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 SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

Nearly fifty years ago, this Court adopted the *Pohutski* framework for analyzing the retroactivity of a judicial decision. It has applied that framework in every case but one: *Spectrum Health*. But *Spectrum Health*'s failure to apply *Pohutski* appears to be inadvertent or mistaken; it did not even cite *Pohutski*. It certainly did not, as the Court of Appeals held, implicitly rewrite the half-a-century of this Court's retroactivity jurisprudence that *Pohutski* represents. The several decisions since *Spectrum Health* have reaffirmed Michigan's reliance on the *Pohutski* framework, not the competing federal standard. Before and after *Spectrum Health*, this Court has relied on and applied *Pohutski*'s practical standard to provide for the maximum of justice under varied circumstances.

In their supplemental brief, Defendants abandon their defense of the Court of Appeals' conclusion that *Spectrum Health* repudiated *Pohutski*. They instead construe *Spectrum Health* as actually having applied the *Pohutski* framework. That position does not withstand scrutiny. *Spectrum Health* mentions neither *Pohutski*'s framework nor a single case that relied on it.

When they finally confront *Pohutski*, Defendants' sole argument is that *Covenant* did not make "new law" under its framework. To meet this, Defendants pontificate on the philosophical meaning of the "true law." But that is not *Pohutski*'s threshold question. The question is: did the decision "establish[] a new principle of law"? 465 Mich at 696. This, in turn, asks if the decision "overruled settled precedent or decide[d] an issue of first impression whose outcome was not clearly foreshadowed." E.g., *MEEMIC*, 460 Mich at 190. *Covenant* crosses this threshold.

From there, Defendants are virtually silent on *Pohutski*. They do not address the remaining three factors of the framework. They entirely ignore the significance of stare decisis, an issue that cannot be overlooked given the holding below. In short, Defendants tacitly concede that if they are wrong under *Pohutski*, and *Covenant* did "establish a new principle of law," then the opinion below is incorrect and *Covenant* applies prospectively, given the watershed decision that it was.

In a final effort to escape *Pohutski*, Defendants alternatively argue that this Court should break with the past and adopt the current federal standard for retroactivity set forth in *Harper v Virginia Dep't of Taxation*, 509 US 86 (1993). This Court has repeatedly rejected that invitation and should do so again here. As this Court explained less than two months ago, Michigan's retroactivity jurisprudence has departed from the federal standard, in favor of the *Pohutski* test.

For the reasons set forth in this and its prior briefing, Allegiance requests that this Court reverse the Court of Appeals, apply *Pohutski*, and hold that *Covenant* applies prospectively only.

ARGUMENT

I. *Covenant* announced a new principle of law; under the *Pohutski* framework, it should be given prospective application.

A. Defendants ignore the decades of caselaw that recognized a provider's right to sue insurance companies directly.

Under *Pohutski*, the threshold question is whether the decision "established a new principle of law." 465 Mich at 696. Defendants state in their response:

> The majority opinion in *Covenant*, signed by six members of the Court, while recognizing the ongoing practice of healthcare provider litigation, says nothing to suggest that its decision is based on a change in the understanding of the law. [Def. Supp. Br. at 33.]

That is wrong. In *Covenant*, this Court stated:

> [W]e are presented with decades of Court of Appeals caselaw concluding that a healthcare provider may assert a direct cause of action against a no-fault insurer to recover no-fault benefits. Although this Court is not in any way bound by the opinions of the Court of Appeals, we nevertheless tread cautiously in considering whether to reject a long line of caselaw developed by our intermediate appellate court. [500 Mich at 200-201.]

If this Court's decision to overrule "decades" of binding caselaw developed by the Court of Appeals is not "a change in the understanding of the law," it beggars the imagination what would be. Equally, Defendants' statement that "there has never been any legal authority that would

have given th[e] impression" that "healthcare providers had a direct cause of action under the no-fault act," Def. Supp. Br. at 26, is directly contradicted by *Covenant* itself. It was the Court of Appeals' published "legal authority" that this Court "overrule[d]" in *Covenant*. 500 Mich at 218.

B. The *Pohutski* threshold does not ask if "new law" was created. It asks whether the decision overruled settled precedent or decided an issue of first impression whose resolution was not clearly foreshadowed.

Defendants devote much of their brief to arguing "what is the law and when is it created or brought into being." Def. Supp Br. at 26; see also *id.* at 26-34. They claim that *Covenant* did not make "new law" because it reinterpreted a statute, and statutes until amended are immutable and the only "true law." Defendants' position fails for several reasons.

First, Defendants' argument simply knocks down a straw man. The *Pohutski* threshold question does not ask whether "new law" was created in a positivist sense, i.e., was this Court's decision somehow a legislative act? *Pohutski*'s threshold question instead asks whether the decision "established a new principle of law." 465 Mich at 696. A decision establishes such a principle where "the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed." *MEEMIC*, 460 Mich at 190; accord *Lindsey*, 455 Mich at 58.[1] Or, as *Pohutski* put it, the decision was "akin to the announcement of a new rule of law." 465 Mich at 696. Defendants' formulation is both crabbed and unsupported. Indeed, if adopted, it would mean courts could never apply the *Pohutski* test to decisions involving statutory interpretation because, by definition, such decisions do not make new law. Def. Supp. Br. at 38. Under this Court's precedent, that is wrong. See e.g., *Lesner*, 466 Mich at 108-109; *Bezeau*, 487

[1] Defendants' statement that there is no "specific test or controlling rules for determining whether a decision constitutes a 'new rule of law'" is wrong. Def. Supp. Br. at 35. This Court has consistently articulated this formulation in defining what, exactly, the threshold asks. See also *Phillips*, 416 Mich at 67-68; *Sexton*, 458 Mich at 60 n 42.

Mich at 463; *Riley*, 431 Mich at 643-646. Indeed, *Pohutski*, itself, addressed the reinterpretation of a statute.

Defendants' argument also fails because, while the legislative power belongs to the Legislature, the judiciary's opinions nevertheless bind under the rules of stare decisis. Defendants' argument ignores Chief Justice Markman's analysis explaining that appellate opinions carry "the force of law," constituting the "bona fide law of this state." Pl. App., Ex. 3, ADM File No. 2014-09 at 3. Regardless of its universal soundness, a published opinion from the judiciary compels and constrains the public. That is what *Pohutski* means when it refers to a new "principle of law."

C. Under *Pohutski*, *Covenant* either overruled settled precedent or addressed an issue whose result was not clearly foreshadowed. Under either scenario, *Covenant* established a new principle of law.

Under *Pohutski*, either *Covenant* overruled settled precedent or it decided an issue of first impression that was not clearly foreshadowed, meaning it established a new principle of law. Defendants cannot have it both ways.

Covenant is explicit; it overruled settled caselaw developed over decades by the Court of Appeals. *Covenant*, 500 Mich at 218. On this basis alone, *Covenant* established a "new principle" of law. Defendants respond that because *this Court* never considered the issue, *Pohutski*'s threshold is not satisfied. Def. Supp. Br. at. 39-40. This argument fails twice. First, the fact that it was the Court of Appeals, rather than this Court, that was overruled in *Covenant* is immaterial. *Tebo*, 418 Mich at 360-361; see also *MEEMIC* discussion, *infra* at 5-6.

Second, even if that were correct, *Pohutski*'s threshold is also met where the opinion "decides an issue of first impression whose resolution was not clearly foreshadowed." *MEEMIC*, 460 Mich at 190; *Lindsey*, 455 Mich at 58. If, as Defendants maintain, the authority must emanate from this Court or be considered unsettled for purposes of *Pohutski*'s threshold, then *Covenant*

was a case of first impression under that framework. And under that formulation, its resolution was not clearly foreshadowed.

Defendants contend that this Court in *Covenant* "easily observed" its outcome, once it looked at the statute. Def. Supp. Br. at 20. The *Covenant* opinion tells a different story. In *Covenant*, this Court's analysis of the act required thirteen pages of its twenty-five page opinion, as it examined and synthesized MCL 500.3157, MCL 500.3158, MCL 500.3105, MCL 500.3107, and MCL 500.3112, along with some "textual clues" found in MCL 500.3114 and MCL 500.3115. This Court did not simply give effect to an obvious statute. *Covenant*, 500 Mich 204-218.

This Court's decision in *MEEMIC* provides an example of the Court retroactively applying a decision whose outcome, unlike *Covenant*, *was* "clearly foreshadowed" under *Pohutski*'s formulation. In that respect, it provides a useful foil.

In *MEEMIC*, this Court considered whether *Profit v Citizens Ins Co of Am*, 444 Mich 281 (1993), applied retroactively. MCL 500.3109(1) states in unambiguous language:

> Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury ….

Before *Profit*, this Court had twice held that social security benefits should be a setoff against no-fault benefits under this provision. *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524 (1979); *Thompson v DAIIE*, 418 Mich 610 (1984). The Court of Appeals in *Profit* still refused the setoff, "reluctantly" concluding it was bound by a different case "despite" the statute's plain language. On appeal, this Court reversed and applied the plain language of § 3019(1) as written.

Profit was silent on its retroactivity; this Court later considered it in *MEEMIC*. It held, for obvious reasons, that it was not "'unexpected' or 'indefensible' that this Court would reverse a Court of Appeals decision that was contrary to the clear and unambiguous language of the statute,

the legislative intent behind the statute, and two prior opinions of this Court." 460 Mich at 195. So, the decision in *Profit* was held to be retroactive.

MEEMIC contrasts with this case to explain why *Covenant* established a new principle of law. In *Profit*, the words of the statute were actually plain, not merely so by lip service, and two opinions from this Court foreshadowed the decision. Not so, here. If this Court had to consider the no-fault act's "textual clues" in reaching its conclusion in *Covenant*, it cannot be said that the holding was "clearly foreshadowed." *MEEMIC*, 460 Mich at 190; *Lindsey*, 455 Mich at 58.[2]

In further support on this point, though this Court had not addressed provider rights before *Covenant*, neither did it do anything to disabuse the bench, bar, or the general public of the notion that the Court of Appeals had gotten it right. In multiple cases under the no-fault act, this Court addressed issues going to the merits of provider-filed lawsuits against insurers without suggesting that providers might not have a cause of action in the first place.[3] In no small bit of irony, the very decision that the Court of Appeals held rewrote Michigan's retroactivity jurisprudence, *Spectrum Health*, was a provider lawsuit filed directly against an insurer under the no-fault act.

This is not to say that *Covenant* was wrong or that this Court should have acted differently or sooner. It only serves to demonstrate that the change in the law wrought by *Covenant* was not "clearly foreshadowed." That is, under *Pohutski*, *Covenant* announced a new principle of law.

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[2] This, in turn, also illustrates why Defendants' reliance on *MEEMIC* is misplaced. Def. Supp. Br. at 23-25. It was not that the Court of Appeals' construction in *Profit* was not "the law," but rather that the court had *ignored* two published opinions of this Court and the plain statutory language in reaching its decision. That is the "hierarchy" this Court mentions; Defendants misconstrue *MEEMIC* when they suggest that this Court disregarded the binding nature of a decision of the Court of Appeals. It was the other way around. See also *Tebo*, *supra*.

[3] See e.g., *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91; 693 NW2d 358 (2005); *Regents of Univ of Michigan v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010); *Detroit Med Ctr v Titan Ins Co*, 486 Mich 912 (2010) (MARKMAN, J, dissenting) (would grant leave in a provider lawsuit to consider the substantive merits); *Spectrum Health*, *supra*. Likewise, this Court has had opportunities to consider provider rights to sue insurance companies directly in the very cases *Covenant* overruled. *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389; 864 NW2d 598 (2014), lv den 497 Mich 1029 (2015); *Botsford Gen Hosp v Citizens Ins Co*, 195 Mich App 127; 489 NW2d 137 (1992), lv den 441 Mich 912 (1993); *Lakeland Neuro Centers v State Farm Mut Auto Ins Co*, 250 Mich App 35, 38 (2002), lv den 467 Mich 909 (2002).

D. Defendants' silence on *Pohutski*'s three factors speaks volumes.

Defendants' entire argument under *Pohutski* is that *Covenant* did not announce a new principle of law. Their brief is silent on applying the *Pohutski* factors beyond the threshold question. Def. Supp. Br. at 19-43. That silence demonstrates their concession that those factors favor the prospective application of *Covenant.* See Pl. App. at. 23-26; Pl. Supp. Br. at 15-19. Once this Court properly rejects Defendants' straw man, this case is straightforward: the purpose of *Covenant* was to correct "decades" of statutory misinterpretation, reliance on that overruled caselaw was overwhelming, and the administration of justice has been upended by the Court of Appeals' retroactive application of *Covenant* here. Prospective application of *Covenant* is proper.

II. Defendants ask this Court to discard half-a-century of caselaw without addressing the application of stare decisis.

Defendants brief is also silent on stare decisis. Defendants attempt to justify their silence by essentially ignoring the Court of Appeals' conclusion that *Spectrum Health* "effectively repudiated" *Pohutski*. The panel in this case, though, has not been alone in reaching this conclusion; other panels have already applied the holding below that *Pohutski* is no longer good law. See *Harston v Co of Eaton*, __ Mich App __; 2018 WL 2746424, *3 n 6 (2018) ("[T]he Supreme Court effectively repudiated *Pohutski* and undermined *Tebo* in *Spectrum Health*.").

Defendants then strangely claim that *Spectrum Health* actually applied the *Pohutski* framework. Def. Supp. Br. at 40-42. If that were true, it was lost on the panel below and those that are now relying on its holding. It also makes no sense. This Court has set forth and applied the *Pohutski* framework in numerous cases since it was adopted, even when concluding that the decision under consideration was fully retroactive. Pl. App. at 11 n 4. *Spectrum Health* does not mention the framework, does not undertake any analysis under it, and does not even cite any of these authorities. Instead, it relies on *Gentzler*, a decision issued nearly twenty years before

Linkletter, the seminal case adopting the *Pohutski* framework. Defendants' argument that *Spectrum Health* applied *Pohutski* is without merit. *Spectrum Health*'s application of retroactivity principles was inconsistent with *Pohutski*. This Court can and should clarify exactly that.

III. This Court has repeatedly rejected the federal standard that Defendants again ask this Court to adopt.

Apparently cognizant of their problems under *Pohutski*, Defendants alternatively urge this Court to abandon *Pohutski* and the line of cases it represents. Defendants instead ask this Court to adopt the federal standard for retroactivity articulated in *Harper*. Def. Supp. Br. at 9-19. This Court has heard this request before and has rejected it. Defendants are incorrect when they claim that, although it has not been adopted in Michigan, the *Harper* standard "has not been rejected either." Def. Supp. Br. at 14. This Court has explicitly and repeatedly rejected that standard.

Harper is derived from *Griffith v Kentucky*, 479 US 314 (1987). *Harper*, 509 US at 90 ("In accord with *Griffith*…, we hold that …."). *Griffith* overruled *Linkletter*, from which the *Pohutski* framework was adopted by this Court. *Harper* and *Griffith* govern under federal law to the exclusion of *Linkletter*.

This is not so in Michigan. Less than two months ago, on July 9, 2018, this Court considered both the federal and state standards governing the retroactivity of a judicial decision. *People v Barnes*, __ Mich __; 2018 WL 3355458 (2018). In *Barnes*, after addressing whether this Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), applied retroactively under the *Harper/Griffith* standard, the Court stated:

> "[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." Consequently, we must also consider whether our *Lockridge* decision applies retroactively on state-law grounds. Our state-law test was set out in *People v Hampton*, 384 Mich 669; 187 NW2d 404 (1971).[5] We consider: "(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice."

> [5] The state-law test in *Hampton* was derived from *Linkletter* []. *Linkletter* was subsequently disavowed as the federal standard for retroactivity in *Griffith* [], but we recognized the *Hampton*/*Linkletter* standard's continued viability as the state-specific standard in *People v Sexton*, 458 Mich 43, 60-61; 580 NW2d 404 (1998). [*Barnes*, 2018 WL at *4.]

This Court not only "recognized" its viability in *Sexton*; *Sexton* squarely confronted the question of whether to adopt the *Harper/Griffith* standard in lieu of *Pohutski*. And it rejected precisely what Defendants now advocate. The Court in *Sexton* noted the *Harper/Griffith* standard (that a new rule applies retroactively to all cases then pending) and, after concluding that it was not bound by *Griffith*, declined to adopt that standard:

> While we acknowledge the reasoning and rationale of *Griffith*, we decline to apply it to the cases before us today. Instead, we find the analysis in *Stovall v Denno*, [388 US 293 (1967),] to be more persuasive. [*Sexton*, 458 Mich at 59.]

The "more persuasive" analysis in *Stovall* was the *Linkletter* test for retroactivity, which included, as this Court noted in *Sexton*, "'reliance and [the] burden on the administration of justice.'" *Id.*, quoting *Stovall*, 388 US at 299. *Sexton* then went on to apply the *Pohutski* test, holding "that the application of these three factors to the rule preclude[d] retroactive application." *Id.* at 61.

Barnes and *Sexton* are not unique in noting that Michigan has departed from the evolving federal retroactivity standard. See *Carp*, 496 Mich at 500-501, 501 n 30 (declining an invitation to "abandon Michigan's separate test for retroactivity and adopt" the federal test). *Barnes* illustrates some of the reasons why. The *Pohutski* framework provides a workable system that considers not only the legal, but the practical implications of retroactively applying a decision. In declining to apply the decision at issue retroactively in *Barnes*, this Court noted that it was "manifest" that "there was widespread, indeed statewide, reliance by the bench and bar" on the old rule and the "effect on the administration of justice" in applying the new rule retroactively would

have been "incalculable." *Barnes*, 2018 WL at *4. So too, here, which is perhaps why Defendants' brief does not mention *Barnes*.

On this point, it bears repeating that Defendants' proposed retroactivity standard is inconsistent with the philosophical underpinnings they profess. Suggesting that the failure to do so violates "basic norms of constitutional adjudication," Def. Supp. Br. at 14, Defendants urge this Court to adopt a rule that judicial decisions applied to the parties before the Court necessarily apply retroactively in all cases "*still open on direct review*." *Id.* at 15 (emphasis added). But this is just line-drawing dressed up as ideological consistency. If Defendants are to be believed, why should these "basic norms of constitutional adjudication" be ignored as to a citizen still imprisoned under a now-discredited law, or a litigant whose property interest was deprived under a now-defunct rule, just because their cases are no longer "open on direct review." After all, Defendants contend that the rulings and interpretations resulting in those deprivations "w[ere] never the law." Def. Supp. Br. at 32. The fact that Defendants do not advocate such a standard gives the lie to their position.

The *Pohutski* framework is designed to "accomplish the 'maximum of justice' under varied circumstances." *Lindsey*, 455 Mich at 68. The Court should reject Defendants' invitation to replace it, as it has repeatedly done already. The framework has proven a workable solution to the difficult problem of retroactive application of judicial decisions in Michigan for nearly fifty years.

RELIEF REQUESTED

Allegiance requests that this Court reverse the Court of Appeals' published opinion below and hold that *Covenant* has prospective application, only.

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Dated: August 31, 2018

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