole cause of action to collect PIP benefits, and in fact requires it to pursue litigation when necessary to collect.

Pursuant to Michigan law, no contract exists unless there is a meeting of the minds between the parties to the agreement:

> Mutuality of agreement, or a meeting of the minds, means that "[t]here must be a meeting of the minds on all the material facts in order to form a valid agreement, and whether such a meeting of the minds occurred is judged by an objective standard, looking to the express words of the parties and their visible acts." *Sanchez v. Eagle Alloy Inc.*, 254 Mich.App. 651, 665-666; 658 N.W.2d 510 (2003), quoting *Groulx v. Carlson*, 176 Mich.App. 484, 491; 440 N.W.2d 644 (1989).

Regardless of the plain language of the agreements at issue, both Plaintiff and all three factoring companies are and always were under the impression that Plaintiff has the right and, in fact, the obligation to sue to collect PIP benefits. (See **Exhibit 10**). Either the parties' agreement is accurate and Plaintiff is the only real party in interest, or there was no contract and thus no transfer of any right.

Significantly, Defendant as a non-party to the agreements lacks standing to challenge those agreements:

> The long-settled rule in Michigan is that a person who is not a party to an assignment lacks standing to challenge it." *Hagerman v. Nationstar Mortgage, L.L.C.*, unpublished *per curiam* Court of Appeals opinion, docket #319271 (2015), citing *Bowles v. Oakman*, 246 Mich. 674, 678; 225 N.W. 613 (1929) (**Exhibit 11 – Full Opinion**).

In other words, Defendant cannot even advocate to this Court any version of the plain language of the agreements at issue. As such, the plain language controls as long as there was a meeting of the minds in the first place. Ultimately, this Court is bound to either invalidate the factoring agreements entirely due to the lack of mutuality of agreement or simply enforce them per the interpretation of the parties to those agreements to the exclusion of any argument from Defendant.

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V. The Court of Appeals has issued several inherently contradictory opinions, though none of those opinions have addressed the proper analysis that the Court of Appeals applied in this case.

i. The Court of Appeals in this case applied the proper analysis in the context of no-fault assignments and subsequent cases failed to follow binding precedent.

In this case, *C-Spine Orthopedics, PLLC v. Progressive Michigan Insurance Company*, __ Mich.App. __ (December 8, 2022) ("*C-Spine I*"), the Court of Appeals held: (1) that standing is not a barrier to the provider plaintiff's claims despite having assigned rights away prior to commencement of the action, (2) that the real-party-in-interest rule does not preclude the litigation, and (3) that even without counter-assignments, the only appropriate remedy would be joinder of the non-party assignees, not dismissal of the action. Judge Markey dissented.

Prior to issuance of *C-Spine I*, the same parties were back for oral argument in the Court of Appeals on *C-Spine Orthopedics, PLLC v. Progressive Marathon Insurance Company*, unpublished *per curiam* opinion, docket number 358773 (February 9, 2023) ("*C-Spine II*"). The opinion states, "Just as in *C-Spine I*, the circuit court improperly determined that C-Spine lacked standing to file suit and therefore erroneously dismissed the action. (**Exhibit 12 – Full Opinion**).

There is now a third appellate opinion in the context of provider plaintiff factoring, *C-Spine Orthopedics, PLLC v. Allstate Ins. Co.*, unpublished *per curiam* opinion, docket number 360887 (March 30, 2023) ("*C-Spine III*"). Interestingly, Judge Markey was again on the panel, this time having filed a "concurrence" that seems more like a dissent. Specifically, Judge Markey only "concurred" due to *stare decisis*, and would otherwise have reversed. (**Exhibit 13 – Full Opinion and Concurrence**).

"Stare decisis means '[t]o abide by, or adhere to, decided cases.'" *Robinson v. Detroit*, 462 Mich. 439, 463 n. 20; 613 N.W.2d 307 (2000), quoting Black's Law Dictionary (rev

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4th ed). "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2).

ii. *Farrar v. SMART*

While there are some similarities between this case and *Farrar v. Suburban Mobility Authority for Regional Transport*, ___ Mich App ___ (February 9, 2023), discussion of the latter is inapposite to this appeal. The analysis by the Court of Appeals in *Wallace*, *infra* case effectively subsumes all issues in *Farrar* aside from the additional argument regarding assignment rescission versus revocation. Further, *Farrar* is distinguishable factually from this case, given it did not involve any attempt to rescind or revoke any assignment. Still further, *Farrar* is legally irrelevant, given that it failed to address *C-Spine I* or the issues presented in that case and this case in the lower courts. Perhaps the most significant distinction is the Court of Appeals' failure to address the real party in interest argument asserted here.

iii. *Robinson v. Szczotka*

In *Robinson v. Szczotka*, unpublished *per curiam* Court of Appeals opinion, docket #359646 (April 6, 2023), the plaintiff commenced litigation *after* having assigned her rights to various medical providers. During litigation, those providers voluntarily "revoked" their rights under the assignments, purporting to vest the plaintiff with the right to collect from the defendant insurer. (**Exhibit 14 – Full Opinion**).

The Court of Appeals held that assignment rendered the providers *exclusive* real parties in interest to collect the related benefits, relying on *Cannon Twp v. Rockford Pub. Schs*, 311 Mich.App. 403, 412; 875 N.W.2d 242 (2015). What the court failed to explain was where that case – or any Michigan precedent – holds that there can be only one real party in interest. Also

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glaringly absent was any discussion of the statute and court rule cited above or the Court of Appeals' published opinion in this case.

Not only did the *Robinson* panel extrapolate the analysis in *Cannon Twp* without any explanation whatsoever, it additionally ignored the part of that case that is directly contradictory to its analysis:

> In reaching this conclusion, we recognize that the MMLLPP did not assign its rights to the township until after this lawsuit was filed. Therefore, at the time the township initiated the lawsuit, it was not the real party in interest as it pertained to the first $50,000 of damages sought in the complaint. However, in denying RPS's motion for summary disposition, the trial court granted the township leave to amend its complaint to properly reflect that it was litigating as the assignee of both the Macks and the MMLLPP. *Cannon Twp, supra*, at 412.

Simply put, even a first assignment of the cause of action that occurs more than a year into litigation brought by a party who never had standing until the assignment effectively vests the plaintiff as the real party in interest.

In direct contradiction of this analysis in *Cannon Twp*, the *Robinson* court went on to hold that the assignment "revocations" failed to correct the real party in interest statute, given that the new transfer was after the plaintiff commenced the action for benefits. Astonishingly, the panel relied on federal law in the context of trademark rights rather than acknowledging the very next paragraph in *Cannon Twp* after the portion the court quoted in its opinion. This was the basis for the *Robinson* court to conclude:

> Here, it is undisputed that at the time she filed the complaint, plaintiff had assigned her rights to recover the unpaid medical bills to her medical providers. Because the rights of plaintiff viz-a-viz defendant and the court had essentially become fixed under the assignment agreements, the revocations could not impact plaintiff's status at the time the complaint was filed. Because plaintiff was not a real party in interest at the time she filed the lawsuit, the trial court erred in denying defendant's motion for summary disposition. *Robinson, supra*, at *7-8 (**Exhibit 14**).

Michigan law, in binding precedent, has already ruled to the contrary; lack of standing at the

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time a complaint is filed does *not* preclude the plaintiff from obtaining standing by virtue of assignment during litigation.

More importantly, the Court of Appeals in *Robinson* nowhere addressed MCL 600.2041 or MCR 2.201(B)(1). Moreover, the court did not consider the assignment revocations to be invalid or ineffective pursuant to MCL 500.3145; instead, it relied on overwhelmingly distinguishable case law to the exclusion of directly on-point, binding precedent.

iv. *Wallace v. SMART*

Wallace v. Suburban Mobility Authority for Regional Transport, ___ Mich App ___ (June 22, 2023) is currently pending a timely filed application for leave to appeal to this Court. Errors asserted include the failure of the Court of Appeals to address the applicability of the statutory provision and court rule to the PIP benefit assignment context that this Court is considering on appeal here, an erroneous attempt to distinguish the Court of Appeals' decision in this case, and improper reliance on *Robinson*, *infra* where that case quite literally rules opposite to binding precedent that the opinion ironically cites for other reasons.

The Court of Appeals' attempt to distinguish the Court of Appeals' decision in this case, *C-Spine I*, from *Wallace* is curious, especially considering Judge Markey was on both panels and the opinion in *Wallace* is demonstrably false. Both cases involved assignments by the plaintiff to non-parties prior to commencement of litigation and new transfers (whether "revocations" or "counter-assignments") during litigation brought by the entity that had already transferred the applicable rights way. *Wallace* expressly states that MCL 500.3145 was not at issue in *C-Spine I*, but Judge Markey's own dissent in *C-Spine I* belies that statement.

> Progressive also contended that medical services provided by C-Spine more than one year prior to January 11, 2021, were not compensable under the one-year-back rule, MCL 500.3145(2). *C-Spine I*, *supra*, dissent at *7.

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On December 8, 2022, Judge Markey signed her dissent in this case expressly stating that the year-back rule was at issue in *C-Spine I*. On June 22, 2023, she signed the unanimous opinion in *Wallace* claiming that issue was not raised.

More importantly, the analysis in *Wallace* contradicts its own conclusion. The Court of Appeals in *Wallace* expressly acknowledged that there is no *stare decisis* effect arising out of published opinions coming to what seems to be an inconsistent conclusion where that conclusion is premised on an issue not articulated in prior precedent:

> In contrast with C-Spine Orthopedics, however, when the transfer of the beneficial interest from the medical providers to plaintiff occurred in this case, the medical providers did not transfer an interest in a claim to which liability attached. When the medical providers revoked their assignments for the benefit of plaintiff to pursue her claims after the litigation began, the medical providers could no longer recover their claims by operation of the one-year-back rule. See MCL 500.3145. This issue was not present in C-Spine Orthopedics. *Wallace, supra*, at *6.

According to Judge Markey, that issue *was* present in *C-Spine I*, meaning the *Wallace* panel was obliged to apply that analysis.

More importantly, as the *Wallace* panel stated, *stare decisis* does not apply where different arguments or issues are raised. Why, then, did the *Wallace* panel entirely ignore the plaintiff's arguments relying on MCR 2.201(B)(1) and MCL 600.2041 that would distinguish it from all prior precedent aside from *C-Spine I* and instead simply adopt the outcome of precedent where that issue was not raised? Obviously, the question is rhetorical. The point here is that even applying *Wallace's* own internally inconsistent analysis, *stare decisis* actually required that panel to adopt the reasoning in *C-Spine I* to the exclusion of all other cited case law related to PIP benefit assignments, given that *Wallace* was the only case other than *C-Spine I* to assert the statutory provision and court rule argument regarding real parties in interest.

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Further, in what appears a conscious effort to distance this result oriented conclusion from the authority on which it is purportedly premised, *Wallace* nowhere references *Cannon Twp*, but instead relies on the unpublished *Robinson* for the premise that there can be only one real party in interest and that standing as the proper plaintiff to bring the claim cannot be retroactively corrected after filing. The problem with reliance on *Robinson* for this conclusion is that *Cannon Twp* quite literally ruled the opposite (i.e. that standing can be retroactively cured).

v. Putting it all together.

C-Spine I was the first decided action involving assignments of PIP benefits cited by any of the parties within the no-fault context. It concluded that, under MCR 2.201(B)(1), even a party plaintiff that had transferred its rights away prior to commencing litigation was a real party in interest. The Court of Appeals went on to explain that the only remedy available to the defendant insurer relative to the transfer was to join the assignees even if rights had not been transferred back during litigation. The opinion explains that, under the court rule and *Cannon Twp*, the fact that the rights were only transferred back to the party plaintiff during litigation did not implicate dismissal.

No other Court of Appeals decision, published or not, addressed that argument. While most of those appeals did not raise the issue, the plaintiff in *Wallace* did. Unfortunately, the Court of Appeals ignored that argument and instead attempted to "distinguish" the analysis due to an entirely unrelated issue to the thrust of *C-Spine I* where that attempt was woefully misplaced, given the limitation issue having been asserted, contrary to the statement in the *Wallace* opinion.

There has never been an issue where injured persons and provider claimants maintain joint or duplicative rights to recover. The legislature generally acknowledged that both assignor and assignee remain real parties in interest in black letter law. This Court mirrored that

instruction in a procedural court rule. The legislature further contemplated duplicative claims specifically in the context of the NFA, providing a specific procedure for any no-fault insurer to avoid duplicative payment. Prior binding precedent, including this very case, notes that joinder is the only remedy where such duplicative claims exists.

Ignoring statute, court rule, and binding precedent is the only way to reverse the Court of Appeals' decision in this case. Worse, such a decision would be directly contradictory to the stated purpose of the NFA and quite possibly cause the entire system to collapse due to the need for assignments but the seemingly insurmountable burden of litigating every single particular claim rather than permitting one plaintiff to pursue all claims not otherwise pursued in litigation. This was common practice prior to *Covenant*, and the legislature clearly intended to return the *status quo* through the June 11, 2019 amendment to MCL 500.3112.

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RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court either AFFIRM the Court of Appeals outright, or DENY the instant Application for Leave to Appeal.

Respectfully Submitted,
SIGAL LAW FIRM, PLLC

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Date: November 14, 2023

This Brief contains 7883 words, exclusive of this statement.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on: November 14, 2023 via:

US Mail _____ Fax _____
Hand Delivery _____ UPS _____
Fed Ex _____ E-mail X

Signature /s/ Matthew S. Payne