STATE OF MICHIGAN

IN THE SUPREME COURT

W.A. FOOTE MEMORIAL HOSPITAL, d/b/a ALLEGIANCE HEALTH, a Michigan non-profit corporation,

Plaintiff/Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN, MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants/Appellees

and

JOHN DOE INSURANCE COMPANY,

Defendant.

Supreme Court Case No. _____

Court of Appeals Case No. 333360

Kent County Circuit Court
Case No. 15-08218-NF

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PLAINTIFF/APPELLANT ALLEGIANCE HEALTH'S APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION AND STATEMENT OF GROUNDS FOR APPLICATION

Just last year, this Court held:

> The Court of Appeals is bound to follow decisions by this Court except where those decisions have *clearly* been overruled or superseded, *and is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined*. [*Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-92; 880 NW2d 765 (2016) (emphasis in original; footnotes omitted).]

In violation of that instruction, the Court of Appeals' published opinion below effectively overrules this Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), and the long line of cases it represents. See page 11 n 4, *infra*. In doing so, the Court of Appeals abolishes the prospective application of judicial decisions at Michigan common law.

In its place, the Court of Appeals engrafts the standard articulated by the United States Supreme Court in *Harper v Va Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). It does this despite the fact that *Pohutski* was decided nearly a decade after *Harper* and this Court, therefore, could have adopted *Harper* if it had seen fit to do so. In support of rewriting this Court's jurisprudence, the Court of Appeals cites a single passage from *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012), which mentioned neither *Pohutski* nor *Harper* and provides only a cursory discussion of retroactivity. The Court of Appeals' anticipation of *Harper* supplanting *Pohutski* as Michigan's new common law is precisely what this Court admonished in *Associated Builders.*

For these reasons, and those below, this application presents legal principles of major significance to Michigan's jurisprudence. MCR 7.305(B)(3). *To wit*, whether the doctrine of prospective application still exists in Michigan and whether the Court of Appeals can *de facto* overrule decisions of this Court, where it determines that their foundations have "evolved." Slip

op at 10. Moreover, the Court of Appeals' published opinion is clearly erroneous, will cause material injustice, and conflicts with an entire line of cases decided by this Court. MCR 7.305(B)(5).

The need for this Court's guidance is manifest. Indeed, the Court of Appeals, itself, has requested it: "[W]e invite our Supreme Court to state expressly whether or to what extent it adopts the *Harper* rationale into Michigan state court jurisprudence." Slip op at 17. *Pohutski* and Michigan's flexible approach to the retroactive application of judicial decisions have a long-running and recently-affirmed history. For the multitude of reasons set forth below and in the dozens of decisions by this Court that have acknowledged the doctrine of prospective application, that doctrine should not be abolished, but affirmed.

Plaintiff W.A. Foote Memorial Hospital, d/b/a Allegiance Health ("Allegiance") requests that this Court accept the Court of Appeals' invitation; grant Allegiance's application for leave to appeal; reverse the Court of Appeals' published opinion below; apply *Pohutski* to this Court's recent decision in *Covenant Med Ctr, Inc v State Farm Mut Ins Co*, ___ Mich ___; 895 NW2d 490 (2017); hold that *Covenant* has prospective application; and remand this case to the Court of Appeals for further consideration of the underlying issues.

STATEMENT IDENTIFYING JUDGMENT

Allegiance seeks leave to appeal the Court of Appeals' published opinion of August 31, 2017 in Court of Appeals Docket No. 333360, attached as **Exhibit 1**. Judge Ronayne Krause concurred in the result only. **Exhibit 2**. That Court of Appeals' decision *de facto* overrules this Court's decision in *Pohutski*, effectively abolishes the doctrine of prospective application of judicial decisions in Michigan, affirms the Kent County Circuit Court's grant of summary judgment to Defendants in light of *Covenant*, *supra*, and remands the case for further proceedings.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the flexible approach to the retroactive application of judicial decisions as articulated in *Pohutski* continues to exist in Michigan.

The Court of Appeals answers, no.

The Circuit Court did not address this issue.

Defendants answer, no.

Plaintiff answers, yes.

2. Whether the Court of Appeals usurped this Court's constitutional authority when it purported to *de facto* overrule dozens of this Court's decisions in the *Pohutski* line of cases.

The Court of Appeals answers, no.

The Circuit Court did not address this issue.

Defendants answer, no.

Plaintiff answers, yes.

3. Whether *stare decisis* supports retaining the *Pohutski* line of cases.

The Court of Appeals did not address this issue.

The Circuit Court did not address this issue.

Defendants did not address this issue.

Plaintiff answers, yes.

4. Whether *Covenant* should be limited to prospective application under the *Pohutski* test.

The Court of Appeals answers, no.

The Circuit Court did not address this issue.

Defendants answer, no.

Plaintiff answers, yes.

STATEMENT OF FACTS AND PROCEEDINGS

I. Allegiance sues Defendants under the no-fault act to assign its claim for the care and treatment of Zoie Bonner; the Circuit Court grants summary disposition to Defendants.

The facts relevant to this application are not in dispute. This case arises out of a motor vehicle accident that occurred on September 4, 2014 in which Zoie Bonner was injured. Allegiance provided Bonner with medical treatment and care, the charges for which totaled $9,113.

In the year following the accident, Allegiance repeatedly attempted to contact Bonner to obtain the applicable insurance information, but it failed to so. Accordingly, on September 3, 2015, Allegiance filed a claim with Defendant Michigan Assigned Claims Plan, seeking no-fault personal protection insurance ("PIP") benefits on Bonner's behalf under Michigan's no-fault insurance act, MCL 500.3101, *et seq*. To comply with the no-fault act's one-year-back provision, MCL 500.3145, Allegiance also filed suit requesting a declaratory judgment that Defendants had a duty to assign its claim to an insurer that would be responsible to process and pay the claim.

On September 17, 2015, Defendants responded to Allegiance's claim, demanding additional information before processing the claim. During discovery, Citizens Insurance Company was identified as a potentially applicable insurer. Allegiance attempted to submit a claim to Citizens, but Citizens denied the claim as being beyond the one-year deadline of MCL 500.3145.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that Allegiance's claim was ineligible for assignment because applicable insurance had been identified and because Allegiance could have recovered PIP benefits from Citizens if it had acted more quickly. Allegiance also moved for summary disposition, arguing that Defendants were

required promptly to assign Allegiance's claim at the time of the claim application unless the claim was "obviously ineligible" and that Defendants had failed to do so.

The trial court granted summary disposition for Defendants, reasoning that Allegiance had failed to demonstrate that it could not have identified coverage at the time it submitted its application to Defendants and that Allegiance could have learned of the Citizens policy if it had sued Bonner directly or a number of other ways.

Allegiance appealed.

II. During the pendency of appeal, this Court issues *Covenant*.

This Court issued *Covenant* on May 25, 2016. That decision reversed decades of Court of Appeals caselaw recognizing that healthcare providers could bring causes of action directly against insurers to recover PIP benefits under the no-fault act. See 895 NW2d at 495-498, 504-505. *Covenant* held:

> [T]he statutory no-fault scheme reveals no support for an independent action by a healthcare provider against a no-fault insurer. . . . [The] terms [of MCL 500.3112] do not grant healthcare providers a statutory cause of action against insurers to recover the costs of providing products, services, and accommodations to an injured person. . . . And further, no other provision of the no-fault act can reasonably be construed as bestowing on a healthcare provider a statutory right to directly sue no-fault insurers for recovery of no-fault benefits. We therefore hold that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act. [*Covenant*, 895 NW2d at 493.]

Accordingly, *Covenant* "overrule[d] all Court of Appeals caselaw inconsistent with this conclusion."[1] *Id.*

[1] Those cases include *LaMothe v ACIA*, 214 Mich App 577; 543 NW2d 42 (1995); *Munson Med Ctr v ACIA*, 218 Mich App 375; 554 NW2d 49 (1996); *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35; 645 NW2d 59 (2002); *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002); *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442; 830 NW2d 781 (2013); *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389; 864 NW2d 598 (2014);

Covenant did not specify whether it applied retroactively.

III. The Court of Appeals holds that *Covenant* has full retroactive effect, *de facto* overrules decisions by this Court, and abolishes Michigan's long-standing common-law doctrine allowing for the prospective application of judicial decision under certain circumstances.

In light of *Covenant*, the Court of Appeals issued a published opinion on August 31, 2017, addressing "whether *Covenant* applies only prospectively, or applies to cases pending on appeal when it was issued." Slip op at 6. Judge Boonstra authored the opinion, which Judge Swartzle joined. Judge Ronayne Krause concurred in the result only.

After analyzing what it characterizes as "the shifting sands of the evolving caselaw, both in Michigan and the United States Supreme Court, on the issue of the retroactivity/prospectivity of judicial decisions," the Court of Appeals concludes that it "would be nigh to impossible to divine a rule of law that lends complete consistency and clarity to the various espousements of the Courts, with their shifting makeups, over the years." Slip op at 10. And although the Court notes that it is an error-correcting court and should, therefore, wait for this Court to decide whether to abolish the doctrine of prospective application earlier adopted and applied by this Court, *id.* at 11, it does so anyhow.

The Court of Appeals divines that this Court's decision in *Pohutski* had been "effectively repudiated" by *Spectrum Health* and somehow replaced by a standard articulated by the United States Supreme Court in *Harper*, despite the fact that *Spectrum Health* cites neither *Pohutski* nor *Harper*. See *id.* at 13 n 14, 16-17. More specifically, the Court of Appeals relies on one passage from *Spectrum Health*. There, after noting that the plurality opinion it disavowed

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Moody v Home Owners Ins Co, 304 Mich App 415; 849 NW2d 31 (2014); *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 313 Mich App 50; 880 NW2d 294 (2015).

was not binding because it did not represent a decision of this Court,[2] *Spectrum Health* noted, "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law." 492 Mich at 536, citing *Gentzler v Constantine Village Clerk*, 320 Mich 394, 398; 31 NW2d 668 (1948); 14 Am Jur p 345. The Court of Appeals then *de facto* overrules *Pohutski*, holding that "*Spectrum* . . . effectively repudiated *Pohutski* on this issue." *Id.* at 13 n 14.

> Venturing further still, the Court of Appeals continues:
>
> > In essence, we conclude that our Supreme Court in *Spectrum Health* essentially adopted the rationale of the United States Supreme Court in *Harper* relative to the retroactivity of judicial decisions of statutory interpretation "to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." [Slip op at 16-17, citing *Harper*, 509 US at 97.]

The Court of Appeals makes this pronouncement notwithstanding the fact that just a few pages earlier it claims that it does not and cannot incorporate *Harper* into Michigan law. Slip op at 11.

Despite having already supplanted *Pohutski* with *Harper* to this Case, the Court of Appeals concludes by inviting this Court to "state expressly whether and to what extent it adopts the *Harper* rationale into Michigan state court jurisprudence." *Id.* The Court of Appeals then affirms the trial court's grant of summary disposition to Defendants and remands the case for further proceedings consistent with its opinion. *Id.* at 20.

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[2] *Spectrum Health* disavowed the the plurality opinion in *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992) (opinion by LEVIN, J.), which created the so-called "family joyriding exception" to MCL 500.3113(a). In doing so, *Spectrum Health* noted, "*Priesman* was not a majority opinion of the Court" and that "Justice Levin's plurality opinion . . . only bound the parties before it and does not bind this Court's decisions." *Spectrum Health*, 492 at 535-536.

ARGUMENT

I. The issues presented in this application should be reviewed *de novo*.

This case involves questions of common law and the retroactivity of judicial decision, both of which this Court reviews *de novo*. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010) (common law); *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008) (retroactivity).

II. The flexible approach to the retroactive application of judicial decisions as articulated in *Pohutski* continues to exist in Michigan.

Joined by Justices Markman, Young, Taylor, and Weaver, Chief Justice Corrigan wrote for this Court in *Pohutski*, "Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity." 465 Mich at 696, citing *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986); *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997), superseded by statute on other grounds. "This flexibility is intended to accomplish the 'maximum of justice' under varied circumstances." *Lindsey*, 455 Mich at 68, citing *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984).

Prospective application of a judicial decision is appropriate where "the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed." *Lindsey*, 455 Mich at 68, citing *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982). This Court has "often limited the application of decisions which have overruled prior law or reconstrued statutes." *Hyde*, 426 Mich at 240.

In *Pohutski*, this Court addressed "whether the plain language of § 7 of the governmental tort liability act, MCL 692.1407, permits a trespass-nuisance exception to governmental immunity." *Pohutski*, 465 Mich at 678. In concluding that it did not because the

Legislature's definition of the relevant word, "state," is "clear and unambiguous," *Pohutski* overruled *Hadfield v Oakland Co Drain Comm'r*, 450 Mich 139; 422 NW2d 205 (1988), and *Li v Feldt (After Remand)*, 434 Mich 584; 456 NW2d 55 (1990). But it did so only after giving consideration to issues of stare decisis and—being "mindful of the effect our holding will have on the administration of justice"—limited its holding to prospective application. *Pohutski*, 465 Mich at 679.

When determining whether a decision will be given retroactive effect, *Pohutski* explained that the threshold issue is whether the decision clearly established a new principle of law. 465 Mich at 696-697, citing *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988) (opinion by GRIFFIN, J.); *Chevron Oil v Huson*, 404 US 97, 106-107; 92 S Ct 340; 30 L Ed 2d 296 (1971) (opinion by STEWART, J.). A court's interpretation of a statute—where it "gives effect to the intent of the Legislature that may be reasonably inferred from the text of the governing statutory provisions"—is "akin to the announcement of a new rule of law," especially when it address earlier "erroneous interpretations" made by other courts. *Pohutski*, 465 Mich at 696-697, citing *Gusler v Fairview Tubular Prod*, 412 Mich 270, 298; 315 NW2d 388 (1981) ("In the interest of fairness we do not believe our holding should affect any disability compensation payments already made.").

Once the threshold consideration is met, *Pohutski* sets forth a three-part test, originally adopted from *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965), for determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Pohutski*, 465 Mich at 696, citing *People*

v Hampton, 384 Mich 669, 674; 187 NW2d 404 (1971). This Court has repeatedly applied this test[3] in the decades before and after *Pohutski*.[4] It has never been overruled.

III. The Court of Appeals usurped this Court's constitutional authority when it purported to *de facto* overrule dozens of this Court's decisions in the *Pohutski* line of cases.

The Court of Appeals' published opinion below holds that this Court "effectively repudiated *Pohutski*" in *Spectrum Health* and "essentially adopted the rationale of" *Harper*. Slip op at 13 n 14, 17. *Spectrum Health* accomplished this substantial shift in Michigan law, according to the Court of Appeals, without so much as mentioning *Harper* or *Pohutski*. See *Spectrum*, 492 Mich at 535-536. Moreover, although unaddressed by the Court of Appeals, this newly-discovered repudiation would also necessarily repudiate the dozens of decisions by this Court that acknowledged the concept of prospective application and that predate and postdate *Spectrum Health*. See n 4, *infra*.

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[3] Allegiance refers to this as the "*Pohutski* test" throughout this application. While any given case may cite a different case for the same test, e.g. *Linkletter*, *MEEMIC*, *Hampton*, the substance is the same.

[4] See *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014) ("*Miller* is not entitled to retroactive application under Michigan's test for retroactivity."); *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 462-463; 795 NW2d 797 (2010); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 205-206; 747 NW2d 811 (2008); *Trentadue v Gorton*, 479 Mich 378, 400-401; 738 NW2d 664 (2007); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 220; 731 NW2d 41 (2007); *Co of Wayne v Hathcock*, 471 Mich 445, 483-484; 684 NW2d 765 (2004); *Lesner v Liquid Disposal*, 466 Mich 95, 108-109; 643 NW2d 553 (2002) (giving decision "only limited retroactive effect" because of a six-and-a-half year old opinion that incorrectly interpreted a statute); ***Pohutski, supra* (2002)**; *MEEMIC v Morris*, 460 Mich 180, 190; 596 NW2d 142 (1999); *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998) (giving "limited retroactive effect" to a Court of Appeals decision); *Lindsey v Harper Hosp*, 455 Mich 56, 80; 564 NW2d 861 (1997) ("A rule of law is 'new' . . . either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision.") (citation omitted), superseded by statute; *Riley*, *supra* (1988); *Pike v Wyoming*, 431 Mich 589, 603-604; 433 NW2d 768 (1988) (holding that it would apply prospectively, not even reaching the plaintiff in the case); *People v Finley*, 431 Mich 506, 523-524; 431 NW2d 19 (1988); *People v Nixon*, 421 Mich 79, 85; 364 NW2d 593 (1984); *People v Woods*, 416 Mich 581, 618; 331 NW2d 707 (1982); *People v Young*, 410 Mich 363, 366-367; 301 NW2d 803 (1981); *People v Gay*, 407 Mich 681, 705; 289 NW2d 651 (1980); *People v Kamin*, 405 Mich 482; 275 NW2d 777 (1979); *People v Markham*, 397 Mich 530, 535; 245 NW2d 41 (1976); *People v Rich*, 397 Mich 399, 402-403; 245 NW2d 24 (1976); *People v Auer*, 393 Mich 667, 676-77; 227 NW2d 528 (1975); *Hampton*, *supra* (1971); accord *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586-587; 702 NW2d 539 (2005); *Tebo v Havlik*, 418 Mich 350, 360-361; 343 NW2d 181 (1984) (noting that "this Court has adopted a flexible approach" to retroactive application of judicial decisions) (opinion by BRICKLEY, J.); *Placek v Sterling Hts*, 405 Mich 638, 664; 275 NW2d 511 (1979).

A. The Court of Appeals strains to find a justification for its decision to ignore binding authority from this Court and replace it with federal authority.

The Court of Appeals ignores *Pohutski*, citing a single passage from *Spectrum Health* that does not even mention, let alone "undertak[e] any analysis of the *Pohutski* 'threshold question' or 'three factor test.'" Slip op at 11. In *Spectrum Health*, this Court considered two no-fault cases involving MCL 500.3113(a), which bars a person from receiving PIP benefits for injuries suffered while using a vehicle "taken unlawfully." In relevant part, *Spectrum Health* disavowed the "family joyriding exception" to MCL 500.3113(a) and overruled several Court of Appeals decisions applying it. *492* Mich at *510.*

That exception was created by a plurality of this Court in *Priesman* that opined, "the Legislature did not intend that a relative's 'joyride' be considered an unlawful taking . . . because, given that most legislators are parents and grandparents, they may have experienced children who used a family vehicle without permission and may have done do themselves." *Spectrum Health*, 492 Mich at 510-511. Thus, the *Priesman* plurality concluded that "the Legislature did not truly intend to exclude teenager who joyride in their relatives' automobiles." *Id.* at 511.

In the section of *Spectrum Health* addressing "stare decisis and retroactivity," this Court explained:

> *Priesman* was not a majority opinion of the Court. As a result, the principles of stare decisis do not apply to *Priesman*:
>
> > "The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties."
>
> Thus, Justice Levin's plurality opinion *Priesman* only bound the parties before it and does not bind this Court's decision. Likewise,

> *Butterworth*, *Mester*, *Allen*, and *Roberts* are Court of Appeals decisions, and, as such, are not binding precedent in this Court.
>
> "'The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.'" [*Gentzler*, 320 Mich at 398.] This principle does have an exception: When a
>
> > "statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision."
>
> . . . [O]ur decision today does not at all affect the parties' contractual rights, and it is retrospective in its operation. [*Id.* at 535-537 (footnotes omitted).]

After noting that it finds "little basis on which to reconcile the various pronouncements of the Courts over time," slip op at 13, the Court of Appeals claims to be "guided by . . . the evolution of caselaw" in the United States Supreme Court and this Court. *Id.* Based on the fact that "the principles adopted and applied by the Michigan Supreme Court with respect to retroactivity/prospectivity had their genesis in the jurisprudence of the United States Supreme Court"—meaning, *Pohutski* cites *Linkletter* and the plurality opinion in *Chevron*—the Court of Appeals holds that *Spectrum Health* has implicitly overruled *Pohutski*. Slip op at 13 n 14; 16-17.

Without explaining the leap, the Court of Appeals then proceeds to incorporate *Harper* as Michigan's new common law on the issue of retroactivity. *Harper* provides:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events

> predate or postdate our announcement of the rule. [*Harper*, 509 US at 97.[5]]

But the Court of Appeals goes further still. It restates its new rule of retroactivity as "judicial decisions of statutory interpretation must apply retroactively because retroactivity is the vehicle by which 'the law' remains 'the law.'" Slip op at 16. That rule is not based upon *Harper*, but a concurrence thereto. See slip op at 14-15. Indeed, the Court of Appeals selectively quotes the *Harper* majority's holding when it concludes that *Spectrum Health* adopted *Harper*'s rule that decisions of statutory interpretation apply retroactively "to all cases still open on direct review and as to all events, regardless of" the timing of the decision. Slip op at 16-17, citing *Harper*, 509 US at 97. When the statement from *Harper* is read in full, *supra*, *infra/supra*, its first clause indicates that judicial decisions may be given prospective application in cases where the decision under consideration was not applied by the court "to the parties before it." *Harper*, 509 US at 97; see also *Crowe v Bolduc*, 365 F3d 86, 93-94 (CA 1, 2004) ("[A] court has only two available options: pure prospectivity or full retroactivity.") (citations omitted).

Accordingly, based on *Spectrum Health*, the Court of Appeals concludes that this Court's opinion *Pohutski* is no longer good law and is now the law of Michigan even though the Court of Appeals concedes that "no Michigan appellate court has actually considered whether the *Harper* rule should be adopted in Michigan."[6] Slip op at 11.

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[5] It bears noting that this holding is dicta from an opinion that occasioned two concurrences (authored by Justices Scalia and Kennedy) and a dissent (authored by Justice O'Connor and joined by Justice Rehnquist). See *Harper*, 509 US at 110 (KENNEDY, J., concurring) ("I cannot agree with the Court's broad dicta, *ante*, at 95-97[.]").

[6] Michigan appellate courts have only cited *Harper* 11 times. Of those, four were unpublished Court of Appeals decisions, and only one was a decision of this Court. See *Comerica Bank-Detroit v Dept of Treasury*, 444 Mich 858; 508 NW2d 499 (1993) (order denying an application for leave to appeal in a tax case in light of *Harper*). Among the published Court of Appeals decisions is *McNeel*, 289 Mich App 76; 795 NW2d 205 (2010). The Court of Appeals below leans heavily on *McNeel*. That case, however, cites *Harper* merely to explain the definition of retroactive application. *Id.* at 94. And in doing so, *McNeel* also acknowledges the continuing viability of the *Pohutski* test. *Id.* at 94-96.

B. The Court of Appeals acts in contravention of the Michigan Constitution and effectively overrules this Court.

The Court of Appeals' conclusion does not follow from its premises. Even if it were logically sound, however, "allowing a case to slip down the memory hole is a poor substitute for deliberately examining and deciding a principle of law." *In re Simpson*, ___ Mich ___, ___ n 62; ___ NW2d ____ (2017) (internal brackets and quotation marks omitted), citing *People v Ream*, 481 Mich 223, 232 n 7; 750 NW2d 536 (2008); *People v Jamieson*, 430 Mich 61, 79; 461 NW2d 884 (1990).[7] Under the doctrine of stare decisis, principles of law "deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed." *Jamieson*, 430 Mich at 79. Thus, even an inconsistent ruling is not sufficient to overrule an express holding of this Court. *Simpson*, *supra*.

More importantly, the Court of Appeals' decision to ignore the *Pohutski* line of cases constitutes, as this Court has characterized it, a "usurpation of this Court's role under our Constitution." *Associated Builders*, 499 Mich at 192. "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds by *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007). "While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it." *Associated Builders*, 499 Mich at 192 n 33, citing *Boyd*, 443 Mich at 523. The Court of Appeals is not permitted to read the judicial tealeaves and predict whether this Court

[7] This Court decided *Simpson* on July 25, 2017. It is not yet available in an official reporter but is available at 2017 WL 3160318.

will overrule its earlier cases. But that is exactly what the Court of Appeals did here. Slip op at 16-17.

C. This Court affirmed the concept of prospective application of judicial decisions after *Spectrum Health*.

Worse still, the Court of Appeals reads the wrong tealeaves. *Spectrum Health*'s cursory retroactivity analysis was not this Court's last word on the subject. This Court's decision in *Carp* provides a more recent and much more thorough analysis of the issue. As set forth above, *Spectrum Health* spent only a couple hundred words on the issue of retroactivity *and* stare decisis; *Carp* spent 46 pages on retroactivity, devoting 15 pages to Michigan's law and its foundations.[8] 496 Mich at 469-515. Moreover, this Court decided *Carp* two years after *Spectrum Health*.

Carp consolidated several cases involving individuals serving non-parolable life sentences for murders they committed as juveniles. See 496 Mich at 457-458. This Court then considered whether *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012)—which held such sentences unconstitutional—should be applied retroactively "pursuant to either the federal or state test for retroactivity." *Carp*, 496 Mich at 451.

Contrary to the Court of Appeals' interpretation below, Justice Markman, writing for the majority in *Carp*,[9] noted that "although our state test is derived from *Linkletter*, nothing requires this Court to adopt each and every articulation of that test . . . . Our state test for retroactivity is . . . . separate and independent of the former federal test . . . ." *Id.* at 500; see also *Pohutski*, 465 Mich at 696 ("[T]he federal constitution does not preclude state courts from

[8] *Carp*'s application of retroactivity principles under federal standards was overruled by *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). Its analysis of retroactivity principles under Michigan standards remains good law.

[9] Justices Markman, Zahra, and Viviano joined Chief Justice Young to form the majority in *Carp*.

determining whether their own law-changing decisions are applied prospectively or retroactively.").

In rejecting the defendant's claim that an unconstitutional statute is void *ab initio*—a position conceptually identical to the Court of Appeals' statement that caselaw erroneously interpreting a statute was "never the law"—*Carp* favorably cited *People v Smith*, 405 Mich 418, 432-433; 275 NW2d 466 (1979), for the proposition that a new rule

> does not always nullify past application of the old rule when the old rule was understood to have to conformed with the Constitution at the time it was applied: "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequence which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." [*Id.* at 496 n 25.]

So too with the binding decisions of our courts, including those of the Court of Appeals holding prior to *Covenant* that the no fault act authorizes medical provider lawsuits. See discussion at pages 21-24, *infra*.

Carp then applied the *Pohutski* test and concluded, "*Miller* is not entitled to retroactive application." *Id.* at 497, citing *Maxson*, 482 Mich at 393; *Carp*, 496 Mich at 511-512. Although *Carp* addresses an issue of criminal procedure, it evidences that Michigan still recognizes exceptions to the retroactivity of judicial decisions and that the *Pohutski* test survived *Spectrum Health*.

IV. *Stare decisis* supports retaining the *Pohutski* line of cases.

Stare decisis indicates that *Pohutski* should not be overruled. In an unacknowledged irony, the Court of Appeals' attempt to overrule *Pohutski* ignores the very *stare decisis* considerations that *Pohutski* addressed. Although *Pohutski* overruled *Hadfield* and *Li*, it did so only after considering *stare decisis*. The Court of Appeals did no such thing when concluding that it could ignore *Pohutski*.

This Court does "not lightly overrule precedent." *Pohutski*, 465 Mich at 694. "Stare decisis is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (internal quotation marks omitted), citing *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000). When considering whether to overrule one of its prior decisions, this "Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change." *Id.* at 695, citing *Placek*, 405 Mich at 665.

In *Robinson*, this Court set forth the factors it considers before overruling a prior decision:

1. Whether the earlier case was wrongly decided;
2. Whether the decision defies "practical workability";
3. Whether reliance interests would work undue hardship; and
4. Whether changes in the law or facts no longer justify the questioned decision [*Robinson*, 462 Mich at 464.]

None of these factors favors overruling *Pohutski*.

A. *Pohutski* was correctly decided.

For purposes of considering the prospective application of judicial decisions, *Pohutski* was not a watershed case. It simply stands as the clearest synthesis and articulation of the common law that this Court has applied for decades. It is neither the first nor the last case from this Court to conclude that the general rule of retroactive application has exceptions. As noted above, *Carp* applied the same general principles in 2014, and *Hampton* applied them in 1971. Before it was the *Pohutski* test, it was the *MEEMIC* test and the *Lindsey* test. After, it was

the *McDonald* test and the *Bezeau* test. This Court's continued reliance on the test illustrates that *Pohutksi* was correctly decided.

For example, just about a month after *Pohutski* was issued, this Court decided *Lesner*, holding that "the formula for calculating worker's compensation benefits for surviving partial dependents in *Weems* [*v Chrysler Corp*, 448 Mich 679; 533 NW2d 287 (1995)] is inconsistent with the governing statute, MCL 418.321. Accordingly, [this Court] overrule[d] that portion of the *Weems* opinion." *Lesner*, 466 Mich at 97. In an opinion authored by Justice Young,[10] this Court held, however, that "the portion of this opinion that overrules *Weems* is to have limited retroactive effect." Applying the *Pohutski* test, *Lesner* noted that "recognition of the effect of changing settled law has led this Court to consider limited retroactivity when overruling prior caselaw." *Id.* at 108-109. Because "*Weems* ha[d] been controlling authority for over six and one-half years," this Court found reliance and determined that retroactive application would have "a detrimental effect on the administration of justice." *Id.* at 109.

In the civil context, this Court again acknowledged the *Pohutski* test in 2004 and again in 2007. *Hathcock*, 471 Mich at 483-484; *Rowland*, 477 Mich at 220. In light of these recent decisions and others, such as *Carp*, there is no reason to believe that *Pohutski* was wrongly decided. For the myriad reasons addressed in the dozens of decisions issued by this Court over the past half-century, *Pohutski* is correct.

That is even clearer because the Court of Appeals' conclusion to the contrary is based on its belief that "the rationale of the United State Supreme Court in *Harper*" should replace *Pohutski*. *Harper* was decided in 1993. If this Court wanted to adopt *Harper* and wipe out the entire concept of prospective application at Michigan's common law, it could have done so in *Lindsey*, *Neal*, *MEEMIC*, *Pohutski*, *Lesner*, *Hathcock*, *Rowland*, *Trentadue*, *McDonald*,

[10] Justices Young, Taylor, and Markman joined Chief Justice Corrigan to form the majority in *Lesner*.

Bezeau, or *Carp*. It did not. That strongly suggests that this Court does not believe *Harper* should govern in Michigan; prospective application should not be abolished.

B. *Pohutski* does not defy practical workability.

The *Pohutski* test has operated in Michigan for 46 years. See *Hampton*, 384 Mich at 674. In light of that fact and the multitude of cases from this Court and the Court of Appeals that have relied on and applied the *Pohutski* test without issue, *Pohutski* does not defy practical workability. For that matter, the *Pohutski* analysis is straightforward and uncomplicated to apply. See discussion at pages 23-26, *infra*.

C. Overruling *Pohutski* would work undue hardship.

For many of the same reasons, the bench and bar of this state have come to rely on *Pohutski*, and overruling it would work an undue hardship. As *Pohutski*'s reference to its "flexible" standard makes clear, it provides stability to Michigan's jurisprudence. Under various circumstances the judiciary's ability to blunt the sharp blow of a sudden departure from longstanding judicial rulings is useful as a tool of law.

Moreover, contrary to the Court of Appeals' suggestion—by reference to retroactivity as a scheme concocted for purposes of legal realism as a technique for judicial lawmaking—the history of Michigan's application of the *Pohutski* test shows that it is anything but the tool of philosopher kings eager to expand the power of the judiciary. To the contrary, *Pohutski* and many of cases that have followed it—e.g., *Lesner*, *Carp*, *Trentadue*, *McDonald* etc.—were decided and supported by majorities comprised of the vanguard of judicial conservativism in Michigan.

D. There has been no change in the law that undermines *Pohutski*.

Pohutski was decided nearly a decade after *Harper*. If *Harper* is the basis for the "evolving caselaw" that the Court of Appeals purports to unpack, 2017 is a peculiar time to

unpack it. Moreover, in its dogged reliance on *Harper*, the Court of Appeals pays lip service to but fails to apply the federalist principle—identified in *Pohutski* and *Carp*—that this Court need not be governed by the United States Supreme Court on state common-law issues, where this Court—and this Court alone—is the Supreme Court.

V. *Covenant* should be limited to prospective application under the *Pohutski* test.

"[R]esolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley*, 431 Mich at 644. Applying the *Pohutski* test, *Covenant* should be limited to prospective application.

A. *Covenant* established a new principle of law.

The threshold question, "in deciding whether a judicial decision should receive full retroactive application is whether that decision is establishing a new principle of law, either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties." *MEEMIC*, 469 Mich at 190. "A rule of law is new for purposes of resolving the question of its retroactive application . . . either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision." *Id.* at 191, citing *Phillips*, 416 Mich at 68.

On this threshold issue, *Covenant* "overrule[d] all Court of Appeals caselaw inconsistent with [its] conclusion." 895 NW2d at 505. That caselaw included at least seven published Court of Appeals decisions issued over two decades, between 1995 and 2015. See page 6 n 1, *supra*. Thus, while the issue was not one of first impression, owing to the Court of Appeals' adumbration, *Covenant* certainly announced a new rule of law.

As Chief Justice Markman explained in his concurrence and dissent to this Court's order publishing for comment the proposed amendment to MCR 7.215:

> The judiciary of our state possesses one principal authority, the exercise of the "judicial power," Const 1963, art 6, § 1, the power to resolve "cases or controversies." *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010). This power can be exercised through a variety of traditional forms—published opinion, unpublished opinions, authored opinions, per curiam opinions, and memorandum opinions. Each of these must conform to the requirements of the law, and each carries the force of law. . . . [T]his signifies that each of these forms of opinion will constitute the bona fide law of this state and will contribute case by case to defining the body of law from which the precedents of this state must be identified. That is, while these distinct forms of caselaw may serve different practical purposes of judicial decision-making, each has in common that it constitutes the genuine corpus of this state's law, both being derived from traditional sources of law—the Constitution, statutes, ordinances, and the common law—and serves in turn as the basis of future law. [ADM File No. 2014-09 at 3 (MARKMAN J., concurring in part and dissenting in part), **Exhibit 3**.]

That only Court of Appeals decisions adopted and upheld the pre-*Covenant* rule is, therefore, of no moment. For the 20 years that they were controlling precedent, those cases were just as much the genuine corpus of Michigan's law as a decision of this Court. Under our constitutional structure, the Court of Appeals, and not just this Court, exercises the "judicial power" of this State, which includes the ability to pronounce what the law is, even if it is later determined, as in *Covenant* and *Pohutski*, that the Court erred in that pronouncement. Const 1963, art 6, § 1 ("The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction . . . one probate court, and courts of limited jurisdiction . . . ."); *id.* at § 10 ("The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court."); MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis."). Indeed, in *Carp* this Court cited a Court of Appeals decision for the proposition that the "old rule . . . received in 1996 the specific approval of its constitutionality by our judiciary" in demonstrating

good faith reliance on that "old rule" by prosecutors. 496 Mich at 505, citing *People v Launsburry*, 217 Mich App 358, 363-365; 551 NW2d 460 (1996).

Thus, the Court of Appeals' recitation of Blackstonian principles is misplaced. Whatever the philosophical position taken on this subject, the nearly-10-million people of this state were bound by the published cases *Covenant* overruled and could ignore them only at their own peril. The Court of Appeals' proclamation that those cases were never actually law is cold comfort to the thousands of parties whose cases closed before May 25, 2017, when this Court filed *Covenant*.

Just as much as the erroneous statutory or constitutional interpretations in *Carp*, *Lesner*, and *Pohutski*, the erroneous statutory interpretations in the caselaw leading to *Covenant* were the law of Michigan. *Covenant* announced a new principle of law.

B. The *Pohutski* factors favor the prospective application of *Covenant*.

1. The purpose of the new rule favors prospective application.

The purpose of the new rule is the primary consideration in determining whether prospective application is appropriate. See *Carp*, 496 Mich at 502. The purpose stated by *Covenant* is "to conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law." 895 NW2d at 496. As the Court of Appeals acknowledges, "*Pohutski* suggests that such a purpose might favor prospective application." Slip op at 18. In fact, *Pohutski* states that such a purpose does favor prospective application. As noted above, similar to *Covenant*, *Pohutski* overruled a case involving erroneous statutory interpretation. On the first factor, *Pohutski* explained that prospective application would further the purpose of correcting that error. 465 Mich at 697 ("First, we consider the purpose of the new rule set forth in this opinion: to correct an error in the interpretation of § 7 of the governmental tort liability act. Prospective application would further

this purpose."). The same is true for *Covenant*'s purpose. Thus, the first factor provides clear direction against *Covenant*'s retroactive application

The Court of Appeals, nevertheless, promotes its decision in *McNeel* above *Pohutski* and concludes that clarification "of the state of the law weighs in favor of retroactive application." Slip op at 18, citing *McNeel*, 289 Mich App at 96. Setting aside the fact that the Court of Appeals has again put itself in a position superior to this Court, *McNeel* in no way stands for that proposition. In fact, the primary consideration *McNeel* gave on this factor of the *Pohutski* test was that the purpose in question was to "clarify[y] an ambiguous state of the law." *McNeel*, 289 Mich App at 96. That is not what *Covenant* did. Thus, *McNeel* is distinguishable but, in any case, inferior to *Pohutski*.

2. The overwhelming extent of reliance and the effect of retroactivity on the administration of justice favor prospective application.

Factors two and three should be considered together. *Carp*, 496 Mich at 502. "[T]he second and third factors will generally tend to produce a unified result that either favors or disfavors retroactivity. This is because the subject of the second factor (general reliance on the old rule) will often have a profound effect on the subject of the third factor (administration of justice)[.]" *Id.* at 502-503 (quotation marks omitted), citing *People v Sexton*, 458 Mich 43, 63-64; 580 NW2d 404 (1998).

On this point, the Court of Appeals correctly notes that "there can be no doubt that plaintiff and others have relied on our prior caselaw over the course of many years" and that "insurers and healthcare providers have acted in reliance on the caselaw that *Covenant* overturned." Slip op at 18. That is correct. Thousands of cases were decided in the pre-*Covenant* landscape. Insurers and healthcare providers alike molded their practices and procedures around that caselaw.

On this subject, a passage from *Carp* applies to *Covenant* as much as it did to *Miller*:

> Applying these considerations in evaluating the second and third factors to [*Covenant*], it is apparent that these factors do not sufficiently favor the retroactive application of [*Covenant*] so as to overcome the first factor's clear direction against its retroactive application. The old rule permitting [healthcare providers to bring suit against insurers] on the basis of the pre-[*Covenant*] scheme . . . received in 199[5] the specific approval of its [application] by our judiciary. [*LaMothe*, *supra*, *et al*.] Further, nothing in [Michigan] Supreme Court caselaw called into any question [provider suits] until [*Covenant*] was decided in 201[7] . . . . Accordingly, at the time [healthcare providers] across Michigan [sued insurers] who would [be unreachable by providers directly] if [*Covenant*] were applied retroactively, the [no-fault act] was affirmatively understood as permitting the [commencement of direct actions by providers against insurers.]
>
> On the basis of this state of the law, [injured people. healthcare providers, and insurers] across Michigan entirely in good faith relied on the old rule whenever [providers brought suit directly against insurers.] Considering the . . . approval the old rule received from . . . our judiciary. . . as well as the length of time during which the old rule prevailed—dating back to [1995]—the reliance on the old rule by Michigan [injured people, healthcare providers, and insurers] was significant and justified. [See *Carp*, 496 Mich at 505-506.]

For the same reasons that the second and third factors did "not sufficiently favor retroactive application so as to overcome the first factor" in *Carp*, they do not do so here. Indeed, here reliance and the administration of justice are even more strongly in favor of prospective application because injured people, healthcare providers, and insurers relied on pre-*Covenant* caselaw in their frequent interactions.

And because *Covenant* was the first case to hold that the no-fault act did not provide a direct cause of action to healthcare providers since the inception of the no-fault act in 1973, physicians who provided care, adjusters who processed claims, and attorneys who litigated their disputes worked entire careers under that system. To claim, as the Court of Appeals does,

that reliance on the pre-*Covenant* state of the law was unreasonable, see slip op at 18-19 is, itself, an unreasonable claim. Accord *Lesner*, 466 Mich at 109 (finding "widespread reliance" because *Weems* "has been controlling authority for over six and one-half years").

The *Pohutski* test—which is still the law of this state through various decisions of this Court—indicates that *Covenant* should be applied prospectively.

RELIEF SOUGHT

Allegiance requests that this Court grant Allegiance's application for leave to appeal; reverse the Court of Appeals' published opinion below; apply *Pohutski* to this Court's recent decision in *Covenant*; hold that *Covenant* has prospective application, such that it does not apply to this case; and remand this case to the Court of Appeals for further consideration of the underlying issues.

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