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. 156622

Court of Appeals Case No. 333360

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

Hon. Donald A. Johnston

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PLAINTIFF/APPELLANT ALLEGIANCE HEALTH'S REPLY IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

This is the rare case where all participants agree that this Court's review is warranted. Highlighting the "significance of the issue" and "invit[ing] the Court to directly examine" the standards applicable to retroactivity analysis in Michigan, Defendants' answer to the application reads at times like a brief in support. Def. Answer at, e.g. ix; accord *id.* at 28-30. And as noted in Allegiance's application, the Court of Appeals explicitly invited this Court to review its decision. Slip op. at 16-17. Allegiance concurs. This case presents an issue of major significance to Michigan's jurisprudence.

If left unaddressed, the Court of Appeals' opinion will sow confusion in the Michigan bench and bar. Defendants' own confusion over the Court of Appeals' holdings broadcasts the uncertainty that will result in the absence of this Court's consideration. Defendants incorrectly argue that the Court of Appeals did not overrule the *Pohutski* test or replace it with the federal standard articulated in *Harper*. *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002); *Harper v Va Dep't of Taxation*, 509 US 86; 113 S Ct 2510; 125 L Ed 2d 74 (1993). However, the Court of Appeals did both, effectively overruling dozens of this Court's decisions and abolishing the doctrine of prospective application in Michigan. If Defendants themselves are confused about that ruling and its effect on Michigan's jurisprudence, it is almost certain that confusion will also affect the bench and bar more broadly.

For nearly 50 years, this Court approved of and applied the *Pohutski* test on retroactivity. With one swift stroke, the Court of Appeals struck it from Michigan law. This Court should grant Allegiance's application and restore Michigan's longstanding retroactivity jurisprudence.

ARGUMENT

I. THE COURT OF APPEALS OVERRULED THE *POHUTSKI* TEST AND ALONG WITH IT NUMEROUS OPINIONS OF THIS COURT.

Defendants contend that, rather than *de facto* overruling—or at a minimum repudiating—the *Pohutski* test, "[a]lmost all of the Court's lengthy opinion is fairly characterized as an analysis of the all-important *Pohutski* threshold." Def. Answer at 16.

> The panel's questioning of *Pohutski* was limited to a very narrow proposition contained therein: namely that, in some circumstances, the correction of a misconstruction of a statute could constitute, or at least be akin to, "a new rule of law." It is solely this proposition that the Court of Appeals correctly concluded was effectively repudiated by *Spectrum Health* [*Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012). The panel said nothing to *Pohutski* as a whole, or to the framework that it created in particular. [*Id.* at 18.]

That is incorrect. The Court of Appeals held that *Spectrum Health* tacitly repudiated the *Pohutski* test in its entirety. The Court of Appeals could not have been clearer on that point:

> [W]e conclude that we need not address the "threshold question" and the "three-factor test" that have often been cited in the Michigan caselaw. The Court's holding in *Spectrum Health*, which the Court notably reached without so much as a mention of *Pohutski*, *effectively repudiated the application of the "threshold question" and the "three-factor test," at least in the context of judicial decisions of statutory interpretation.* [Slip op at 17 (emphasis added).]

Thus, although the Court of Appeals addressed the threshold question of whether *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), announced a new rule of law, it did so only in the context of repudiating the *Pohutski* test as set forth above. See slip op at 13-17. Standing behind *Spectrum Health*, the Court of Appeals implicitly threw out dozens of this Court's decisions that had implemented the *Pohutski* test, including *People v*

Carp, 496 Mich 440; 852 NW2d 801 (2014), which was decided two years after *Spectrum Health*.

Because Defendants misunderstand the Court of Appeals' holding, they mistakenly understate the significance of its published opinion on Michigan's jurisprudence.

II. THE COURT OF APPEALS ADOPTED THE FEDERAL STANDARD OF *HARPER* INTO MICHIGAN LAW.

Defendants similarly misread the Court of Appeals' opinion in concluding, "the Court expressly and flatly refused to adopt the *Harper* rule, deferring to this Court's prerogative." Def. Answer at 19. While it is true that the Court of Appeals claimed that it lacked the authority to "extend *Harper* ourselves," slip op at 11, it did so anyhow on grounds similar to those on which it overruled the *Pohutski* test.

To wit, the Court of Appeals held:

> 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 retroactive applicability of its judicial decisions of statutory interpretation. . . Having so concluded, we invite or Supreme Court to state *expressly* whether or to what extent it adopts the *Harper* rationale into Michigan state court jurisprudence. [*Id.* at 16-17 (emphasis added, footnote omitted).]

Thus, after the Court of Appeals decision, the *Pohutski* test is no longer law in Michigan, while *Harper* is. The semantic distinction between whether the Court of Appeals adopted the *Harper* rule and whether the Court of Appeals interpreted *Spectrum Health* as having tacitly adopted the *Harper* rule is of no moment. The effect of the opinion is the same. It drastically changes Michigan's law on retroactivity.

As explained in Allegiance's application, the Court of Appeals lacked the authority to repudiate *Pohutski* or incorporate *Harper*, notwithstanding its interpretation of *Spectrum Health*'s silence as supporting those major changes to Michigan law. See *Associated*

Builders & Contractors v City of Lansing, 499 Mich 177, 191-92; 880 NW2d 765 (2016). Even were that not the case, overruling decades worth of caselaw requires the consideration of *stare decisis*, which neither the Court of Appeals below nor *Spectrum Health* addressed vis-à-vis the *Pohutski* test. See *People v Jamieson*, 430 Mich 61, 79; 461 NW2d 884 (1990).

III. DEFENDANTS' RHETORICAL DISTINCTION BETWEEN NEW LAW AND NEW INTERPRETATIONS OF LAW FURTHER DEMONSTRATES THE NEED FOR THIS COURT'S GUIDANCE.

A. Defendants misread Allegiance's application.

Defendants are incorrect when they contend that Allegiance did not address whether *Covenant* constitutes new law for purposes of retroactivity. Def. Answer at 9. In fact, just sentences later they concede—albeit in a footnote—that Allegiance did address that argument. Even if Defendants' argument were not self-contradictory, Allegiance spends pages 21-23 of its application supporting its argument that "*Covenant* established a new principle of law." Accordingly, Defendants' contention that Allegiance simply "presumes th[is] premise" is mistaken. Def. Answer at 9.

Defendants also misstate this Court's holdings where they argue, "at least in recent years, this Court has consistently" held that reinterpretation of statutory text does not establish a "new principle of law"—as that concept is applied in the *Pohutski* test. Def. Answer at 20. In support, Defendants cite *Spectrum Health*; *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000); and *Gentzler v Smith*, 320 Mich 394; 31 NW2d 668 (1948). But Defendants' reliance on those cases is misplaced. Allegiance's application thoroughly addressed *Spectrum Health,* and so that analysis will not be reproduced here. This Court's decision in *Gentzler* nearly 70 years ago hardly supports what this Court has done in "recent years." And, in any event, *Gentzler* does not undertake a retroactivity analysis but instead deals with the impairment of contracts and vested rights. 320 Mich at 399-400. Finally, *Robinson* does not

address retroactivity or the *Pohutski* test, and it is otherwise entirely silent on the point for which Defendants cite it; namely, that a "prior misconstruction" of a statute was allegedly never law.

Defendants then argue that "[i]n support of the contrary position [that reinterpretation of a statute constitutes new law], plaintiff essentially relies on one single case," *Carp*. Def. Answer at 20. That is also incorrect. Because it involved the reinterpretation of a statute, *Pohutski*, itself, supports that position: "We turn to the threshold question . . . . Although this opinion gives effect to the intent of the Legislature that may be reasonably inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law . . . ." 465 Mich at 696. So too do a number of other cases cited in Allegiance's application.

For instance, in *Bezeau v Palace Sports & Entertainment*, 487 Mich 455, 463; 795 NW2d 797 (2010), this Court explained:

> In determining whether *Karaczewski* was incorrectly given retroactive effect, we must first answer the threshold question whether *Karaczewski* clearly established a new principle of law. The decision in *Karaczewski* to overrule *Boyd* established a new interpretation of MCL 418.845 that broke from the longstanding interpretation of the statute. *Although the Court interpreted the statute consistently with its plain language, the Court's interpretation established a new rule of law because it affected how the statute would be applied* to parties in workers' compensation cases in a way that was inconsistent with how the statute had been previously applied. [Emphasis added.]

See also, e.g., *Lesner v Liquid Disposal*, 466 Mich 95, 108; 643 NW2d 553 (2002) (referring to reinterpretation of statutory language as "changing settled law"); *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632, 646; 433 NW2d 787 (1988) (referring to a reinterpretation of statutory language as a "new rule"); accord *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982) ("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."). See Application at, e.g., 11 n 3.

B. Defendants' position is inconsistent with *Carp*.

Ignoring these other cases, Defendants attempt to distinguish *Carp*, arguing that it was a criminal case that considered collateral review in the context of a general rule of nonretroactivity. Def. Answer at 20-21. None of those distinctions, however, are material to the relevant passage from *Carp*, which provides that "this Court does not adhere to the doctrine that an unconstitutional statute is void *ab initio*" and explaining that "a new constitutional rule does not always nullify past application of the old rule when the old rule was understood to have conformed with the Constitution at the time it was applied . . . ." *Carp*, 496 Mich at 496 n 25. Under *Carp*, when a court reinterprets the Constitution that change is treated as new law under the *Pohutski* test.

While Defendants concede that this analysis "does, at least on some level, consider whether the legal rule at issue is 'new law,'" they attempt to evade its conclusion by arguing that the "principle does not necessarily transfer to the question here." Def. Answer at 21-22. That unsupported argument lacks merit. Defendants create a distinction without a difference. If a reinterpretation of the Constitution does not demand the Blackstonian rigidity for which Defendants advocate, there is no principled basis to treat the reinterpretation of a statute differently.

Carp lays bare the fact that Defendants and the Court of Appeals rely not on legal substance, but a rhetorical device. As the Court of Appeals itself conceded:

> We fully appreciate the conundrum faced by litigants who follow and endeavor to conform their behavior to what they legitimately understand to be the guidance and directives of our courts, only to be confronted with a subsequent judicial change of direction that seemingly pulls the rug from under them. [Slip op at 16 n 16.]

There is nothing "seeming" about it, and the practical reality is more severe than the Court of Appeals lets on. Litigants are not permitted to view the decisions of our courts as mere "guidance and directives." Just as the Court of Appeals was not free to ignore the decisions of this Court and predict that its authority would yield, litigants are not free to ignore the decisions of the Court of Appeals and predict that its authority will yield. As a matter of reality, when the Courts of Appeals issues published opinions, they are binding law in Michigan until they are overruled or disavowed.

C. The *Pohutski* test has proven to be workable in administering justice fairly in Michigan.

The concept that courts say what the law is instead of what it should be and Blackstone's proclamation that bad law is not and never was law have a place in theory. But the practical problems they present cannot be easily dismissed. For instance, before *Covenant* was decided, if an attorney had advised her client that the no-fault act did not permit a direct cause of action between a healthcare provider and an insurer, the client would have lost her case, and the lawyer would have been liable for malpractice. That practical reality is the reason behind the flexibility built into the *Pohutski* test and why this Court stated that "*practically speaking* our holding is *akin to* the announcement of a new rule of law . . . ." *Pohutski*, 465 Mich at 696 (emphasis added).

The *Pohutski* test is the means by which Michigan courts have historically addressed problems presented by changes in the law—be they theoretical, Blackstonian "changes" or practical ones. When this Court overrules decades of caselaw, it is changing the rights and duties of Michiganders. Citizens cannot simply ignore published Court of Appeals opinions or decisions of this Court, regardless of their adherence to the statutory or constitutional text. Those that do, do so at their peril, as decisions of this Court and the Court of Appeals carry

the force of law. As this Court noted in *Robinson*, a decision that Defendants emphasize, the "essence of the rule of law" in a free society is "to know in advance what the rules of society are." 462 Mich at 467. Until the Court of Appeals' decision in this case, the *Pohutski* test was the release valve for parties at risk of harm when those rule changes, as the Court of Appeals put it, threatened to "pull[] the rug from under them." Slip op at 16 n 16.

That practical reality is partially acknowledged by Defendants' argument, which stops short of fully honoring the Blackstonian concept that they claim to hold dear. Even under the strictest analysis, Defendants concede that reinterpretation of a statute should only reach "cases still open on direct review." Def. Answer at 30. Yet, if it is true that the reinterpretation of a statute renders previous interpretations void *ab initio*, there is no principled, theoretical reason why closed cases should not be reopened and adjudicated under the law as it had always been. Practicality is the only reason for drawing such a line.

Stated differently, the question is simply where that line should be drawn. The *Pohutski* test has satisfactorily answered that question for nearly 50 years.

CONCLUSION

Allegiance requests that this Court grant its 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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Dated: December 6, 2017

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