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STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals
(Riordan, PJ, and Boonstra and Gadola, JJ)

SPINE SPECIALISTS OF MICHIGAN, PC,

Plaintiff-Appellant,

v

MEMBERSELECT INSURANCE COMPANY,

Defendant/Appellee.

Supreme Court Case No. 165445

Court of Appeals Case No. 358296

Macomb County Circuit Court
Case No. 2020-003355-NF
Hon. Edward Servitto, Jr. (P27600)

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PLAINTIFF/APPELLANT SPINE SPECIALISTS OF MICHIGAN, PC'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

The issue on appeal in this no-fault PIP benefits action is whether the statutory tolling provision under MCL 500.3145(3) of the No-Fault Act applies to PIP lawsuits filed after the effective date of the amended No-Fault Act, which was June 11, 2019, including PIP lawsuits seeking to recover PIP benefits for services provided before June 11, 2019. The lower courts mistakenly concluded that all PIP claims for services provided before June 11, 2019 are precluded unless a lawsuit was filed within one year of when the services were provided – REGARDLESS of whether a formal denial was issued and when it was issued. Simply put, the lower courts held that MCL 500.3145(3) could not be applied "retroactively". But, the lower courts erred in so holding because, unlike the *Andary* case[1], which involved substantive rights to recover PIP benefits as promised when coverage was secured, the new statutory tolling provision does not present a similar question of retroactive application. The one year back rule under MCL 500.3145(1) serves a damages-limiting function, and consequently, it is not the same as a limitations period. Moreover, no change was made to the one-year back rule by adding the new statutory tolling provision.

In responding to the leave application, MemberSelect contends that the lower courts got it right because this Court previously concluded under that the one year back rule is a damages-limiting provision, and therefore, it must be substantive, and not procedural. Respectfully, that claim overstates the case because no appellate court has expressly said that the one year back rule's damages-limiting function makes it substantive, rather than procedural, and even if the courts had said that, it begs the question in this case. Here, the

[1] *Andary v USAA Cas Ins Co*, published per curiam opinion of the Michigan Court of Appeals, Docket No. 356487, issued August 25, 2022.

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issue is not whether the one year back rule is a substantive provision or not – the question is whether the statutory tolling provision added in 2019 is merely a procedural rule applied to mitigate the harsh effects of the one year back rule when no formal denial was issued.

This Court should grant leave to appeal or otherwise review the Court of Appeals' published decision in this important PIP case. It should do so regardless of what this Court concludes in the *Andary* case, because the issue of whether MCL 500.3145(3) applies to PIP claims for services provided before June 11, 2019 is a completely different question.

This Court should resolve the underlying conflict between the Court of Appeals' published holding in this case and the contrary result that it reached in *Encompass*[2], which was decided on the same day, but published immediately, not belatedly, because *Encompass* should have been applied as binding precedent based on rules of stare decisis under MCR 7.215(C). The Court of Appeals is not free to ignore court rules adopted by this Court regarding precedent in Michigan, including the requirement under MCR 7.215(J) that the Court of Appeals follow its published decisions issued after November 1, 1990.

As with *Andary*, the Court of Appeals' publishing decision in this case creates a bright-line rule as to how the amended No-Fault Act should be applied. But, whether the Court of Appeals was correct in applying that same bright line rule to a statutory tolling provision is a different question and it is one on which this Court should have the final say. It may be simple to say that the holding in the Andary case on retroactive application of the amended No-Fault Act necessitates the same outcome in this case, but using an overly simply legal analysis ignores the distinction between the statutory provisions in question.

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[2] *Encompass Healthcare, PLLC v Citizens Ins Co,* published per curiam opinion of the Michigan Court of Appeals, Docket No. 357225, issued November 17, 2022.

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COUNTER-STATEMENT OF FACTS

For brevity's sake, Spine Specialists will not repeat the underlying facts in this case. It instead relies upon the statement of facts provided in Application for Leave to Appeal. That being said, however, it is worth pointing out that MemberSelect did not deny the claims made by Spine Specialists for PIP benefits at issue in this case until August, 2020. It is unclear why it did so even then as its position in this case has always been that a formal denial was not needed to avoid statutory tolling under the amended No-Fault Act. Presumably, it did so to avoid the possibility of paying penalty interest on PIP benefits owed under MCL 500.3142 or to avoid paying attorney fee sanctions under MCL 500.3148.

ARGUMENT

I. MemberSelect's discussion of how the new statutory tolling provision under MCL 500.3145(3) applies to PIP claims that accrued before the effective date of the amended No-Fault Act on June 11, 2019 is admittedly not on point because the question is whether it applies to PIP lawsuits filed after that date.

MemberSelect asks this Court to focus on when the claims for PIP benefits accrued, while ignoring when the PIP lawsuit was filed. But, by its own admission, that is not the question presented in this case. See Answer to Leave Application at pp 8-9.The question is whether the new statutory tolling provision under MCL 500.3145(3) applies to a PIP lawsuit filed after the amended No-Fault Act became effective on June 11, 2019 even though it relates to an antecedent event, i.e., when the claim for PIP benefits accrued. Since that is the question on appeal, the discussion of when PIP benefits accrued is besides the point and it need not be addressed in responding to MemberSelect's position. Accordingly, Spine Specialists will focus on addressing whether the new statutory tolling provision applies to PIP lawsuits filed after the effective date of the amended No-Fault Act.

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II. MemberSelect's contention that applying the new statutory tolling provision under MCL 500.3145(3) would affect its substantive rights is not correct as the one year back rule is a damages-limiting provision not a statute of limitations.

In answering the leave application, MemberSelect observes that "[t]his Court has directly held that the substantive rights and liabilities of the parties to an action are properly determined *according to the law as it stood when the claims accrued*." [MemberSelect's emphasis, citing *Husted v Consumers Power Co*, 376 Mich 41, 47; 135 NW2d 370 (1965); and *Slater v General Motors Corp*, 73 Mich App 741, 743 n 1; 252 NW2d 544 (1977). It then takes a "giant leap" in its legal analysis by concluding that the one year back rule affects substantive rights "as this Court specifically held that it is a 'damages-limiting' provision." Id, citing *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 214; 818 NW2d 279 (2012). But, this Court never expressly reached that conclusion in *Joseph* when it clarified that the one year back rule is a damages-limiting provision. To the contrary, this Court in *Joseph* was simply clarifying that the one year back rule is not a true statute of limitations. MemberSelect provides no support for claiming it has a vested right in a damages-limiting provision, much less that applying the new statutory tolling provision violates vested rights. It is not substantive – it is merely a procedural rule limiting damages that can be recovered.

If anything, this Court's holding in the *Joseph* case supports Spine Specialists' position because it clarifies that the one year back rule is not a statute of limitations, it is merely a "damages limiting provision". No prior cases have held that a "damages limiting provision" is a substantive provision that affects vested rights like a statute of limitations. Moreover, as Spine Specialists noted – see Application for Leave to Appeal at pp 7-8 – even amendments to an existing statute of limitations do not necessarily affect vested rights. To determine if vested rights are affected, and thus, whether an amendment can be

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applied, this Court must review the factors in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38-40; 852 NW2d 78 (2014), as the Court of Appeals did in Andary. MemberSelect steadfastly avoids discussing those factors as they do not favor its position.

III. MemberSelect is clearly wrong in claiming that submission of a PIP claim was "of no legal significance" before the No-Fault Act was amended in 2019 because reasonable proof of loss was required then as it is now to recover penalty interest under MCL 500.3142 and attorney fees under MCL 500.3148.

MemberSelect argues that the submission of a claim for PIP benefits and "the insurer's 'formal denial' of the claim *were of no legal significance"* before the No-Fault Act was amended in 2019. See Answer to Application for Leave to Appeal at p 10. But, that statement is clearly wrong. Submitting reasonable proof of loss in support of a claim for PIP benefits had legal significance because it was required to claim both penalty interest under MCL 500.3142 for not paying PIP benefits within 30 days and attorney fees under MCL 500.3148 for unreasonably delaying or denying payment of PIP benefits. While the legal significance was not the same as it is today because of the new statutory tolling provision, it is absurd to say that submission of a claim for PIP benefits had "no legal significance" before the No-Fault Act was amended to add the statutory tolling provision. It simply had a different legal significance and import before MCL 500.3145(3) was added.

CONCLUSION

This Court should grant leave to appeal or otherwise review the Court of Appeals' published decision in this PIP case which held that the new statutory tolling provision does not apply to PIP lawsuits filed after the amended law became effective on June 11, 2019. It should address whether the new statutory tolling provision is merely a procedural rule or alternatively, whether it represented a substantive (and not simply remedial) change in the

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law. It should do so regardless of what this Court concludes in *Andary*, supra, because the issue of whether MCL 500.3145(3) applies to PIP claims for services provided before June 11, 2019 is a different question. It should resolve the underlying conflict between the Court of Appeals' published holding in this case and the contrary result reached in *Encompass.*

RELIEF REQUESTED

Plaintiff/Appellant, Spine Specialists of Michigan, PLLC, requests that this Court grant leave or otherwise review the Court of Appeals' published decision to affirm the trial court's holding that summarily dismissed its PIP claims under MCR 2.116(C)(7) and(C)(10) because the lower courts erred by concluding that the statutory tolling provision under MCL 500.3145(3) did not apply "retroactively" to PIP claims for services provided before the No-Fault Act was amended as MCL 500.3145(3) is no more than a procedural rule that should be applied to all PIP lawsuits filed after the effective date of the amended No-Fault Act.

Respectfully submitted:

Dated: July 17, 2023

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CERTIFICATE OF COMPLIANCE

I, Steven A. Hicks, certify that Plaintiff/Appellant Spine Specialists of Michigan, PC's Reply Briefing that is being filed today, July 17, 2023, complies with the type-volume limitation under the appellate court rules. I am relying on the word count of the word-processing software used to produce the leave application. The application used a 12 point proportional font and the word count for that application is calculated as being 1857 words.

Dated: July 17, 2023

/s/ Steven A. Hicks
Steven A. Hicks (P49966)