STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS,
Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals Nos. 356914 and 356915

Genesee County Circuit Court No. 13-101626-NF

APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-APPELLANT, PROGRESSIVE MARATHON INSURANCE COMPANY

PROOF OF SERVICE

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page

Cases

Statutes / Court Rules

STATEMENT OF THE QUESTIONS PRESENTED

I. Childers' claim for PIP benefits was subject to the expired 1-year statute of limitations of MCL 500.3145(1), and any claim the MPCGA might have had was explicitly derivative of the injured claimant's rights. On the statute of limitations issue, therefore, should this Court review and reverse the published opinion of the Court of Appeals, where the erroneous conclusions reached in that opinion (a) are the direct result of its demonstrably false premise that the guaranty act provides the MPCGA with a statutory cause of action, and (b) flow from the court's failure to apply or even consider the text of the act's statutory provisions that correctly resolve the question?

Defendant-Appellant PMIC answers, "Yes."

Intervening Plaintiff-Appellee MPCGA would answer, "No."

Plaintiff-Appellee Childers would answer, "No."

II. Should the Court should grant review and reverse the Court of Appeals' holding that PMIC is liable under MCL 500.3114(4) for payment of PIP benefits to Childers as the occupant of the uninsured vehicle owned and operated by Shaina Groulx, where PMIC assumed no risk of loss whatsoever on behalf of Groulx when she was operating her own uninsured vehicle, and thus did not qualify as her "insurer" within the meaning of MCL 500.3114(4)?

Defendant-Appellant PMIC answers, "Yes."

Intervening Plaintiff-Appellee MPCGA would answer, "No."

Plaintiff-Appellee Childers would answer, "No."

INTRODUCTION

What is the statute of limitations applicable to an action brought by the Michigan Property & Casualty Guaranty Association ("MPCGA") when it sues another insurer for reimbursement of the benefits it was compelled to pay under the property and casualty guaranty act, MCL 500.7901, *et seq*.? As the guaranty act itself provides no answer, this case presents a question of substantial jurisprudential significance.

Up until now, there likewise has been no answer to this question provided in any opinion of the Court of Appeals. Plenary review of the Court of Appeals' opinion is particularly warranted, Defendant-Appellant submits, where the court in this case *did* attempt to answer this important question, but very clearly got it wrong – and this is a *published* opinion of the Court of Appeals. Moreover, right or wrong, the Court of Appeals' opinion does not even settle on a single, clear answer, but instead offers two alternative, and mutually exclusive, answers.

This brief will show that the answer to the question is that the statute of limitations applicable to the MPCGA's claim varies depending on the rights of the insured or injured claimant to whom MPCGA benefits were paid, since it is those rights, statutorily deemed to have been assigned to the MPCGA, that form the basis of the MPCGA's action. This, PMIC submits, is the true and correct answer to the question presented; yet neither of the alternative answers provided by the Court of Appeals opinion reached this conclusion. And under the opinion of the Court of Appeals, every no-fault insurer is left exposed indefinitely to a potential claim for lifetime insurance benefits for injuries arising from an accident of which

it never had notice, since the opinion effectively eliminates the accident-based limitations period of §3145(1) anytime the MPCGA gets involved in a claim.

This case also presents the related question of whether the statute of limitations applicable to an injured claimant's action seeking recovery of no-fault PIP benefits, ordinarily set by the 1-year provision in §3145(1) of the no-fault act, MCL 500.3145(1), changes when the claimant's original insurer is declared insolvent, the MPCGA assumes responsibility for the ongoing benefits, and the claimant pursues a potential recovery from a lower priority insurer. PMIC here submits that the answer is "no." Yet, the Court of Appeals concluded otherwise, again reaching two alternative, and mutually exclusive conclusions, both of which can are founded on demonstrably false premises.

Indeed, the Court is advised that this question is raised in another application for leave currently pending before the Court in *Vann v Michigan Prop & Cas Guaranty Assoc and Progressive Michigan Ins Co*, Supreme Court No. 164276. This question of law, PMIC submits, requires this Court's review, and requires a clear and correct answer.

Finally, even if the action had been timely filed by the plaintiffs, this application also raises an issue of statutory construction under the no-fault act. The substantive issue is whether PIP coverage was owed by PMIC to claimant Justin Childers based on a no-fault insurance policy issued *not* to Shaina Groulx but to her resident relative brother, where Childers was injured in an uninsured automobile owned and being operated by Shaina Groulx. The issue turns on whether PMIC was the "insurer" of Shaina Groulx under

MCL 500.3114(4) of the no-fault act.[1] Here, as detailed in the ensuing brief, under the terms of its policy, PMIC provided no protection and incurred no risk whatsoever in connection with Shaina Groulx's operation of her own uninsured automobile. There is, therefore, no principled basis for holding, as the Court of Appeals did in reversing the trial court, that PMIC was Ms. Groulx's "insurer" in connection with this loss.

The published opinion of the Court of Appeals in this case involves issues of jurisprudential importance, and its decision on these issues, PMIC respectfully submits, are clearly erroneous and will cause material injustice. This application for leave to appeal should be granted.

JUDGMENT BEING APPEALED AND RELIEF SOUGHT

This application challenges the judgment of the Court of Appeals rendered in its published opinion of September 15, 2022 (**Exh. 1**, *Apx. 1*), which affirmed in part and reversed in part the Genesee County Circuit Court's "Opinion and Order Following Parties' Respective Motions for Summary Disposition Pursuant to MCR 2.116(C)(7) and (10), issued March 29, 2021 (**Exh. 2**, *Apx. 17*).

The trial court had ruled against the plaintiffs' contention that Defendant PMIC was precluded by the "mend-the-hold" doctrine from asserting a statute of limitations defense

[1] On June 11, 2019, numerous provisions of the no-fault act were amended by 2019 PA 21 and 2019 PA 22. Among those amended was §3114(4). There is no dispute that the pre-amended version of the no-fault act apply to this action. The language of §3114(4) at issue in this case ("... the *insurer* of the owner..." and "... the *insurer* of the operator..."), however, remain in another sub-sections of MCL 500.3114 – *see*, MCL 500.3114(5)(a)-(d). The statutory construction issue presented thus remains important for no-fault jurisprudence.

(Exh. 2, pp. 30-31, *Apx. 47-48*), but proceeded to rule against PMIC on the merits of the defense (*id*., pp. 31-33, *Apx. 48-50*). The court nonetheless granted summary disposition in favor of PMIC based on its holding that the injured claimant, Justin Childers, was not entitled to benefits from PMIC, since such entitlement required a determination that PMIC was Shaina Groulx's "insurer" and the court held that it is was not.

On appeals of right by all parties, the Court of Appeals upheld the trial court's rejection of PMIC's statute of limitations defense (**Exh. 1**, slip op at 8-10, *Apx. 9-11*), and reversed the trial court's grant of summary disposition to PMIC on the coverage issue (*id*., slip op at 10-14, *Apx. 11-15*). For the reasons detailed in the ensuing arguments, PMIC submits that both rulings are clearly erroneous, yet on issues of major significance to the state's insurance jurisprudence, will stand as binding holdings since they are issued in a published opinion.

The Court is respectfully urged, therefore, to grant this application for leave to appeal and, after plenary review, reverse the judgment of the Court of Appeals and direct that summary disposition be granted in favor of Defendant-Appellant PMIC.

STATEMENT OF FACTS AND PROCEEDINGS

Factual Background

The parties identified and stipulated to the essential facts underlying the issues that were presented below and are now before this Court for review (**Exh. 5** – Stipulated Facts, 9/2/2015, *Apx. 112*).

On August 6, 2011, Justin Childers was severely injured in an automobile accident while riding as a passenger in a 1988 Oldsmobile owned and operated by Shaina L. Groulx. The automobile was uninsured, and Shaina Groulx herself likewise possessed no automobile insurance in her name at the time of the accident. (*Id*., Stipulated Facts, Nos. 1-2, *Apx. 112-113*).

Justin Childers was domiciled in the same household as his mother, Susan Childers, and Susan Childers was the named insured on a valid policy of no-fault insurance issued by American Fellowship Mutual Insurance Company. Thus, consistent with MCL 500.3114(1), Justin was entitled to receive personal protection insurance benefits from American Fellowship, and American Fellowship paid them (*Id*.,Stipulated Facts, Nos. 3-4, *Apx. 113*).

On June 12, 2013, American Fellowship was declared insolvent, thus triggering the Michigan Property & Casualty Guaranty Association's statutory duties to step in and provide payment of benefits for the "covered claims" of the insolvent insurer (*Id*., Stipulated Facts, Nos. 5-7, *Apx. 113*). While paying benefits on Justin's claim, the MPCGA investigated whether other insurance might apply to the loss since, if "benefits are recoverable by a claimant" under another insurance policy, the claimant is required to obtain and exhaust any such benefits before looking to the MPCGA for payment; and to the extent benefits have

been paid by the MPCGA, the claimant is deemed to have assigned to the MPCGA any rights he has against any other insurer for payment of the "covered claim." MCL 500.7925(1)[2]; MCL 500.7931(3)[3]; MCL 500.7935(2).[4] (*Id*., Stipulated Facts Nos. 7-8, *Apx. 113-114*).

Progressive Marathon Insurance Company ("PMIC") first received notification of the injuries suffered by Justin Childers on or about September 24, 2013, more than two years after the accident (*Id*., Stipulated Facts, No. 9, *Apx. 114*). PMIC had issued a no-fault insurance policy to Shaina's brother, Matthew M. Groulx, which policy was in effect at the time of the August 6, 2011, accident. Neither Shaina Groulx nor her 1988 Oldsmobile were identified on the PMIC policy. (*Id*., Stipulated Facts, No. 11, *Apx. 114-115*; **Exh. 6** – Progressive Michigan Auto Policy, *Apx. 117*). Yet on the basis that Shaina was living with her brother at that time (see **Exh. 5** – Stipulated Facts, No. 12, *Apx. 115*), the MPCGA and Childers have maintained that PMIC qualified as Shaina Groulx's "insurer" for purposes of

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[2] "'Covered claims' means obligations of an insolvent insurer ..." MCL 500.7925(1).

[3] (3) If damages or benefits are recoverable ... by a claimant or insured under an insurance policy other than a policy of the insolvent insurer, or under a self-insured program of a self-insured entity, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter. [MCL 500.7931]

[4] (2) An insured or claimant entitled to the benefits of this chapter shall be considered to have assigned to the association, to the extent of any payment received from the association, his or her rights against the estate of the insolvent insurer, rights under the policy under which his or her claim arose, and any other rights the insured or claimant may have against any other person for payment of the covered claim paid by the association. [MCL 500.7935]

MCL 500.3114(4)[5] and thus would be an insurer within the statutory order of priorities for payment of Justin Childers' benefits.

PMIC promptly denied responsibility for this loss, shortly after which this case was filed in the Genesee County Circuit Court.

Proceedings Below

Plaintiff Childers initiated this action on November 2, 2013. PMIC answered, denying the allegations that it provided coverage applicable to Justin Childers' injuries and asserting among its affirmative defenses that the action is barred by the no-fault act's statute of limitations, MCL 500.3145(1). The MPCGA was thereafter granted leave to intervene as plaintiff by Order of June 9, 2014 (**Exh. 3** – Register of Actions, *Apx. 57*). PMIC answered the Intervening Plaintiff's Complaint, again denying the allegations of applicable coverage and asserting, in any event, that the action is time-barred by the statute of limitations.

As the questions presented were fundamentally issues of law, the parties agreed to a set of stipulated facts and presented cross-motions for summary disposition with extensive briefing (*see*, **Exhs. 7-9** – Defendant's Motion for Summary Disposition, 9/3/2015, Defendant's Response in Opposition to the Motions for Summary Disposition, 10/8/2015, and Defendant's Reply to the Responses of Childers and the MPCGA, 10/28/2015, *Apx. 172, 193, 206*).

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[5] Under MCL 500.3114(4), as it existed prior to 2019 and for all purposes in this case, a person suffering accidental injury while occupying a motor vehicle, and having no higher priority policy from which to claim PIP benefits, would claim such benefits "from insurers in the following order of priority: (a) The insurer of the owner or registrant of the vehicle occupied. (b) The insurer of the operator of the vehicle occupied."

The trial court heard extensive oral argument on the cross-motions on October 25, 2016 (**Exh. 4** – Hearing Transcript, 10/25/2016, *Apx. 68*), at the conclusion of which the court requested that the parties submit short, summary outlines of their key argument points (*id*., Tr 10/25/2016, pp. 41-42, *Apx. 108-109*). Progressive submitted its "Supplemental Outline Brief" on November 16, 2016 (**Exh. 10**, *Apx. 213*).

After an extended delay and the assignment of a new judge to the case, the trial court issued an Order and Opinion on March 29, 2021, granting PMIC's motion for summary disposition and denying the motions for summary disposition of Plaintiff Childers and Intervening Plaintiff MPCGA (**Exh. 2**, *Apx. 18*). Addressing first whether the plaintiffs' action against Progressive was barred by the no-fault act's statute of limitations, the court initially rejected the plaintiffs' contention that PMIC was precluded from asserting its statute of limitations defense under the "mend-the-hold" estoppel doctrine (**Exh. 2**, pp. 30-31, *Apx. 47-48*). On the merits of the statute of limitations defense, however, the court held that the MCL 500.3145(1)'s requirement that any action be filed within 1-year of the accident was inapplicable as against the MPCGA, and that, as a practical matter, a claim could not have accrued against PMIC until American Fellowship was declared insolvent (*id*., pp. 31-33, *Apx. 48-50*).

The court then addressed the question of whether Childers was entitled to benefits from PMIC in the first place, and concluded that he was not. All agreed that any potential for coverage turned on whether MCL 500.3114(4) applied, and specifically on whether PMIC qualified as "the insurer" of the subject vehicle's owner and operator, Shaina Groulx,

since, under §3114(4), any person sustaining injury while occupying the vehicle she owned and was operating, could claim benefits from *her* "insurer." In making this analysis, the court rejected the notion asserted by Childers and the MPCGA that the inquiry amounted "simply to see whether Ms. Groulx is listed as an 'insured' or an 'eligible injured person' under the terms of the policy." **(Exh. 2**, p. 33, *Apx. 50*). Instead, the court noted, the test is "whether, under the terms of the policy, Defendant was the 'insurer' of Ms. Groulx (i.e., agreed, by contract, to assume the risk of loss on the part of Ms. Groulx and compensate her for it)." (*Id*., p. 34, *Apx. 51*). Toward that end, the court "examined the policy (which necessarily includes the terms and conditions of coverage, exceptions, and exclusions). And, based upon the results of such examination, the Court finds that Defendant was not an 'insurer' of Ms. Groulx." (*Id*.).

The court recognized that, under different circumstances, Ms. Groulx actually could claim PIP benefits from PMIC under her brother's policy based on her status as a resident domiciled in the same household as the policyholder. But this potential coverage is insufficient, the court observed, to render PMIC her "insurer" for purposes of MCL 500.3114(4), as the Court of Appeals held in *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527; 740 NW2d 503 (2007) (*id*., 33-34, *Apx. 50-51*). Thus, the trial court held:

> [U]nder the very circumstances presented in this case, Ms. Groulx could not claim PIP benefits from Defendant because she was statutorily disqualified from PIP benefits, from any source, while operating her own vehicle that she had failed to insure. Had she properly insured the vehicle, the corresponding insurer would have been her insurer. Her having failed to do so, Defendant did not become her "insurer" (i.e., Defendant assumed no risk whatsoever in connection with her

> use of her own vehicle); rather, she was disqualified from entitlement to PIP benefits altogether.

(**Exh. 2** – Opinion and Order, pp 34-35, *Apx. 51-52*).

From the court's grant of summary disposition in favor of PMIC, both the MPCGA and Childers filed claims of appeal (respectively, Nos. 356914 and 356915). Defendant PMIC cross-appealed to challenge the trial court's rejection of its statute of limitations defense under MCL 500.3145(1). After briefs were filed and oral arguments were heard, the Court of Appeals issued a published opinion on September 15, 2022 (**Exh. 1**, *Apx. 2*). The court upheld the trial court's rejection of the plaintiffs' "mend-the-hold" estoppel claim (*id*., slip op at 6-8, *Apx. 7-9*), but otherwise ruled in favor of plaintiffs.

On the statute of limitations issue, the Court of Appeals affirmed the trial court's holding that the no-fault act's 1-year limitation period under MCL 500.3145(1) did not operate to bar plaintiffs' claims (*id*., slip op at 8-10, *Apx. 9-11*). Advancing alternative grounds for its holding, the court first held that the MPCGA enjoyed a statutory right of action for reimbursement against insurers such as PMIC, and since the guaranty act failed to equip this action with any particular period of limitations, held that the default six-year statute of limitations under MCL 600.5813 applies. As an alternative basis ("even if MPCGA's claim against Progressive is governed by the one-year limitations period in MCL 500.3145(1)"), the court held that it "would defeat the purpose of the guaranty act" were it to apply §3145(1)'s 1-year limitations period from the date of the accident. So instead the court utilized an approach under which §3145(1)'s 1-year period would begin on "the date the claim accrues." (**Exh. 1**, slip op at 9-10, *Apx. 10-11*).

Finally, on the question of coverage, the Court of Appeals reversed the trial court's decision in favor of PMIC (**Exh. 1**, slip op at 10-14, *Apx. 11-15*). Where the trial court had ruled that PMIC was *not* "[t]he insurer]" of Shaina Groulx for purposes of extending coverage to claimant Justin Childers, the Court of Appeals held (under the section of its opinion entitled "INSURED PERSON") that Ms. Groulx was an "insured person" under the PMIC policy and, accordingly, irrespective of applicable exclusions that precluded Ms. Groulx from any protections or entitlement to benefits under the policy, PMIC qualified "as the next insurer in the chain of priority under MCL 500.3114(4)(b) because Progressive was the insurer of the operator of the vehicle occupied by Justin Childers at the time of the accident." (*Id*., slip op at 14, *Apx. 15*).

This application for leave to appeal now seeks this Court's review to address and correct the flawed analyses and conclusions reached by the published Court of Appeals opinion in this case.

ARGUMENT

Standard of Review

The legal rulings presented to this Court for review were rendered by the trial court on motions for summary disposition brought under MCR 2.116(C)(7) and (10). As its first issue raised in this application, Defendant PMIC contends that both lower courts erred in failing to hold the claims of Plaintiff Childers and Intervening Plaintiff MPCGA barred by the 1-year statute of limitations in MCL 500.3145(1). PMIC moved on this ground under MCR 2.116(C)(7), under which summary disposition is properly granted if "[t]he claim is barred because of ... statute of limitations." A ruling under this sub-rule is reviewed by the appellate courts under the non-deferential de novo standard. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999).

As its second issue raised for this Court's review, PMIC contends that the Court of Appeals erred in reversing the trial court's grant of summary disposition in favor of PMIC under MCR 2.116(C)(10) since, beyond any genuine dispute of fact, PMIC was not Shaina Groulx's "insurer" and, accordingly, under MCL 500.3114(4), it did *not* extend coverage for PIP benefits to Justin Childers, the occupant of her uninsured motor vehicle. Summary disposition under MCR 2.116(C)(10) is appropriately granted where no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475, 489-490; 835 NW2d 363 (2013); and, again, appellate review of the lower courts' rulings is de novo. *Maiden*, 461 Mich at 118, 120.

Finally, resolution of these issues require interpretation and application of statutes and a contract of insurance, which the appellate courts regard as questions of law subject to the de novo standard of review. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014); *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 413; 596 NW2d 164 (1999); *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

I. Childers' claim for PIP benefits was subject to the expired 1-year statute of limitations of MCL 500.3145(1), and any claim the MPCGA might have had was explicitly derivative of the injured claimant's rights. On the statute of limitations issue, therefore, this Court should review and reverse the published opinion of the Court of Appeals, where the erroneous conclusions reached in that opinion (a) are the direct result of its demonstrably false premise that the guaranty act provides the MPCGA with a statutory cause of action, and (b) flow from the court's failure to apply or even consider the text of the act's statutory provisions that correctly resolve the question.

Defendant PMIC has maintained that this action filed by Plaintiff Childers, then joined by Intervening Plaintiff MPCGA – unquestionably an "action for recovery of personal protection insurance benefits" payable under the no-fault act – was barred by the applicable statute of limitations. The case was initiated by Childers, the injured claimant, on November 22, 2013. The intervening plaintiff, MPCGA, joined the action with its own complaint on June 9, 2014. The motor vehicle accident giving rise to the claim occurred two-to-three years earlier on August 6, 2011.

These bare chronological facts indicate that the action against PMIC was and is barred by the 1-year statute of limitations of MCL 500.3145(1). This straight, uncomplicated 1-year limitation provision is subject to two explicit exceptions, one based on written notice of

injury submitted to the insurer during the first year post-accident, and the other based on the insurer having made previous payments on the loss, but it is entirely undisputed that neither of these exceptions applies here. Accordingly, the governing provision of the statute, in stark clarity, provides as follows:

> An action for recovery of personal protection insurance benefits payable under this chapter may not be commenced more than 1 year after the date of the accident causing the injury[.]

MCL 500.3145(1).[6] Under this statute, Childers' action, joined by the MPCGA, was time-barred – it "may not be commenced" – because it was filed more than 1 year after the subject accident.

The lower courts, however, refused to apply §3145(1)'s strict 1-year deadline from the date of the accident. The Court of Appeals, in particular, did so without ever reaching any final determination as to what statute of limitations actually does apply. It first seemed to hold that the guaranty act bestowed upon the MPCGA statutory cause of action whose period of limitations, by default, was six years, since this purported statutory action did not come equipped with a statute of limitations its own. (Op, 9). But the opinion then retreats a step to offer an alternative conclusion, hinting perhaps that §3145(1) might be the applicable limitations provision after all – only it materially deviates from the actual text of §3145(1). Where the 1-year limitations period in §3145(1) expressly runs from the date of the motor vehicle accident, the opinion grafts a cause of action "accrual" date to the statute. (Op, 9-10). The following will show neither of these alternative conclusions is valid.

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[6] Although provisions were added to this statute in 2019 as part of the no-fault reform amendments of 2019 PA 21, this case has proceeded from its inception under the pre-amended version of the statute.

When interpreting a statute, courts effectuate the Legislature's intent by looking at the statutory text itself, giving meaning to every word, phrase, and clause in the statute "and considering both their plain meaning and their context." *Liss v Lewiston- Richards, Inc*, 478 Mich 203, 207; 732 NW2d 514 (2007). If the language is clear and unambiguous, "the statute must be enforced as written and no further construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). Courts must """give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory."""" *South Dearborn Envtl v Dept of Envtl Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018) (citations omitted).

So often are these tenets repeated that they now surely constitute "black letter law." Yet what stands out in the Court of Appeals opinion in this case–a published opinion, no less–is its glaring failure to confront the actual text of the statutory provisions that directly control the statute of limitations issue before the Court.

The MPCGA was ordered into creation, MCL 500.7901, *et seq.*, to handle claims against insolvent insurers to the extent such claims are "covered claims" under MCL 500.7925. "'Covered claims' means obligations of an insolvent insurer" that meet specific qualifications spelled out in the statute.[7] Childers' claim for PIP benefits against his

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[7] Subject to narrow exceptions identified in later sub-sections of §7925, the statute defines a covered claim as follows:

> (1) "Covered claims" means obligations of an insolvent insurer that meet all of the following requirements:
>
> (a) Arise out of the insurance policy contracts of the insolvent insurer issued to residents of this state or are payable to residents of this state on behalf of insureds of the insolvent insurer.

insolvent insurer, American Fellowship Mutual Insurance Company, became a "covered claim" within the meaning of §7925 (**Exh. 5** – Stipulated Facts, No. 7, *Apx. 113*). The MPCGA thus assumed responsibility for paying the insolvent insurer's claims – albeit, as the Court of Appeals' opinion notes, as a "last resort insurer" (**Exh. 1**, p. 2, *Apx. 3*). *Accord*, *Auto Club Ins Assoc v Meridian Mut Ins Co*, 207 Mich App 37, 40; 523 NW2d 821 (1994) (when the MPCGA steps in to handle an insolvent insurer's claims, it is regarded as "an insurer of last resort rather than merely a reinsurer who simply assumes the obligations of an insolvent insurance company").

Yet precisely what is meant by this informal label of "last resort insurer" and how that status is implemented under the MPCGA's statutory provisions is critical for an understanding of the statute of limitations question in this case. This is so, because while the MPCGA's responsibility for paying the insolvent insurer's claims is limited by the extent to which any other coverage is available to pay the loss, when there simply is no other coverage from which benefits "*are recoverable*," the MPCGA remains responsible for the loss.

(b) Were unpaid by the insolvent insurer.

(c) Are presented as a claim to the receiver in this state or the association on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(d) Were incurred or existed before, at the time of, or within 30 days after the date the receiver was appointed.

(e) Arise out of policy contracts of the insolvent insurer issued for all kinds of insurance except life and disability insurance.

(f) Arise out of insurance policy contracts issued on or before the last date on which the insolvent insurer was a member insurer.

Two provisions, in particular, are key. One, MCL 500.7931(3), addresses the MPCGA's right to refrain from making payments otherwise owed if recoverable benefits from another source are available to the injured claimant; and the other, MCL 500.7935(2), addresses benefits already paid by the MPCGA and its ability to seek reimbursement from that other source.

Under §7931(3), the injured claimant is required to exhaust all coverage available under any other insurance policy, and any such benefits thus recoverable *by the claimant* qualify as a credit against the "covered claim" payable by the MPCGA. In this regard, the MPCGA's position is effectively subordinated to such other coverages. But under the terms of the statute, and as the opinion in *Auto Club v Meridian Mutual* confirms, the MPCGA's position is subordinated to other coverage only when such other coverage is actually available: "'[T]he setoff provision of [§7931(3)] clearly states that ***if coverage is available*** *under another valid policy*, that coverage must be exhausted before the MPCGA becomes involved.'" *Id.*, 207 Mich App at 41, *quoting*, *Yetzke v Fausak*, 194 Mich App 414, 422; 488 NW2d 222 (1992) (emphasis added). This critical premise is stated in the statute itself:

> (3) ***If*** damages or benefits *are* ***recoverable*** ... ***by a claimant*** *or insured* under an insurance policy other than a policy of the insolvent insurer, or under a self-insured program of a self-insured entity, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter.

MCL 500.7931 (emphasis added).

Unambiguously, this statute allows the MPCGA to subordinate itself to another insurer's coverage *only* if benefits from that other insurer are, in fact, "recoverable" – and specifically, *recoverable by the underlying claimant*. The injured claimant thus is obligated

under the statute to exhaust his existing claims against any other insurers. But if the injured claimant has no viable claim against his other potential provider of benefits, it simply means that no other benefits are "recoverable."

Thus "*if* damages or benefits are *recoverable*" by Justin Childers under another policy, such as the PMIC policy issued to Matthew Groulx (or, as the *Auto Club v Meridian* opinion puts it, "if coverage is *available*" under this other policy), then ultimate responsibility for the claimed benefits would fall on the issuer of the other policy and not on the MPCGA. Yet under §7931(3), it simply cannot be said that benefits are "available" or "recoverable" – "***by a claimant***" – when that person's claim is barred by the statute of limitations. When the lawsuit seeking recovery of benefits is not filed until more than two years after the accident, with no prior notice of the accident on the part of the insurer, benefits are *not* available or recoverable under that insurer's no-fault policy, §3145(1); and thus no credit or setoff is available to the MPCGA against its obligation to continue payment of its "covered claim."

The same holds true with respect to the MPCGA's ability to recoup monies it already has paid on the claim. Just as the MPCGA's right to "a credit" or setoff against future payments turns on the injured claimant's underlying rights against another potentially obligated insurer, so is the MPCGA's right of reimbursement from another insurer is defined by the rights of the underlying claimant when it comes to seeking reimbursement from that insurer. Here, that means the MPCGA must stand in the shoes of the injured claimant, Childers, against PMIC. MCL 500.7935(2) provides:

> (2) An insured or claimant entitled to the benefits of this chapter [i.e., Childers] shall be considered to have ***assigned to the association***, to the extent of any payment received from the

> association, his or her rights against the estate of the insolvent insurer, rights under the policy under which his or her claim arose, and ***any** other **rights the insured or claimant may have against any other person** [**i.e., PMIC**]* for payment of the covered claim paid by the association.

MCL 500.7935 (emphasis added).

According to this statute, Childers is deemed to have assigned to the MPCGA any rights he had against PMIC to the extent of his receipt of payments from the MPCGA.[8] The MPCGA's action against PMIC, in other words, is a subrogation action. The rights held by the MPCGA are those that were assigned to it by Childers. As such, the MPCGA has no greater rights than Childers himself would have had in pursuing recovery from PMIC. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 342 Mich App 182, 204; 920 NW2d 148 (2018); *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343; 715 NW2d 324 (2006) (an insurer who becomes subrogated to the rights of the insured to whom benefits were paid substitutes for the insured and acquires no greater rights than those possessed by the insured; thus if the insured's claim against the primary insurer for recovery of PIP benefits would be barred by the 1-year statute of limitations, the subrogee-insurer's claim to recover those benefits are barred, as well). *Accord*, *Jones v Chambers*, 353 Mich 674, 681-682; 91 NW2d 889 (1958): "The assignment created nothing. It simply passed to [the assignee] rights already in existence, if any. If [the assignor] had no

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[8] The parties stipulated to this very point. "[T]o the extent of any benefit payments actually made by the MPCGA, Childers is deemed to have assigned to the MPCGA any rights he may have against any other insurer for payment of the 'covered claim.' MCL 500.7931(3); MCL 500.7935(3)." (**Exh. 5** – Stipulated Facts, No. 8, *Apx. 114*).

rights, then [the assignee] acquired none by virtue of the assignment. To rule otherwise would be to give such an assignment some strange alchemistic power to transform a dross and worthless cause of action into the pure gold from which a judgment might be wrought."

In short, the MPCGA's right to take "a credit" for benefits under another insurance policy is entirely dependent upon those benefits being "recoverable ... *by* [*the*] *claimant or insured*," §7931(3); and likewise, the MPCGA's ability to pursue another insurer for reimbursement of benefits it already paid is based entirely on the rights that the "*insured or claimant*" possesses against that insurer, as those rights are deemed to have been "*assigned*" to the MPCGA by the underlying claimant. §7935(2).

The Court of Appeals missed this point entirely. The Court's opinion ignores the MPCGA statutory status as an "assignee" altogether – *it never addresses or even cites MCL 500.7935(2)*. Instead, the opinion concludes that the guaranty act bestows upon the MPCGA its own independent right of action, then proceeds to apply "the default six-year statute of limitations period under MCL 600.5813" since the guaranty act does not specify any limitations period for this supposed cause of action. (**Exh. 1** – slip op at 9, *Apx. 10*). But not only is the Court's discernment of an independent cause of action on the part of the MPCGA fundamentally inconsistent with §7935(2), but as the following will show, it is also founded on the demonstrably false premise that the statute refers to this right of action as a "covered claim."

In its opening description of the MPCGA's role in this case, the Court of Appeals oddly describes the "covered claim" that is imposed on the MPCGA (*see*, MCL 500.7925,

discussed above) as if it were something beneficial or a favorable right, as opposed to an obligation to pay:

> [O]n June 12, 2013, American Fellowship was declared insolvent and the MPCGA assumed responsibility for its obligations, *giving the MPCGA a "covered claim"* under Michigan's property and casualty guaranty association act, MCL 500.7901, *et seq*.

(**Exh. 1** – slip op at 2, *Apx. 3*) (emphasis added). Notably, no specific citation is provided for the proposition that the MPCGA is granted some sort of statutory right of action; instead, the opinion cites only the entire guaranty act itself. But fundamentally, this passage betrays a critical misunderstanding as to what the statute means by a "covered claim."

As applied to this case, when the guaranty act refers to a "covered claim" (*see*, §7925), it is referring to the PIP claim Childers had against the now insolvent American Fellowship Insurance Company, *not* an MPCGA reimbursement claim against another insurance company. Yet later passages in the opinion reveal that the Court of Appeals did, indeed, operate under the misconception that, by taking on the burden of paying Childers' ongoing benefits previously owed by American Fellowship, it was granted a statutory "covered claim" for reimbursement. And it was on this *false* premise that the Court applied a generic six-year statute of limitations on the MPCGA's claim against PMIC:

> [W]e agree with MPCGA that because there is no specified limitations period for *covered claims*, the default six-year limitations period prescribed by MCL 600.5813 for actions not subject to other limitations periods applies.
>
> * * *
>
> [B]ecause no such limitations period has been adopted for *covered claims brought by the MPCGA*, it is appropriate to

> apply the default six-year limitations period in MCL 600.5813 to *such claims*.

(**Exh. 1** – slip op at 9, *Apx. 10*) (emphasis added). The Court's erroneous understanding that a "covered claim" was a statutory right of action bestowed on the MPCGA also is manifested in the opinion's alternative conclusion that, "even if" the MPCGA's claim against PMIC is governed by the one-year period set forth in MCL 500.3145(1), it was still timely filed:

> ... MPCGA should be afforded, at a bare minimum, one year from the date of insolvency to pursue *its right to a covered claim*. Any other approach would defeat the purpose of the guaranty act if *MPCGA could only pursue covered claims* that occur within the limitations period for the underlying automobile accident.

(*Id*., at 10, *Apx. 11*) (emphasis added).

The Court of Appeals thus critically misunderstood the "covered claim" referenced in the guaranty act. It is not a right statutorily granted to the MPCGA to "pursue" reimbursement of benefits it paid. Rather, it is a claim for benefits held by the injured person against the original insurer that was declared insolvent. It is thus a coverage *liability* held by that insurer, and it is this *liability* – this "covered claim" – that passes to the MPCGA. In short, contrary to the very premise of the Court of Appeals' statute of limitations ruling in this case, the guaranty act's "covered claim" is not an independent, statutory reimbursement "claim" bestowed upon the MPCGA. Rather, as affirmatively declared in §7935(2), the MPCGA's right to pursue reimbursement from another insurer is defined by the rights, if any, possessed by the injured claimant, who is deemed to have assigned those rights to the MPCGA. But this key statutory provision is altogether missing from the court's opinion analysis.

The Court of Appeals opinion briefly addresses, and appears to rely in part, MCL 500.7911(3), for the proposition that the MPCGA is immune to the no-fault act's 1-year statute of limitations (**Exh. 1** – slip op at 9, *Apx. 10*) ("Because the Legislature has seen fit to largely exempt MPCGA from the Insurance Code [citing §7911(3)], MPCGA is not subject to the one-year limitations period that applies to a party pursuing benefits under the no-fault act, including other insurers asserting rights to subrogation"). This conclusion, however, cannot reasonably be inferred from the very general language of §7911(3):

> (3) The association is subject to the requirements of this chapter and chapter 81 but is not subject to the other chapters of this act. The association shall be subject to other laws of the state to the extent that it would be subject to those laws if it were an insurer organized and operating under chapter 50, to the extent those other laws are not inconsistent with this chapter.

MCL 500.7911(3). Here, where §7935(2) limits the MPCGA's reimbursement rights to those *the injured claimant* might have possessed, the operative question is whether the *injured claimant* would be subject to §3145(1); and nothing in §7911(3) purports to free the injured claimant from the provisions of the no-fault act.[9]

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[9] The MPCGA argued below that *Felsner v McDonald Rent-A-Car*, 173 Mich App 518; 434 NW2d 178 (1988), supported its argument that §7911(3) protected it from §3145(1), but the argument is without merit. *Felsner* did not address how the no-fault act's provisions are relevant to claims assumed by the MPCGA in the first place, let alone the impact of §3145(1) in particular. The case merely held that the MPCGA can enjoy the "*benefits*" accorded insurance companies by the insurance code (in that case, MCL 500.3030–the right not to be sued directly by a tort plaintiff). The plaintiff had opposed that view, citing §7911(3) to say that the MPCGA is "not subject to the other chapters of this act," and the court rejected it as inapplicable. It said §7911(3) was meant only to relieve the MPCGA from complying with *burdens* imposed on insurance companies by the insurance code. 173 Mich App at 522-523. This broad purpose of §7911(3) cannot reasonably be construed to immunize a subrogated reimbursement action brought by the MPCGA–as assignee of the injured person–from operation of the 1-year statute of limitations of §3145(1).

Nor is there merit to the proposition stated in the court's opinion that "plaintiff and MPCGA are not seeking PIP benefits under the no-fault act; they are seeking credit for payments MPCGA made[.]" (**Exh. 1** – slip op at 8, *Apx. 9*). True, the injured claimant is obligated under §7931(3) to exhaust coverage available under any other policy, such as the PIP benefits purportedly available under the Progressive policy issued to Matthew Groulx; and, true, the MPCGA is seeking reimbursement of benefits it paid under duties imposed by the guaranty act. Yet is beyond dispute that what the plaintiffs seek to compel PMIC to pay in this case are nothing other than no-fault PIP benefits; and it is recovery of these benefits that MPCGA, via assignment of Childers' rights under §7935(2), is likewise attempting to achieve. It thus cannot plausibly be maintained that Childers and the MPCGA "are not seeking PIP benefits" payable pursuant to the no-fault act, simply because such recovery would effectively reimburse the MPCGA's payout of benefits under the guaranty act. *See*, *Auto Club Ins Assoc v New York Life Ins Co*, 440 Mich 126, 134-138; 485 NW2d 695 (1992).[10]

PMIC thus respectfully submits that the Court of Appeals fundamentally erred in its conclusion that the MPCGA's action against PMIC was subject to a six-year statute of

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[10] In *Auto Club*, this Court held that although the plaintiff, a no-fault insurer, was seeking reimbursement of the PIP benefits it paid toward its insured's medical expenses, its subrogated claim for reimbursement against the defendant health insurer was *not*, therefore, effectively a claim for no-fault benefits but, rather, a claim to recovery the health insurance benefits payable under the defendant insurer's health insurance policy. The Court expressly rejected the contrary rationale advanced in *Badger State Mut Cas Ins Co v Auto-Owners Ins Co*, 128 Mich App 120, 127; 339 NW2d 713 (1983). *See*, 440 Mich at 135. The rationale employed by the Court of Appeals in this case matches the rationale rejected by this Court in *Auto Club*.

limitations, as it is founded on the false premise that the MPCGA enjoys a statutory cause of action of its own (a "covered claim"). Rather, since *by statute* the MPCGA proceeds in this matter as an assignee of any rights Justin Childers possessed against PMIC, and since the action, irrefutably, is "[a]n action for recovery of personal protection insurance benefits payable under this chapter [i.e., the no-fault act]," MCL 500.3145(1), the applicable statute of limitations is the one explicitly provided in §3145(1).

Seemingly in response to the possibility that its aforesaid analysis might be subject to challenge, the Court of Appeals advanced an altogether different analysis as an alternative – one that accepts the proposition that §3145(1)'s 1-year limitation period applies, but that grafts onto §3145(1) an approach based on when the claim accrued:

> [E]ven if MPCGA's claim against Progressive is governed by the one-year limitations period in MCL 500.3145(1), that claim could not have accrued until the highest-priority insurer was declared insolvent. Until American Fellowship became insolvent, MPCGA did not have any claim against the next-priority insurer.

(**Exh. 1**, slip op at 9, *Apx. 10*). But this approach, too, is demonstrably flawed.

In support of its reliance on when the subject claim accrued, the opinion cites MCL 600.5827 ("Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues") (*see*, slip op at 9, *Apx. 10*). Here the court seems to have ignored entirely the opening caveat of §5827 – "*Except as otherwise expressly provided*..." The text of §3145(1) contains no reference to when a cause of action accrues. On the contrary, it states very explicitly that its 1-year period of limitations runs from "the date of the accident

causing the injury[.]" Accordingly, the edict of §5827 on which the Court of Appeals relied is inapplicable by its very terms.

Moreover, seemingly to buttress its "accrual rule" approach – and perhaps responding to its perceived need to address "yet another hole in the no-fault act that the courts must fill" (**Exh. 1** – slip op, at 1, *Apx. 2*), the court declares that the MPCGA "should be afforded, at a bare minimum, one year from the date of insolvency to pursue its right to a covered claim." (*Id*., slip op at 10, *Apx. 11*). Any other approach, the court says, "would defeat the purpose of the guaranty act if MPCGA could only pursue covered claims that occur within the limitations period for the underlying automobile accident." (*Id*.).

The opinion thus would graft onto §3145(1) an accrued claim approach for the benefit of the MPCGA–overriding the explicit text of the statute itself, in order to protect the basic purpose of the guaranty act. Not only does this constitute judicial legislation at its finest, PMIC submits, but it is simply wrong. The purpose of the guaranty act is *not* to afford the MPCGA with a right to reimbursement. Rather, it is to protect the public – i.e., motor vehicle accident victims – from losing a source of benefits in the event of his or her auto insurer becoming insolvent. *Yetzke v Fausak*, 194 Mich App 414, 418-419; 488 NW2d 222 (1992) (cited by the court for this very proposition – **Exh. 1**, slip op at 8-9, *Apx. 9-10*). Besides, in reaching this policy decision, the court utterly failed to weigh its conclusion against the countervailing policy considerations underlying the Legislature's decision to enact a strict, one-year-from-the-accident limitation period in §3145(1).[11] This failure

[11] "If the statute [§3145(1)] has provisions that are harsh, they undoubtedly reflect the compromises that were hammered out in the Legislature at the time mandatory automobile no-fault

illustrates the wisdom in the basic rule that courts are to respect the policy determinations made by the Legislature. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 405; 605 NW2d 300 (2000).

Finally, turning to the action filed not by the MPCGA but by Childers himself, the opinion of the Court of Appeals follows the same two-alternative path it did for the MPCGA's claim. It first cites MCL 500.7931(3) for the proposition that Childers' claim against PMIC arose not under the no-fault act but under the guaranty act (which, again, lacking any particular limitation of actions clause, is deemed to adopt the default six-year period from the RJA). Yet §7931(3) does not even hint at conferring a right of action on the insured person or claimant. Rather, in the event other benefits are "recoverable," it simply imposes *an obligation* on that person to exhaust those coverages before looking to the MPCGA for payment. Whether or not the person has a viable claim against such other payers is left entirely open.

Then as it did when addressing the MPCGA's claim, the opinion offers an "alternative[ ]" path to the same result, which again grafts onto §3145(1) a "claim accrual" basis in substitution for the statute's express date-of-the-accident basis as the commencement date of the 1-year limitation period (**Exh. 1**, slip op at 10, *Apx. 11*). In this regard, for the same reasons detailed above, the Court of Appeals conclusively erred in holding that Childers' action against PMIC was timely filed under §3145(1), just as it erred in holding

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insurance was enacted by the Michigan Legislature. ... [Courts] cannot revise, amend, deconstruct, or ignore their product and still be true to [their] responsibilities that give [the courts] only the judicial power." *Cameron v Auto Club Ins Assoc*, 476 Mich 55, 65-66; 718 NW2d 784 (2006).

that Childers' action might be governed by the six-year statute of limitations under §5827 of the RJA.

In sum, this published opinion of the Court of Appeals, purporting to apply specific statutory provisions to declare what the statute of limitations is for an action brought by the MPCGA against another insurer for reimbursement of benefits paid, is fatally flawed. Under its own statutory provision, MCL 500.7935(2), the MPCGA's rights against another insurer are nothing more or less than those of an assignee of the injured person. Justin Childers' ability to sue PMIC was limited by the express terms of §3145(1) (applicable to "[a]n action for recovery of [PIP] benefits payable under [the no-fault act]"). And since §3145(1) rendered Childers' action time-barred, so too was the action filed by the MPCGA.

This Court is respectfully urged to grant this application for review, and ultimately reverse the lower courts' rulings and hold that the actions filed against PMIC in this matter were barred by §3145(1).

II. The Court should grant review and reverse the Court of Appeals' holding that PMIC is liable under MCL 500.3114(4) for payment of PIP benefits to Childers as the occupant of the uninsured vehicle owned and operated by Shaina Groulx, since PMIC assumed no risk of loss whatsoever on behalf of Groulx when she was operating her own uninsured vehicle, and thus did not qualify as her "insurer" within the meaning of MCL 500.3114(4).

Justin Childers was domiciled with his mother when he sustained permanent injuries in the subject motor vehicle accident, which gave rise to his entitlement to personal protection insurance ("PIP") benefits under the no-fault act. The insurer in priority for providing Justin's PIP benefits was his mother's insurer, American Fellowship Mutual Insurance Company. Indeed, American Fellowship would have been responsible for his loss regardless of whose vehicle he was occupying and whether or not it was insured. MCL 500.3114(1).[12] When American Fellowship was declared insolvent, the MPCGA stepped into this position as the entity responsible for Childers' benefits – except when "damages or benefits are recoverable by ... a claimant or insured under [another] insurance policy[.]" MCL 500.7931(3). (*See*, **Exh. 5** – Stipulated Facts, Nos. 7-8, *Apx. 113-114*).

As the second question presented in this application, the issue is whether there was, in fact, any coverage under another policy. Jason Childers was not himself a PMIC policyholder (named insured) nor was he a resident relative of any PMIC policyholder. What the plaintiffs have contended, rather, is that he is statutorily entitled to claim benefits from

[12] In pertinent part, §3114(1) provides that "a personal protection insurance policy ... applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises out of the a motor vehicle accident. ..."

"the insurer" of the owner/operator of the motor vehicle he was occupying at the time of his accident, under MCL 500.3114(4):

> Except as provided in subsection (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> a. The insurer of the owner or registrant of the vehicle occupied.
>
> b. The insurer of the operator of the vehicle occupied.

MCL 500.3114(4) (as it existed prior to the 2019 amendments). But Childers, of course, was not occupying a car owned or being operated by PMIC's insured, Matthew Groulx; he was occupying a car owned and operated by Shaina Groulx–and PMIC was not her insurer.

To argue otherwise, Plaintiff Childers and Intervening Plaintiff MPCGA have insisted that PMIC qualified as Shaina Groulx's insurer under §3114(4) purely on the basis that she was a resident relative of her brother Matthew and, accordingly, could potentially qualify–under other circumstances *not present in the case at bar*–for entitlement to PIP benefits as an "eligible injured person" under the PMIC policy. Now in a published opinion, the Court of Appeals adopts this approach, holding that Shaina qualified under her brother's policy as an "insured person" (equating her potential status as an "eligible injured person" with "insured person"), and thus entitled to benefits under §3114(4).

Yet this conclusion flows from a dispositive error. In its opinion, the court clearly states that "the relevant inquiry in this case is whether Shaina is an 'insured person' as defined by the Progressive policy[.]" (**Exh. 1**, slip op at 3 n 1, *Apx. 4*). This is incorrect.

Here, and throughout the remainder of the opinion, the Court fails to come to terms with the fact that the dispositive inquiry is *not* whether the PMIC policy identifies Shaina in any context as an "insured person" but, rather, whether, *PMIC* qualified as *her "insurer"* – §3114(4) – which is determined by *whether PMIC bore any insured risk on her behalf*. And here, PMIC did not.

The controlling test for whether an insurance company will be deemed "the insurer" of the owner or operator of a particular motor vehicle, for purposes of §3114(4), is provided in *Amerisure Ins Co v Coleman*, 274 Mich App 432; 733 NW2d 93 (2007), as limited by *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527; 740 NW2d 503 (2007). Under *Coleman*, the inquiry for determining whether §3114(4) imposes coverage on an insurer to pay an injured passenger's PIP benefits focuses on whether, "at the time of the accident," the occupied vehicle's owner or operator was being protected by the insurer – whether that insurer, in other words, had assumed a risk of loss for that owner or operator:

> The term "insurer" [as it appears in §3114(4)] is not defined in the no-fault act. Black's Law Dictionary (7th ed.) defines "insurer" as "[o]ne who agrees, by contract, **to assume the risk of another's loss and to compensate for that loss**. Accordingly, we must determine whether, under the terms of the Titan insurance policy, Titan was the insurer of Bernard, who was the operator of the vehicle at the time of the accident.

Coleman, 274 Mich App at 435-436 (emphasis added).

In *Coleman*, "Bernard" was not Titan's named-insured policyholder, but as a resident spouse of Titan's policyholder he was effectively elevated to "named insured" status ("**you**" and "**your**") and thus included in the insuring agreement statement that, "'[i]n return for

your premium payment, we agree to insure **you** subject to all the terms of this policy.'" *Coleman*, 274 Mich App at 436 (quoting the policy). Bernard was held to be covered (i.e.–protected by the insurer's assumption of his risk of loss) while he was driving the uninsured car owned by his mother-in-law. Importantly, no circumstances existed to preclude him from accessing this coverage; he very well could have recovered PIP benefits himself for any injuries he sustained in the accident.

In the case at bar, plaintiffs Childers and MPCGA reasoned that, in *Coleman*, since "Bernard" had coverage for his accident as an "insured" spouse and resident relative, rendering his wife's insurer *his* "insurer" for purposes of §3114(4), then PMIC should likewise be regarded as Shaina Groulx's "insurer" since she, too, was a resident relative of PMIC's policyholder, Matthew Groulx. But *Dobbelaere*, and the specific definition of "insurer" used in *Coleman* itself, precludes this leap in logic. "[T]he fact that an individual might derivatively claim PIP benefits through a named insured under MCL 500.3114(1) *does not render the policy issuer the 'insurer' of that individual* for purposes of MCL 500.3114(4)." *Dobbelaere*, 275 Mich App at 532 (emphasis added).

To be sure, Shaina Groulx's status as a resident relative of PMIC's named insured might have enabled her to claim benefits or seek coverage from PMIC *in other circumstances*. For instance, while driving her brother's car (or anyone else's car, as long as it was not hers), Shaina would have the protections of PMIC's BI liability coverage and the policy's UM/UIM coverage. Indeed, *in other circumstances*, Shaina likewise could have claimed benefits under the policy's no-fault PIP coverage ("Part II – Personal Protection

Insurance Coverage") (*See*, **Exh. 6** – Progressive Michigan Auto Policy, pp. 7-12, *Apx. 134-139*). For instance, if she were injured as a passenger in someone else's vehicle or even if struck as a pedestrian by another car, she would qualify for benefits under her brother's policy in accordance with MCL 500.3114(1) and 3115(1).

But, in accord with *Coleman* and *Dobbelaere*, this *potential* right to benefits under these inapplicable circumstances did not render PMIC her "insurer" for all times and all circumstances–any more than PMIC would be deemed the "insurer," for purposes of §3114(4), of every unknown future occupant of his vehicle and of every unknown pedestrian that might *potentially* be injured by Matthew Groulx's covered vehicle. Under the circumstances of *this* case and the accident in which Childers was injured, where Shaina Groulx was operating her own uninsured vehicle, Shaina *had no coverage whatsoever* under

the PMIC policy.[13] PMIC assumed no risk with respect to Shaina Groulx–which is the operative test under *Coleman*, 274 Mich App 435–so PMIC was not her "insurer."

In reaching its conclusion to the contrary, the Court of Appeals opinion never comes to terms with the actual definition of "insurer" identified and applied in *Coleman*, *supra*. Rather, taking the position that a policy's mere utilization of the term "insured" (or "eligible injured person") renders the issuer of the policy "the insurer" of anyone so identified, the

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[13] Under Part I of the PMIC policy (for bodily injury liability), Shaina would be an "insured" by her status as a resident relative of the named insured person, but Part I's Exclusion 14 applies to defeat her covered status:

> Coverage under this Part I, including our duty to defend, will not apply to any **insured person** for:
>
> * * *
>
> 14. **bodily injury** ... arising out of the ownership ... or use of any vehicle owned by a **relative**, other than a **covered auto** for which this coverage has been purchased. ... [**Exh. 6**, "Part I – Liability to Others," pp. 2-6, *Apx. 130-133*.]

Under Part II of the PMIC policy (for first party PIP benefits), Shaina likewise would be an "eligible injured person" for PIP, but Part II's Exclusion 8 applies to defeat her covered status:

> Coverage under Personal Protection Insurance does not apply to accidental bodily injury:
>
> * * *
>
> 8. sustained by the owner or registrant of a **motor vehicle** ... involved in an accident which is not covered by security as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended.
>
> [*Id*., "Part II – Personal Protection Insurance Coverage," pp. 8, 10, *Apx. 133, 137*; also *see*, Exclusions 11 and 15, *id*., and MCL 500.3113(b).]

Finally, under Part III of the PMIC policy (for UM/UIM benefits), Shaina again would be an "insured" by her status as a resident relative of the named insured person, but Part III's Exclusion 1.b applies to defeat her covered status:

> Coverage under this Part III will not apply:
>
> 1. to **bodily injury** sustained by any person while using or **occupying**:
>
> * * *
>
> b. a motor vehicle that is **owned** by ... a **relative**. This exclusion does not apply to a **covered auto** that is insured under this Part III.
>
> [*Id*., "Part III – Uninsured/Underinsured Motorist Coverage," p. 14, *Apx. 141*.]

opinion simply relies on the opinion of *Sours v Titan Ins Co*, unpublished Court of Appeals opinion No. 301328 (December 27, 2011) (*see*, **Exh. 1**, slip op at 13-14, *Apx. 14-15*).

The conclusion reached in *Sours*, however, directly conflicts with the published authority of *Coleman* and *Dobbelaere*. And *Sours*, just like the Court of Appeals' opinion issued in this case, woodenly relies on whether the named insured's relative, operator of her own uninsured car, might fall under a threshold definition of "insured person" (or, here, "eligible injured person"), while *disregarding* applicable exclusions that would defeat any claim of coverage on her part.

Thus the court in *Sours*, just like the Court of Appeals in this case, erred in equating its facts with those in *Coleman*, in which "Bernard" was held to be *covered* under his wife's Titan policy and, accordingly, Titan was held to be his "insurer" under §3114(4). But in *Sours*, the operator of the car–just like Shaina Groulx in this case–would *not* qualify for coverage. *Coleman*, therefore, dictates the exact opposite holding as was reached here and in *Sours* since, under *Coleman*, if the person is not a named insured on the policy, the insurance company can be that person's "insurer" only under circumstances in which, by its contract, it *assumes the risk of the person's loss and of compensating them for the loss*. *Id*., 274 Mich App at 435.

Contrary to the *Sours*-based discussion presented by the Court of Appeals in this case (**Exh. 1**, slip op at 12-13, *Apx. 13-14*), the inquiry is *not* simply to see whether a resident relative is listed as an "insured" [or an "eligible injured person"] somewhere in the policy. The test is cannot be that superficial. It can be said with 100% certainty that a resident

relative in *Dobbelaere* also was identified in the no-fault policy as an "insured" (or "eligible injured person" or some equivalent), since Michigan law required no-fault coverage potentially to extend to resident relatives, MCL 500.3114(1); yet *Dobbelaere* held that this potential resident-relative coverage does *not* render an insurance company "the insurer" of the resident relative for purposes of §3114(4). Notably, *Dobbelaere* was overlooked entirely by the court in *Sours*; it is not even cited in the opinion.

Under *Coleman*, again, the court "must determine whether, under the terms of the [named insured's] insurance policy, [the issuing insurance company] was the insurer of [the resident relative] who was the operator of the vehicle at the time of the accident." *Id*., 274 Mich App at 435-436. And here, by examining "the terms of the [PMIC] insurance policy," which necessarily includes not only the initial terms of coverage but the exceptions and exclusions as well,[14] it is clear that PMIC was *not* an "insurer" of Shaina Groulx in this instance as it assumed *no risk* of loss on the part of Ms. Groulx and would not compensate her for any loss, whether for her own injuries or for her liability for someone else's injuries.

Had Ms. Groulx insured her own car as she was required to under the law, MCL 500.3101(1), *that* insurer would have been "the insurer of the owner [and] operator" of the vehicle occupied by Justin Childers, and he could look to that insurer for his benefits under §3114(4). But where Ms. Groulx did not maintain any such insurance, there is no principled basis for concluding that PMIC became her "insurer" when it neither insured her

[14] An insurance policy "is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. [ ] Accordingly, the court must look at the contract as a whole and give meaning to all terms." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

car nor insured Ms. Groulx herself with respect to her use of that car. This was not a "risk" "assume[d]" by PMIC.

The trial court properly held, therefore, that PMIC does not qualify as "the insurer of" Shaina Groulx; she *had* no insurer in this case (**Exh. 2** – Opinion and Order, pp. 33-35, *Apx. 50-52*). In holding to the contrary, the Court of Appeals reversibly erred, PMIC submits, by narrowly (and woodenly) focusing on Shaina's "insured person" status rather than on the dispositive question of whether, after considering the policy's applicable exceptions and exclusions, PMIC qualified as *her "insurer"* in this instance.

This Court is requested to grant leave to appeal and conclude that §3114(4) does not apply, that Childers had and has no claim against PMIC, and that the MPCGA, therefore, remains responsible for providing the no-fault PIP benefits owed to Childers.

RELIEF REQUESTED

For all the reasons set forth above, Defendant-Appellant, Progressive Marathon Insurance Company, respectfully requests that the Court grant leave to appeal in this matter, and after plenary review, reverse the judgment of court of appeals and direct that summary disposition be granted in favor of PMIC based on a holding that Intervening Plaintiff MPCGA, not PMIC, is responsible for payment of Plaintiff Childers's no-fault benefits.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

By: /s/ Daniel S. Saylor

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October 27, 2022

STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS,
Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals Nos. 356914 and 356915

Genesee County Circuit Court No. 13-101626-NF

PROOF OF SERVICE

DANIEL S. SAYLOR, of the law firm of GARAN LUCOW MILLER, P.C., attorneys for Defendant-Appellant, Progressive Marathon Insurance Company, certifies that on **October 27, 2022**, he served a copy of **Defendant-Appellant's Application for Leave to Appeal**, with **Appendix** and this **Proof of Service**, upon counsel for both Plaintiff-Appellees Childers and MPCGA, respectively, by directing the Court's *MI-File* system to deliver true copies to **Richard F. Burns, Jr., Esq.**, Law Offices of Richard F. Burns, Jr., P.C., 30150 Telegraph Rd., Ste. 300, Bingham Farms, MI 48025, at **richard@richardburnslaw.com**; and **Benjamin W. Jeffers, Esq.**, Hickey, Hauck, Bishoff, Jeffers & Seabolt, PLLC, One Woodward Avenue, Ste. 2000, Detroit, MI 48226, at **bjeffers@hhbjs.com**.

/s/ Daniel S. Saylor
DANIEL S. SAYLOR