NO-FAULT LITIGATION IN A POST-*COVENANT* ERA

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I. INTRODUCTION

The term "sea change" likely has never been more apt to describe a particular *Survey* period than the instant one. No-fault litigation underwent significant changes in the past year, with the Michigan Supreme Court and the Michigan Court of Appeals directly addressing major issues that the statutory scheme leaves untouched. For instance, the supreme court delivered its eagerly anticipated opinion in *Covenant Medical Center v. State Farm Mutual Automobile Insurance Co.*,[1] effectively eliminating a medical provider's direct cause of action against an insurer for outstanding bills (or, on the other hand, clarifying that such a cause of action never existed).[2] However, with one single footnote, the court also created a vast source of new issues over contract principles such as assignments, third party beneficiaries, and policy interpretation for practitioners to investigate.[3] The courts continued to refine and reform additional issues in no-fault litigation that are not specifically addressed by the statute, most especially in the areas of fraud and rescission. With no-fault legislative reform undoubtedly looming, the judiciary in this *Survey* period assumed a necessarily similar "disruptive" role as well.

II. DECISIONS OF THE MICHIGAN SUPREME COURT

A. Providers' Right to a Direct Cause of Action

In a decision that changed the landscape of first-party no-fault litigation, the Michigan Supreme Court abrogated a medical provider's right to a direct cause of action against no-fault insurers.[4] Operating upon years of published court of appeals precedent, the trial court and the court of appeals issued opinions based upon the assumption that medical providers were entitled to a direct cause of action against no-fault insurers.[5] The supreme court noted that the issue presented to the court of appeals was whether the direct cause of action by medical providers was permissible.[6] The supreme court in its opinion indicated that the court of appeals was correct to assume that medical providers had a right to a

1. Covenant Med. Ctr. v. State Farm Mut. Auto. Ins. Co., 500 Mich. 191, 895 N.W.2d 490 (2017).
2. *Id.*
3. *Id.* at ___, 895 N.W.2d at 505 n.39.
4. *Id.* at ___, 895 N.W.2d at 493.
5. *Id.*
6. *Id.* at ___, 895 N.W.2d at 495.

direct cause of action based on past court of appeals precedent.[7] However, the supreme court indicated that in order to adjudicate the issues presented to the court, it had to reconsider the assumptions underlying the provider's right to a direct cause of action.[8]

The supreme court's opinion notes that it took seriously the precedent established by the court of appeals and that it was hesitant to overturn years of longstanding precedent.[9] As such, the court undertook a meticulous review of the various decisions by the court of appeals that established that providers were entitled to a direct cause of action.[10] The supreme court found these prior decisions to be lacking in a thorough analysis of the direct right to a cause of action.[11] The court noted that these prior decisions did not provide a convincing basis for their recognition of the right to a direct cause of action.[12]

The supreme court then turned its analysis to the language of the No-Fault Act itself.[13] The court's opinion undertook a painstaking review of every sentence of MCL Section 500.3112.[14] The court ultimately found no section within the No-Fault Act to support the right of a medical provider to directly sue a no-fault insurer.[15] The court confirmed that the No-Fault Act allowed insurers to meet their obligations to their insureds by issuing payments to providers directly, but cautioned that this did not create a right for medical providers to sue no-fault insurers directly.[16] After establishing that there was no statutory basis to rule otherwise, the supreme court held that medical providers had no statutory right to a direct cause of action against no-fault insurers.[17]

The court took care to identify a number of potential other routes for medical providers to recover for services rendered to patients injured in automobile accidents.[18] In particular, the supreme court highlighted that medical providers could sue patients directly to recover for services they had provided but had not been paid for.[19] The supreme court also indicated that providers might be able to argue that they are third-party beneficiaries of no-fault insurance contracts, in order to continue to

7. *Id.* at ___, 895 N.W.2d at 496–97.
8. *Id.*
9. *Id.* at ___, 895 N.W.2d at 496.
10. *Id.* at ___, 895 N.W.2d at 496–98.
11. *Id.* at ___, 895 N.W.2d at 498.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at ___, 895 N.W.2d at 505.
19. *Id.*

assert their rights to recover directly from no-fault insurers.[20] The availability of this third-party beneficiary argument is dependent on the language of the individual no-fault insurance contract.[21] Finally, the supreme court indicated that medical providers could seek to obtain assignments of rights from their patients.[22] Such assignments would assign the patient's right to incurred benefits to the medical provider.[23] Notably, these assignments would only assign the right to recover benefits incurred in the past and present as MCL 500.3143 prohibits the assignment of future benefits.[24] The supreme court's decision stopped short of providing trial courts with instruction as to the applicability of anti-assignment clauses in insurance contracts.

B. Notice and the One-Year Back Rule

In *Perkovic v. Zurich American Insurance Company,*[25] the Michigan Supreme Court held that notice for purposes of the one-year back rule does not require notification that a claimant may seek no-fault benefits.[26] Plaintiff was injured while operating a semi-truck and sought treatment for his injuries at the Nebraska Medical Center.[27] The Nebraska Medical Center submitted the records and its bill to plaintiff's employer's insurer, Zurich American Insurance Company.[28] Zurich denied the claim on the basis that it had not received a claim of injury from plaintiff.[29] Plaintiff filed his initial complaint in the trial court seeking benefits from his own automobile insurance company, Citizens Insurance Company of the Midwest.[30] Plaintiff also added Hudson Insurance Company, the insurer of his bobtail truck.[31] Plaintiff did not amend his complaint to add Zurich as a defendant until thirteen months after the subject accident.[32] Citizens and Hudson appealed to the court of appeals asserting that Zurich would

20. *Id.* at. ___, 895 N.W.2d at 496.
21. *Id.*
22. *Id.* at ___, 895 N.W.2d at 505 n.40.
23. *Id.*
24. *Id.*
25. Perkovic v. Zurich Am. Ins. Co., 500 Mich. 44, 893 N.W.2d 322 (2017).
26. *Id.* at 46–47, 893 N.W.2d at 324.
27. *Id.* at 47, 893 N.W.2d at 324.
28. *Id.*
29. *Id.* at 48, 893 N.W.2d at 324.
30. *Id.*
31. *Id.*
32. *Id.*

be highest in priority for plaintiff's claims.[33] The court of appeals agreed and remanded the case to the trial court for a consistent ruling.[34]

Once the case returned to the trial court, Zurich filed for summary disposition, pursuant to MCR 2.116(C)(7), asserting that plaintiff's claims against it were barred by the one year-back rule.[35] Zurich asserted that, because they had not paid any benefits on behalf of plaintiff or received any written notice of plaintiff's claim of injury within the statutory period, his claims were barred and they did not owe any benefits.[36] Plaintiff argued that the submission by the Nebraska Medial Center of its records and bill within the statutory period satisfied any requirement of the notice rule.[37] The trial court granted summary disposition in favor of Zurich and plaintiff filed an appeal.[38]

The supreme court held that notice is satisfied when documentation containing all information required under the statute is provided to a no-fault insurance company, even when the information is supplied by a provider treating the claimant's injuries.[39] The court noted that the information the Nebraska Medical Center had supplied contained the claimant's (and injured party's) name and address, as well as the time, place, and nature of the injuries sustained.[40] The court held that the information sent to Zurich within the statutory period was sufficient and that MCL 500.3145(1) does not require an explicit statement that the information is being provided to support a claim for benefits.[41] The court also noted that the claimant need not be presently pursuing a claim for no-fault benefits at the time of submission.[42] As such, the trial court's order granting summary disposition in favor of Zurich was vacated.[43]

In a dissenting opinion, Justice Young agreed with the majority's reasoning, but held that the one-year back rule was not satisfied because the information submitted to Zurich did not communicate a claim of entitlement to personal injury protection benefits.[44]

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33. *Id.*
34. *Id.* at 48–49, 893 N.W.2d at 325.
35. *Id.* at 49, 893 N.W.2d at 325; *see also* MICH. COMP. LAWS ANN. § 500.3145(1) (West 2018).
36. *Perkovic*, 500 Mich. at 49, 893 N.W.2d at 325.
37. *Id.*
38. *Id.*
39. *Id.* at 53–56, 893 N.W.2d at 327–28.
40. *Id.* at 52, 893 N.W.2d at 326.
41. *Id.* at 53–54, 893 N.W.2d at 327–28.
42. *Id.*
43. *Id.* at 56, 893 N.W.2d at 328.
44. *Id.* at 57, 893 N.W.2d at 329.

C. "Reasonably in Dispute" with Regard to Underinsured Motorist Claims

In *Nickola v. MIC General Insurance Co.*,[45] the supreme court considered whether an insurer could avoid payment of penalty interest for an underinsured motorist claim that was "reasonably in dispute."[46] Plaintiffs sustained injuries in an automobile accident and then presented a claim for underinsured motorist benefits to their insurer.[47] The defendant insurer denied the claim asserting that plaintiffs would be unable to meet the threshold injury requirement as they sustained mere aggravations of pre-existing injuries.[48] Subsequently, plaintiffs demanded arbitration of the underinsured motorist claim pursuant to the arbitration clause in the insurance policy.[49] Defendant alleged that the arbitration clause required both parties to agree to the arbitration and refused to place the claim into arbitration.[50] Plaintiffs filed suit and the matter was ordered into arbitration.[51] The arbitration provision of the policy provided that each side would select an arbitrator, and the third arbitrator would be selected by the two appointed by the parties.[52] The policy language empowered the court to select a third arbitrator, in the event one could not be selected by the arbitrators appointed by the parties.[53] In the instant case, the parties could not agree upon a third arbitrator, but neither side demanded a court appointed third arbitrator for a period of six years.[54] Eventually, the court appointed a third arbitrator, and an arbitration award was entered in plaintiffs' favor.[55]

Plaintiffs filed a motion for entry of judgement on the arbitration award and requested that penalty interest be included pursuant to the Uniform Trade Practices Act. [56] The court found the inclusion of penalty interest under the Uniform Trade Practices Act inappropriate where the underinsured claim was "reasonably in dispute."[57] Plaintiff appealed to the Michigan Supreme Court. [58]

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45. Nickola v. MIC Gen. Ins. Co., 500 Mich. 115, 894 N.W.2d 552 (2017).
46. *Id.*
47. *Id.* at ___, 894 N.W.2d at 554.
48. *Id.*
49. *Id.* at ___, 894 N.W.2d at 555.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*; MICH. COMP. LAWS ANN. § 500. 2006(4) (West Supp. 2018).
58. *Nickola,* 500 Mich. at ___, 894 N.W.2d at 555.

The court began its review by noting that underinsured motorist benefits are contractual, as opposed to statutory.[59] Defendants argued that plaintiffs were not a part of the class entitled to penalty interest under the Uniform Trade Practices Act.[60] The supreme court rejected this argument and found that pursuant to the contract, they were "directly" entitled to benefits from the insurance company.[61] The court noted that plaintiffs were insureds for purposes of their underinsured motorist claim and not "third-party tort claimants" as required under the Uniform Trade Practices Act.[62] The court relied upon a plain language analysis of the statute as distinguishing between the "identity of the claimant, not the nature of the claim."[63] The court found that the "reasonably in dispute language" did not apply to the claim of the insured.[64] The court clarified that if benefits are not paid on a timely basis, the penalty interest provision applies without regard to whether the claim was reasonably in dispute.[65] The court remanded to the trial court for consistent proceedings and overruled the decision of the court of appeals in *Auto-Owners Insurance Co. v. Ferwerda Enterprises, Inc.*, 287 Mich. App. 248, 797 N.W.2d 168, as inconsistent.[66]

D. Assessing Fees Owed to a Victorious Plaintiff

In *Pirgu v. United Services Automobile Ass'n*,[67] the plaintiff sustained a closed head injury, resulting in his wife being named guardian and conservator.[68] Ultimately, United Services Auto Associate (USAA), the assigned insured, terminated his benefits, with a jury trial eventually awarding the plaintiff approximately $70,000.00.[69] Post-judgment, his counsel sought nearly $230,000.00 in fees, claiming a billing rate of $350.00 and 600 billed hours on the case.[70] Since the jury had only awarded 33% of what the plaintiff had claimed (between $200,000.00 and $400,000.00) in damages, the trial court first determined that there was an unreasonable denial, but only assessed 33%

59. *Id.* at ___, 894 N.W.2d at 555–56.
60. *Id.* at ___, 894 N.W.2d at 557.
61. *Id.* at ___, 894 N.W.2d at 558.
62. *Id.*
63. *Id.* at ___, 894 N.W.2d at 560–61; *see also* MICH. COMP. LAWS ANN. § 500.2006(4) (West Supp. 2018).
64. *Nickola,* 500 Mich. at ___, 894 N.W.2d at 560–61.
65. *Id.* at ___, 894 N.W.2d at 561.
66. *Id.*
67. Pirgu v. United Serv. Auto. Ass'n, 499 Mich. 269, 884 N.W.2d 257 (2016).
68. *Id.* at 271-72, 884 N.W.2d at 259.
69. *Id.* at 272, 884 N.W.2d at 259.
70. *Id.*

of the jury award as an attorney's fee.[71] The plaintiff's attorney appealed the award.[72] The court of appeals relied on *University Rehabilitation Alliance, Inc. v. Farm Bureau General Insurance Co. of Michigan*,[73] which held that *Smith v. Khouri*[74] did not apply to the award of a no-fault attorney's fee; rather, the *Smith* factors only applied to case evaluation attorney fee awards.[75] Ultimately, the supreme court granted leave and overturned this opinion, holding that *Smith* was, in fact, applicable to the award of attorney's fees for an unreasonable denial under the No-Fault Act.[76] *Pirgu*, therefore, expanded on *Smith* to outline the calculation of such a fee: (1) the trial court should consider the local rates for similar attorney services using statistics or other survey information to determine the applicable hourly rate; (2) the trial court should then determine what amount of hours would be reasonable and then multiple those hours by the previously determined rate; and (3) the judge should determine whether that multiplied amount should be adjusted upward or downward, based on a list of factors (which the court specifically noted was not exhaustive).[77] That list included, among other factors: the experience, reputation and ability of the lawyer; the difficulty or novelty of the case; the amount in question and result obtained; the expenses incurred; the nature and length of the professional relationship with the client; the likelihood, if apparent to the client, that acceptance of the case might preclude the lawyer's acceptance of other cases; the time limitations imposed by the client; and whether the fee is fixed or contingent.[78]

E. Surpassing the Jurisdictional Threshold of the District Court Mid-Litigation

In Michigan, district courts retain exclusive jurisdiction in civil actions where the amount in controversy does not exceed $25,000. If that amount does exceed $25,000, the circuit court is the appropriate jurisdiction.[79] The court, in *Hodge v. State Farm Mutual Automobile*

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71. *Id.*

72. *Id.* at 273, 884 N.W.2d at 259.

73. Univ. Rehab. All., Inc. v. Farm Bureau Gen. Ins. Co. of Mich., 279 Mich. App. 691, 700, 760 N.W.2d 574 (2008), *overruled by Pirgu*, 499 Mich. 269, 884 N.W.2d 257.

74. Smith v. Khouri, 481 Mich. 519, 751 N.W.2d 472 (2008).

75. *Pirgu*, 499 Mich. at 273, 884 N.W.2d at 259–60.

76. *Id.* at 280–81, 884 N.W.2d at 263–64.

77. *Id.* at 281–82, 884 N.W.2d at 264.

78. *Id.*; *see also* Wood v. Detroit Auto. Inter-Ins. Exch. 413 Mich. 573, 588, 321 N.W.2d 653 (1982).

79. MICH. COMP. LAWS ANN. § 600.8301 (West 2000).

Insurance Co.,[80] addressed what happens when a plaintiff's initial claim for damages, filed in the district court, inflates during litigation and eventually surpasses the jurisdictional threshold.[81] Ultimately, the court unanimously held that, absent evidence of bad faith, jurisdiction is based on the allegations raised in the pleadings alone.[82]

Plaintiff Hodge sustained an injury when she was struck by an automobile insured by State Farm.[83] She filed suit in the 36th District Court in Detroit, seeking no more than $25,000 in unpaid first party personal injury protection (PIP) benefits.[84] However, as discovery progressed, State Farm discovered that Hodge's claimed expenses exceeded the $25,000 threshold, and, believing that she would "blackboard" these expenses at trial, filed a motion to prevent her from presenting more than $25,000 at trial and preventing the jury from awarding more than $25,000.[85] When the trial court denied the motion, the case proceeded to trial, where Hodge did exactly as State Farm predicted and, in fact, claimed benefits exceeding $100,000, far above the jurisdictional limit.[86] The jury awarded her nearly $86,000 in benefits, but the court reduced Hodge's verdict to its jurisdictional limit of $25,000—a significant discount for Hodge.[87] Regardless, State Farm appealed to the circuit court, arguing that the district court's remedial measure of reducing the award did not properly "cure" the fact that her claim so largely exceeded the trial court's jurisdiction.[88] The circuit court agreed, reversing the lower court's judgment on State Farm's motions to limit Hodge's claims.[89]

The court of appeals then found that, in most instances, the district court's jurisdiction is determined by reviewing the damages a plaintiff claims in the pleadings.[90] However, should pre-trial discovery, the plaintiff's counsel's arguments, and the presentment of evidence at trial

80. Hodge v. State Farm Mut. Auto. Ins. Co., 499 Mich. 211, 844 N.W.2d 238 (2016).

81. *Id.*

82. *Id.* at 223–24, 844 N.W.2d at 245.

83. *Id.* at 214, 844 N.W.2d at 239.

84. *Id.*

85. *Id.* at 214, 844 N.W.2d at 240.

86. *Id.*

87. *Id.*

88. *Id.* Essentially, State Farm's arguments appear to suggest that the jury's award was inflated by the large claim Hodge submitted; had she claimed $25,000, they may have awarded below that amount, thereby resulting in less exposure to State Farm.

89. *Id.*

90. *Id.* at 215, 844 N.W.2d at 240.

establish that damages exceed $25,000, the district court must be divested of its jurisdiction.[91]

The Michigan Supreme Court reversed in part, effectively adding a "bad faith" requirement.[92] The general rule remains: jurisdiction is based on the allegations of the pleadings.[93] The evidence developed during discovery or trial does not matter—the district court will retain jurisdiction so long as the complaint alleges $25,000 or less, unless there is bad faith shown in such an allegation.[94] The court also found that the original remedy—capping damages at the jurisdictional limit—was the proper way to address this problem.[95] Notably, the court did not address what exactly constituted "bad faith," but a concurring opinion by Justice Markman clarified this issue, finding that an insurer must show that the plaintiff intends to bring claims over $25,000 and may have selected the district court to gain an unfair advantage.[96] Justice Markman concluded that bad faith was shown on Hodge's part, as she essentially fabricated the value of her claim when it was clear during discovery that her outstanding expenses would exceed $25,000.[97] However, State Farm did not make this argument at the district court level, so the supreme court did not address Justice Markman's concerns in the majority opinion.[98]

F. Notice Under the "One Year Back Rule" and the Concept of "Traceable Symptoms"

In *Dillon v. State Farm Mutual Automobile Insurance Co.*,[99] plaintiff Dillon sustained injuries in 2008, initially complaining of upper and lower back injuries and receiving a series of treatments solely focused on those injuries.[100] An issue arose when, in 2011, she began treating for hip pain and claimed that the hip pain was related to her 2008 accident.[101] Defendant State Farm denied payment for her hip treatment on the basis that there was no notice of any hip injuries within one year of the accident (thereby applying the One-Year-Back Rule of MCLA section 500.3145(1), which requires claims to be submitted within one year of

91. *Id.*
92. *Id.* at 224, 844 N.W.2d at 245.
93. *Id.*
94. *Id.*
95. *Id.* at 223–24, 844 N.W.2d at 245.
96. *Id.* at 224–38, 844 N.W.2d at 245–53 (Markman, J., concurring).
97. *Id.*
98. *Id.* at 224, 844 N.W.2d at 245.
99. Dillon v. State Farm Mut. Auto. Ins. Co., 315 Mich. App. 339, 340, 889 N.W.2d 720 (2016).
100. *Id.* at 340, 889 N.W.2d at 720.
101. *Id.* at 340–41, 889 N.W.2d at 721.

the accident in question).[102] When Dillon brought suit, the jury found in her favor and awarded payment for her hip treatment.[103] Then, on appeal by State Farm, the court of appeals ruled that Dillon was not required to supply specific notice of her hip injury in her initial notice after the 2008 accident.[104] According to the court of appeals, it was sufficient that she notified State Farm of general physical injuries within a year of the accident.[105]

However, the supreme court recently vacated this decision in an opinion marked for publication, reasoning that the statute requires "only the kind of notice that an ordinary layperson can provide."[106] While the court of appeals appears to indicate that notice of a general injury within one year is sufficient to meet the requirements of MCLA section 500.3145, the supreme court refined the rule, indicating that "a description of symptoms that are traceable to a diagnosed injury is sufficient to constitute such notice."[107] In essence, a claimant cannot simply report a general injury, but must at least report some "traceable" symptoms as a normal layperson would.[108]

G. Statute of Limitations Questions with Subrogation Claims

In *Suburban Mobility Authority For Regional Transportation v. Auto Club Insurance Ass'n*,[109] the supreme court declined to review a prior court of appeals decision.[110] Willie Clay Jr. was riding on a bus operated by the Suburban Mobility Authority (SMART).[111] When the bus pulled away from the bus stop, Clay slipped and fell to the floor, injuring his left knee.[112] He applied for no-fault benefits from SMART, indicating that he did not own nor reside with any relative who owned an insured motor vehicle.[113] SMART paid the no-fault benefits, totaling nearly

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102. *Id.* at 341, 889 N.W.2d at 721–22; *see also* MICH. COMP. LAWS ANN. § 500.3145(1) (West 2016).

103. *Dillon*, 315 Mich. App. at 341, 889 N.W.2d at 722.

104. *Id.* at 344–45, 889 N.W.2d at 723–24.

105. *Id.*

106. Dillon v. State Farm Mut. Auto. Ins. Co., 501 Mich. 915, 902 N.W.2d 892, 893 (2017) (mem.).

107. *Id.* at 915, 902 N.W.2d at 894.

108. *Id.* at 915, 902 N.W.2d at 893.

109. Suburban Mobility Auth. for Reg'l Transp. v. Auto Club Ins. Ass'n, 499 Mich. 971, 880 N.W.2d 584 (2016).

110. *Id.*

111. Suburban Mobility Auth. for Reg'l Transp. v. Auto Club Ins. Ass'n, No. 324132, 2016 WL 191923, at *1 (Mich. Ct. App. Jan. 14, 2016).

112. *Id.*

113. *Id.*

$125,000, over a period of April 18, 2011 to December 7, 2012.[114] In March 2013, Clay sued SMART, alleging negligence.[115] During the course of discovery in that case, SMART discovered that Clay lived with his father, who owned a vehicle that was insured with Auto Club.[116] SMART therefore sought reimbursement for the benefits paid to Clay from Auto Club, reasoning that, under MCLA section 500.3114, since Clay was a resident relative of his father, Auto Club was the insurer of highest priority.[117] Auto Club refused, citing MCLA section 500.3145, which requires that an action for recovery of no-fault benefits must commence within one year of the date of the accident, a deadline that had long passed.[118] SMART sued Auto Club shortly thereafter, but the trial court granted Auto Club's motion for summary disposition, on the basis of the "One-Year-Back" rule.[119]

On appeal, SMART argued that the general six-year limitations period of MCL Section 600.5813 governed; yet, the court noted that, when an insurance company mistakenly pays no-fault benefits while another insurance company had the obligation to pay benefits due to it being in higher priority in the no-fault statutory scheme, the applicable limitations period was MCLA section 500.3145, as the action between the two insurers would be one of subrogation.[120]

MCLA section 500.3145(1) provides, in relevant part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury.[121]

As there was no dispute that SMART commenced its action against Auto Club later than one year after the accident, and that Auto Club had

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at *2.
118. *Id.*
119. *Id.*
120. *Id.* at *3–5; *see also* Titan Ins. v North Pointe Ins., 270 Mich. App. 339, 343–44, 347, 715 N.W.2d 324 (2006).
121. MICH. COMP. LAWS ANN. § 500.3145(l) (West 2016).

no notice of the claim prior to that one year "deadline", none of the exceptions to the "One-Year-Back" rule applied.[122]

The court also noted that, as subrogee, SMART was "substituted in the place of the subrogor" such as Clay, "thereby attaining the same and no greater right to recover against a third party," such as Auto Club.[123] As Clay could not have sued Auto Club himself at the time SMART commenced their suit, since he would have also been time-barred, the court could not rule that SMART be able to sue Auto Club and essentially have greater rights than Clay.[124]

Interestingly, the court recognized that SMART's reliance on *Madden v. Employers Insurance of Wausau*[125] was proper, as was the case's holding that an insurer's request for the recovery of no-fault benefits paid by mistake is not an action for subrogation; however, it rejected the case as non-binding precedent, having been decided before 1990.[126]

Of additional note: SMART argued that, as a government-sponsored transportation program, it should be considered "exempt" from the payment of no-fault benefits if the injured claimant has available no-fault coverage, and that this "exempt" status removes it from "the realm of subrogation."[127] However, the court of appeals disagreed, finding the "exempt" status immaterial since such a status is not contemplated in the No-Fault Act.[128] The court recognized that SMART was subject to a specific priority scheme under MCLA section 500.3114(2)(c), which provides that a passenger riding a bus operated by a government sponsored transportation program is not entitled to PIP benefits from the insurer of the bus unless that passenger is not entitled to benefits under any other policy.[129] While Clay would not have been eligible to recover benefits from SMART had SMART been aware of his other insurance at the outset, that did not essentially make them "exempt" from the requirements or limitations of subrogation.[130] Such an argument was a distinction without a difference. SMART had still paid benefits when

122. *Suburban Mobility*, 2016 WL 191923, at *4–5.

123. *Id.* at *3–4 (citing Morrow v. Shah, 181 Mich. App. 742, 749, 450 N.W.2d 96 (1989)).

124. *Id.* at *5.

125. Madden v. Emp'rs Ins. of Wausau, 168 Mich. App. 33, 424 N.W.2d 21 (1988).

126. *Suburban Mobility*, 2016 WL 191923, at *5; MICH. CT. R. 7.215(J)(1).

127. *Suburban Mobility*, 2016 WL 191923, at *8. This argument makes practical sense, in that SMART's payment of no-fault benefits ultimately may impact taxpayers.

128. *Id.* at *8–10.

129. *Id.* at *8–9.

130. *Id.*

another company was actually responsible for them, which is the essence of subrogation.[131]

As a result, just as Clay could not ignore the "One-Year-Back" rule of MCLA section 500.3145(1) to recover from Auto Club, SMART could not assume greater rights and recover from them.[132]

H. Emphasizing the "Transportational Function" of a Vehicle

In *Kemp v. Farm Bureau General Insurance Co. of Michigan*, Plaintiff Kemp was retrieving a lunch box and overnight bag from the floorboard of his pick-up truck when he sustained an injury to his leg.[133] He requested that his no-fault insurer, Farm Bureau, pay for his treatment with an urgent care center and doctor, but Farm Bureau denied benefits.[134] Kemp filed suit, with Farm Bureau moving for summary disposition, on the basis that his injury did not arise out of the ownership, operation, maintenance, or use of his parked vehicle as a motor vehicle, as provided in MCLA section 500.3106.[135]

MCLA section 500.3106 provides that PIP benefits cannot be recovered when a motor vehicle is parked, unless the following exceptions apply: (1) the vehicle was parked in such a way as to cause unreasonable risk of bodily injury; (2) the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process; or (3) the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.[136]

The trial court granted Farm Bureau's motion, finding that the injury was "merely incidental" to the use of the vehicle—essentially, that the motor vehicle was simply the site of the injury, rather than a cause of it.[137] The court of appeals affirmed the ruling.[138] The supreme court, however, disagreed, finding that the injury was related to the transportational function of the truck, and therefore, eligible for no-fault coverage.[139]

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131. *Id.* at *9–10.
132. *Suburban Mobility*, 2016 WL 191923, at *10.
133. Kemp v. Farm Bureau Gen. Ins. Co. of Mich., 500 Mich. 245, 901 N.W.2d 534, 537 (2017).
134. *Id.*
135. *Id.*; MICH. COMP. LAWS ANN. § 500.3106 (West 2016).
136. *Kemp*, 500 Mich. at___, 901 N.W.2d at 537.
137. *Id.* at ___, 901 N.W.2d at 537–38.
138. *Id.* at ___, 901 N.W.2d at 537.
139. *Id.* at ___, 901 N.W.2d at 545–46.

In so doing, the court reflected on the second exception to MCLA Section 500.3106 (MCLA 500.3106(1)(b)).[140] The court found that plaintiff Kemp had created a question of fact regarding whether his injury arose from physical contact with property being lifted onto or unloaded from the vehicle during the "loading or unloading" process.[141] Then, a jury could have analyzed whether his "loading or unloading" his personal effects—the lunch box and overnight bag—caused sufficient strain on Kemp so as to cause the injury in question.[142] The court also found that unloading one's personal items—even hypothetical examples such as a purse, grocery bags, etc. come to mind—is connected to the "transportational function" of a vehicle, which is essentially to convey persons and things from one place to another.[143] As a result, since retrieving personal items from a car once it is parked is "foreseeably identifiable" with normal use of a vehicle, there was at least a question of fact regarding the causal relationship between the injury and the "transportational function" of the vehicle.[144] This opinion makes some sense, as it is typical to park one's car and then retrieve a personal item while getting out of the vehicle or even in the back seat of the vehicle, before entering one's home or ultimate destination. It appears the court may have relied on this act being "typical" in coming to its conclusion that retrieving items from a car is linked to the transportational function of the car.

III. DECISIONS OF THE MICHIGAN COURT OF APPEALS

A. Reasonable Efforts Under Coordinated Policies

The Michigan Court of Appeals in *St. John Macomb-Oakland Hospital v. State Farm Mutual Automobile Insurance Co.*,[145] considered what is required of a no-fault claimant with a coordinated policy for no-fault insurance benefits.[146] The court of appeals reversed the trial court's decision to grant summary disposition in favor of the claimant's automobile insurance carrier, stating that a claimant, such as Plaintiff St. John Macomb-Oakland Hospital, need not engage in a lengthy and costly process appeals process, challenging a determination of medical

140. *See* MICH. COMP. LAWS ANN. § 500.3106(1)(b) (West 2017).
141. *Kemp*, 500 Mich. at___, 901 N.W.2d at 539–40.
142. *Id.* at ___, 901 N.W.2d at 540.
143. *Id.* at ___, 901 N.W.2d at 542–43.
144. *Id.* at ___, 901 N.W.2d at 545–46.
145. St. John Macomb-Oakland Hosp. v. State Farm Mut. Auto. Ins. Co., 318 Mich. App. 256, 896 N.W.2d 85 (2016).
146. *Id.*

necessity by a health insurance carrier, before obtaining payment from an applicable no-fault insurance policy.[147]

Plaintiff, St. John Macomb-Oakland Hospital, presented a claim to the no-fault insured's health insurer, Blue Cross Blue Shield, for services it had rendered to the insured as a result of injuries sustained in an automobile accident.[148] Blue Cross Blue Shield denied to extend coverage for the services and asserted that these services were not medically necessary and as such, not entitled to coverage under the Blue Cross Blue Shield policy.[149] Blue Cross Blue Shield outlined a detailed procedure for appealing its denial to extend coverage for services rendered.[150] St. John Macomb-Oakland Hospital did not avail itself of the appeals procedure set forth by Blue Cross Blue Shield and instead presented a claim directly to the insured's no-fault insurance policy through State Farm Mutual Automobile Insurance Company.[151] The no-fault insurance carrier, State Farm Mutual Automobile Insurance Company, refused to pay for a mental health program attended by the claimant for treatment of closed head injuries arising from the motor vehicle accident, as a result of Blue Cross Blue Shield's determination that this treatment was not medically necessary.[152]

Ultimately, plaintiff filed suit in the Macomb County Circuit Court asserting that State Farm's refusal to provide benefits constituted a breach of its contract with the insured.[153] Defendant State Farm filed a motion for summary disposition pursuant to MCR 2.116(C)(10) asserting that plaintiff had not made the requisite reasonable efforts to first obtain coverage from plaintiff's primary Blue Cross Blue Shield policy.[154] The trial court considered whether the appeals procedure set forth by Blue Cross Blue Shield would be considered reasonable and whether plaintiff had exercised reasonable efforts to obtain coverage from the insured's primary insurer.[155] The trial court denied defendant's motion for summary disposition and found that a question of fact existed as to whether plaintiff had exercised reasonable efforts to obtain coverage through the Blue Cross Blue Shield policy.[156] Defendant filed a motion

147. *Id.* at 266, 896 N.W.2d at 90.
148. *Id.* at 258, 896 N.W.2d at 86.
149. *Id.* at 258–59, 896 N.W.2d at 86.
150. *Id.*
151. *Id.* at 260, 896 N.W.2d at 87.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

for reconsideration of its motion for summary disposition.[157] The trial court found that plaintiff had failed to provide sufficient evidence that it had made reasonable efforts to obtain benefits from Blue Cross Blue Shield.[158]

Plaintiff appealed to the Michigan Court of Appeals and the court reviewed the trial court's grant of State Farm's motion for summary disposition under a de novo review standard and the court's grant of State Farm's motion for reconsideration for abuse of discretion.[159] The question before the court was whether Plaintiff had supplied sufficient evidence that it had made reasonable efforts to obtain payment from Blue Cross Blue Shield.[160] Defendant State Farm asserted that reasonable efforts would have necessarily included the appeals procedure set forth by Blue Cross Blue Shield.[161] Ultimately, the court of appeals held that plaintiff was not required to go through the appeals procedure set forth by Blue Cross Blue Shield and that the trial court had abused its discretion in granting State Farm's motion for reconsideration.[162] The court considered the issue in light of MCLA section 500.3107(1)(a).[163] The no-fault law provides for first-party PIP benefits for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations."[164] The court of appeals cited to the supreme court's analysis from its decision in *Tousignant*, stating:

> Our Supreme Court has stated that the term "payable," which appears in the no-fault contract at issue in this case, is the functional equivalent of the phrase "required to be provided." In *Tousignant*, our Supreme Court cited its previous decision in *Perez v. State Farm Mut. Auto. Ins. Co.*, for the proposition that the phrase "required to be provided" "means that *the injured person is obliged to use reasonable efforts to obtain payments that are available.*" Thus, a plaintiff must make reasonable efforts to obtain payments that are available from the

157. *Id.* at 261, 896 N.W.2d at 87.
158. *Id.*
159. *Id.* at 261, 896 N.W.2d at 87–88.
160. *Id.* at 261, 896 N.W.2d at 88.
161. *Id.* at 262, 896 N.W.2d at 88.
162. *Id.* at 270, 896 N.W.2d at 92.
163. *Id.* at 263, 896 N.W.2d at 88.
164. MICH. COMP. LAWS ANN. § 500.3107(1)(A) (West 2016).

> health insurer in order for the plaintiff to establish that the benefits are not payable by the health insurer.[165]

The court noted that the *Tousignant* decision did not outline the steps that a claimant must take in order to establish "reasonable efforts."[166] However, the court of appeals highlighted the fact that the plaintiff in *Tousignant* took no steps to obtain payment from the health insurer while the plaintiff in case before the court had, at a minimum, submitted its claims to Blue Cross Blue Shield for payment.[167] The court noted that a coordinated policy is intended to achieve goals of cost-containment and efficiency and these goals would not be served by obligating a claimant to pursue a costly and lengthy appeals procedure.[168] The decision of the court reinforces the fact that the No-Fault Act is intended to secure prompt payment for economic losses.

B. Fraud in the Procurement of Policies and the Innocent Third-Party Doctrine

The Michigan Court of Appeals in *Southeast Michigan Surgical Hospital v. Allstate Insurance Co.*[169] signaled a change in the treatment of "innocent third-parties."[170] This case arises out of injuries Jamie Letkeemann sustained while he was a passenger in a rear-end automobile accident.[171] David Krelau insured and owned the involved vehicle, a 2010 Ford Escape.[172] In the process of obtaining his insurance policy through Allstate, Mr. Kreklau represented that he would be the primary driver of the vehicle and that the vehicle would be garaged primarily at his residence.[173] Almost immediately after Kerklau purchased the policy, he gave the vehicle to Danielle Riordan to operate and garage at her residence.[174]

Mr. Letkeeman sought treatment for his injuries with Southeast Michigan Surgical Hospital.[175] Subsequently, Southeast Michigan

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165. *St. John Macomb-Oakland Hosp.*, 318 Mich. App. at 263–64, 896 N.W.2d at 89 (citations omitted) (emphasis in original).

166. *Id.* at 265, 896 N.W.2d at 89.

167. *Id.*

168. *Id.* at 266, 896 N.W.2d at 90.

169. Southeast Mich. Surgical Hosp. v. Allstate Ins. Co., 316 Mich. App. 657, 892 N.W.2d 434 (2016).

170. *Id.*

171. *Id.* at 659, 892 N.W.2d at 436.

172. *Id.* at 661, 892 N.W.2d at 437.

173. *Id.*

174. *Id.*

175. *Id.* at 659, 892 N.W.2d at 437.

Surgical Hospital filed a claim against Allstate directly.[176] Mr. Letkeemann also filed his own first-party no-fault claim against Allstate.[177] During discovery at the trial court level, Allstate determined that the policy had been procured through fraud due to misrepresentations.[178] On defendant Allstate's motion for summary disposition, Allstate argued that because the subject policy of insurance was fraudulently procured, it was entitled to rescind the policy.[179] Plaintiffs Letkeemann and Southeast Michigan Surgical Hospital argued that Mr. Letkeemann was an innocent third-party and so even if the policy was obtained through fraud, defendant Allstate could not rescind coverage as to Mr. Letkeemann because he was innocent of fraud in the procurement of the policy.[180] Ultimately, the trial court denied defendant Allstate's motion for summary disposition and instead granted summary disposition in favor of plaintiffs.[181]

The court of appeals reviewed the trial court's decision to grant summary disposition to plaintiffs under a de novo standard of review.[182] The court of appeals began their review by affirming that Mr. Letkeemann was properly categorized as an innocent third-party.[183] The court of appeals also affirmed that the trial court correctly held that Mr. Kerlau obtained the Allstate policy through fraud.[184] The court of appeals affirmed that the ruling in *Bazzi* required it to reverse the decision of the trial court and to remand the proceedings to the lower court for compliance with the innocent third-party doctrine set forth in *Bazzi*.[185] Plaintiffs set forth two possible alternative grounds for the court of appeals to find in their favor, without requiring the court to review the innocent third-party issue.[186] First, plaintiffs suggested that defendant Allstate had failed to assert fraudulent inducement as an affirmative defense and as such had waived their right to assert the defense.[187] However, the court indicated that a party's failure to sufficiently plead an affirmative defense in its first responsive pleading does not constitute a

176. *Id.*
177. *Id.*
178. *Id.* at 660, 892 N.W.2d at 437.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 661, 892 N.W.2d at 437.
184. *Id.*
185. *Id.* at 659, 892 N.W.2d at 436 (citing Bazzi v. Sentinel Ins. Co., 315 Mich. App. 763, 891 N.W.2d 13 (2016)).
186. *Id.* at 662, 892 N.W.2d at 438.
187. *Id.* at 663, 892 N.W.2d at 438.

waiver of the affirmative defense.[188] The court of appeals noted that even if Allstate had failed to specifically plead fraudulent inducement, it would be entitled to move to amend its pleading to add an affirmative defense.[189] Plaintiffs also argued that defendant was equitably estopped from rescinding the subject policy of insurance where plaintiffs had relied on their initial representations that the vehicle was insured.[190] However, the court of appeals noted that plaintiffs could not demonstrate that they had been prejudiced by defendant's decision to rescind the policy and as such, could not establish equitable estoppel.[191] The Michigan Court of Appeals expressly indicated that it was in complete agreement with the dissent from *Bazzi* and called for a special conflict panel.[192]

After a poll of the appellate judges, pursuant to MCR 7.215(J)(3)(a), the court declined to convene a special conflict panel. Thus, the outcome of the *Southeast Michigan Surgical Hospital* case was held in abeyance pending the outcome of *Bazzi*.

C. Fraud as to Innocent Third Parties

The Michigan Court of Appeals *in Bazzi*[193] confirmed that an insurer retained the ability to rescind a no-fault policy based upon fraud in the application process and is not obligated to pay benefits, including to a third-party innocent of the fraud.[194] The plaintiff, Ali Bazzi, presented a personal injury protection claim to Sentinel Insurance Company under a commercial automobile policy.[195] At the time of the accident, plaintiff was operating a vehicle owned by his mother, Hala Bazzi.[196] The vehicle was insured under a commercial automobile policy issued to Mimo Investments, LLC.[197] Sentinel Insurance Company maintained that Hala Bazzi leased the involved vehicle for personal use and not for commercial use by Mimo Investments, LLC.[198] Sentinel asserted that fraud occurred when Hala Bazzi was not disclosed on the policy application as a regular driver of the insured vehicle.[199] Sentinel also

188. *Id.* at 663, 892 N.W.2d at 438–39.
189. *Id.* at 663, 892 N.W.2d at 439.
190. *Id.* at 665, 892 N.W.2d at 440.
191. *Id.*
192. *Id.* at 669, 892 N.W.2d at 442.
193. Bazzi v. Sentinel Ins. Co., 315 Mich. App. 763, 891 N.W.2d 13 (2016).
194. *Id.*
195. *Id* at 768, 891 N.W.2d at 14.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 769, 891 N.W.2d at 15.

asserted that Mimo Investments, LLC was essentially a shell corporation, without assets or employees, utilized for the purpose of defrauding Sentinel and to obtain a lower policy premium.[200] As a result, Sentinel asserted that the policy of insurance for the involved vehicle had been fraudulently procured and sought to rescind the policy.[201]

At the trial court level, Sentinel moved for summary disposition and asserted that the subject policy of insurance was rescinded due the material misrepresentations made in the application for insurance.[202] On Sentinel's motion for summary disposition, the trial court held that the "innocent third-party" doctrine[203] protected plaintiff's claims. The "innocent third-party doctrine" is a common law doctrine that previously prevented insurers from denying the claims of third-parties innocent of any fraud, even in the instance of rescission.[204] Initially, Sentinel's application for leave to appeal to the Michigan Court of Appeals was denied.[205] Subsequently, Sentinel sought leave to appeal in the Michigan Supreme Court, which remanded the instant case to the Michigan Court of Appeals.[206]

In its opinion, the Michigan Court of Appeals held that the opinion in *Titan Insurance Co. v. Hyten* [207] required it to find the innocent third-party rule does not apply to a claim for PIP benefits.[208] The court found that the "easily ascertainable rule" considered by the court in *Titan* was indistinguishable from the "innocent third-party" doctrine.[209] The opinion in *Bazzi* states that the "question is not whether PIP benefits are mandated by statute, but whether the statute [the No-Fault Act] prohibits the insurer from availing itself of the defense of fraud."[210] As such, the *Bazzi* court noted that the No-Fault Act does not restrict the fraud defense in the context of PIP benefits. The court confirmed that insurers are not obligated to pay benefits under a policy rescinded due to fraud, even to a third-party innocent of the fraud.[211] The court of appeals affirmed the ability of trial courts to grant summary disposition in cases where no question of material fact exists as to the issue of fraud.[212]

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200. *Id.* at 769, 891 N.W.2d at 14.
201. *Id.* at 769, 891 N.W.2d at 15.
202. *Id.*
203. *Id.*
204. *Id.* at 783, 891 N.W.2d at 23.
205. *Id.* at 769, 891 N.W.2d at 15.
206. *Id.*
207. Titan Ins. Co. v. Hyten, 491 Mich. App. 553, 817 N.W.2d 562 (2012).
208. *Bazzi*, 315 Mich. App. at 770, 891 N.W.2d at 15.
209. *Id.* at 783, 891 N.W.2d at 22–23.
210. *Id.* at 774, 891 N.W.2d at 17.
211. *Id.* at 781–82, 891 N.W.2d at 21–22.
212. *Id.* at 780–81, 891 N.W.2d at 21.

D. The Innocent Third-Party Rule Following Bazzi

In *State Farm Mutual Automobile Insurance Co. v. Michigan Municipal Risk Management Authority*,[213] the Michigan Court of Appeals considered the right of third-party defendant QBE to claim fraud as a defense to an insurance contract in light of developments to the innocent third-party rule following the outcome of *Bazzi*.[214] This appeal is the result of a priority dispute between State Farm Mutual Insurance Company and the Michigan Municipal Risk Management Authority stemming from a police chase resulting in a motor vehicle versus motorcycle accident.[215] State Farm, the insurer of the motorcyclist's personal vehicle, paid his no-fault PIP benefits.[216] State Farm then filed a claim for reimbursement against the Michigan Municipal Risk Management Authority, the insurer of the involved police vehicle and QBE, the insurer of Whitney Gray, the insurer of the titled registered owner of the Grand Prix operated by William Johnson at the time of the accident.[217] Subsequently, QBE filed a third-party complaint against State Farm asserting that it was not obligated to reimburse any of the PIP benefits paid because it was entitled to rescind the QBE policy of insurance issued to Gray as a result of fraud.[218] QBE asserted that Gray had committed fraud in her application for insurance benefits when she represented that the insured vehicle was registered to her, when it was in fact registered to her mother.[219] QBE asserts that had Gray truthfully disclosed on the insurance application that her mother was the owner of the insured vehicle, they would not have issued the policy.[220] The trial court denied QBE's motion for summary disposition asserting that it would not be entitled to rescind the insurance policy at issue.[221]

Concurrently, State Farm filed a motion for summary disposition asserting that MMRMA was in priority for reimbursement of PIP benefits paid to the motorcyclist.[222] MMRMA argued that a question of material fact existed as to whether the police vehicle was actually

213. State Farm Mut. Auto. Ins. Co. v. Mich. Mun. Risk Mgmt. Auth., 317 Mich. App. 97, 892 N.W.2d 451 (2016).

214. *Id.*

215. State Farm Mut. Auto. Ins. Co. v. Mich. Mun. Risk Mgmt. Auth., No. 319709, 2015 WL 728652, at *1 (Mich. Ct. App. Feb. 19, 2015), *judgement vacated*, 498 Mich. 478, 868 N.W.2d 898 (2015) (mem.).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at *3.

220. *Id.*

221. *Id.*

222. *Id.* at *2.

involved in the subject accident.[223] The trial court also denied State Farm's motion for summary disposition on the basis that the question of whether the police vehicle was involved in the subject accident was a question for the jury.[224] As a result, State Farm and QBE filed applications for leave to appeal to the Michigan Court of Appeals.[225]

The court of appeals considered the issues presented by State Farm's application for leave in light of the decision in *Turner v. Auto Club Insurance Ass'n*.[226] In light of *Turner*, the court of appeals reversed the trial court's denial of State Farm's motion for summary disposition.[227] As to QBE's application for leave to appeal the court noted that, in this case, the motorcyclist's entitlement to PIP benefits is statutory in nature (as opposed to contractual).[228] The court of appeals affirmed that the innocent third-party rule as articulated under *Titan* involved only contractually mandated benefits as opposed to statutorily mandated benefits.[229] The court of appeals affirmed the trial court's denial of QBE's motion for summary disposition and affirmed the trial court's rationale that QBE would not be entitled to rescind.[230] However, subsequently the Michigan Supreme Court vacated the opinion of the court of appeals as to QBE's appeal and remanded the issue to the court of appeals for reconsideration in light of *Bazzi*.[231] The supreme court directed that the court of appeals reconsideration should be held in abeyance pending its decision in *Bazzi*.[232] On remand, the court of appeals held that the innocent third party rule did not survive *Bazzi* and that the trial court erred in denying QBE's motion for summary disposition.[233]

In *Frost v. Progressive Michigan Insurance Co.*,[234] the court of appeals initially determined that Progressive was entitled to rescind the subject policy, even though the policyholder's daughter was the party

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223. *Id.*

224. *Id.*

225. *Id.* at *3.

226. *Id.* at *5 (citing Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 528 N.W.2d 681 (1995)).

227. *Id.*

228. *Id.* at *7.

229. *Id.*

230. *Id.*

231. State Farm Mut. Auto. Ins. Co. v. Michigan Mun. Risk Mgmt. Auth., 498 Mich. 870, 868 N.W.2d 451 (2015).

232. *Id.*

233. State Farm Mut. Auto. Ins. Co. v. Michigan Mun. Risk Mgmt. Auth., 317 Mich. App. 97, 103, 892 N.W.2d 451, 454–55 (2016).

234. Frost v. Progressive Mich. Ins. Co., No. 316157, 2014 WL 4723810 (Mich. Ct. App. Sept. 23, 2014), *judgment vacated*, 497 Mich. 90, 860 N.W.2d 636 (2015) (mem.).

bringing a claim, due to the elimination of the "innocent third party rule" in *Titan*.[235] However, the supreme court vacated that opinion for reconsideration in light of *Bazzi*.[236] On remand, the court of appeals reviewed its prior decision and determined that it was consistent with the ruling of *Bazzi*.[237] It reiterated that Progressive need only establish the proper grounds for rescission, regardless of the fact that an "innocent" party was bringing the claim rather than the policyholder who made a misrepresentation.[238] Ultimately, since the policyholder had made a policy application misrepresentation Progressive could demonstrate that misrepresentation was material, the policy could be rescinded and the claimant's claim could be dismissed.[239]

E. Social Security Income and Survivor's Loss Under the No-Fault Act

The court of appeals in *Scugoza v. Metro Direct Property and Casualty Insurance Co.*[240] considered the reach of survivors' loss benefits under the No-Fault Act.[241] The No-Fault Act provides that survivors' loss benefits are payable for a loss of "contributions of tangible things of economic value."[242] The court of appeals determined that the plain language of the statute necessarily included social security income as a "thing[s] of economic value."[243] Plaintiff's husband, Nicholas Scugoza, died as a result of injuries sustained in a motor vehicle accident.[244] At the time of the decedent's death, he was entitled to monthly social security income benefits.[245] Plaintiff presented a claim to her husband's insurer for survivors' loss benefits under the No-Fault Act.[246] The insurer issued payment for survivor's loss benefits but did not include social security benefits in those payments. Ultimately, plaintiff filed suit demanding that the amount of social security income her husband was receiving be included in the amount of survivors' loss benefits payable to her as a "tangible thing of economic value."[247] The

235. *Id.*
236. Frost v. Progressive Mich. Ins. Co., 487 Mich. 980, 860 N.W.2d 636 (2015).
237. *Frost v. Progressive Mich. Ins. Co.*, 2014 WL 4723810, at *2.
238. *Id.* at *4.
239. *Id.*
240. Scugoza v. Metro Direct Prop. & Cas. Ins. Co., 316 Mich. App. 218, 891 N.W.2d 274 (2016).
241. *Id.*
242. MICH. COMP. LAWS ANN. § 500.3108(1) (West 2016).
243. *Scugoza*, 316 Mich App. at 220, 891 N.W.2d at 275.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 220–21, 891 N.W.2d at 275.

trial court opined that social security benefits were necessarily included in survivors' loss benefits pursuant to the plain language of the No-Fault Act.[248] Subsequently, the defendant insurer appealed to the court of appeals.[249]

On appeal, plaintiff argued that social security income qualified as a "tangible thing of economic value" under the Act, just as pension benefits would. [250] Ultimately, the court of appeals opted for a plain language approach to the narrow issue presented.[251] The court considered the dictionary definition of tangible.[252] The tangible requirement of the statute simply requires that the contribution's value be capable of appraisal.[253] To determine the meaning of "economic value", the court of appeals consulted Black's Law Dictionary.[254] Ultimately finding that "the phrase 'tangible things of economic value' refers to something that is capable of being valued or having its worth ascertained."[255] The court cited to the court's opinion in *Jarosz v. Detroit Automobile Inter-Insurance Exchange* for the proposition that social security income constitutes income, although income not received from employment.[256] The court of appeals also considered the interpretation of survivors' loss statute in *Miller v. State Farm Mutual Automobile Insurance Co.* and found that social security income is to be included in the computation of survivors' loss benefits.[257] The *Miller* court rejected the argument that "tangible things of economic value" should not be limited to wage and salary.[258]

Defendant presented a legislative history argument and the court of appeals readily cited to the supreme court's "distaste for legislative history."[259] Defendant also asserted that social security income should not be included in the computation of survivors' loss benefits because it is not income attributable to employment.[260] The court of appeals plain

248. *Id.* at 221, 891 N.W.2d at 275.
249. *Id.* at 220, 891 N.W.2d at 275.
250. *Id.* at 221, 891 N.W.2d at 275.
251. *Id.* at 223, 891 N.W.2d at 276.
252. *Id.* at 223–24, 891 N.W.2d at 277 (quoting *Tangible* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003)).
253. *Scugoza*, 316 Mich App. at 223–34, 891 N.W.2d at 277.
254. *Id.* (quoting *Economic Value*, BLACK'S LAW DICTIONARY (10th ed. 2014)).
255. *Id.* at 224, 891 N.W.2d at 277.
256. *Id.* (citing Jarosz v. Detroit Auto. Inter-Ins. Exch., 418 Mich. 565, 585, 345 N.W.2d 563 (1984)).
257. *Id.* (citing Miller v. State Farm Mut. Auto. Ins. Co., 410 Mich. 538, 302 N.W.2d 537 (1981)).
258. *Id.*
259. *Id.* at 227, 891 N.W.2d at 279.
260. *Id.* at 228, 891 N.W.2d at 279.

language analysis found no support for defendant's argument in then language of the act.[261] The court of appeals specifically declined to opine as to plaintiff's argument that social security income constitutes the equivalent of benefits under a pension.[262]

F. Derivative Claims When an Insured's Claim is Barred

In *Dawoud v. State Farm Mutual Insurance Co.*,[263] the court of appeals considered the effect on derivative claims where the insured's claim has been barred.[264] Here, the underlying plaintiffs were involved in an automobile accident and sought coverage through the Michigan Automobile Insurance Placement Facility.[265] State Farm was assigned the claim and ultimately the plaintiffs filed suit against State Farm.[266] Treatment facilities, Grace Transportation Inc. and Utica Physical Therapy, provided services to the plaintiffs and intervened in the suit.[267] Plaintiff's claims were ultimately dismissed with prejudice for their repeated failure to comply with discovery orders.[268] Subsequently, State Farm filed for summary disposition asserting that the dismissal of the plaintiffs' claims constituted an adjudication on the merits that would bar the derivative claims of intervening plaintiffs from proceeding.[269] In response, the providers argued that because Michigan law allowed providers to bring an independent cause of action, their claims should be permitted to proceed.[270] The trial court granted State Farm summary disposition and the service providers appealed to the Michigan Court of Appeals.[271]

The issue presented on appeal was whether a provider's claim could continue where the underlying claimant's claims had been dismissed for discovery violations (including the failure to attend depositions), as opposed to a substantive dismissal based on the statute or policy.[272] The parties agreed that, had the claims of the injured parties failed on the merits, the providers would have no claim due to the derivative nature of

261. *Id.*
262. *Id.* at 230, 891 N.W.2d at 280.
263. Dawoud v. State Farm Mut. Ins. Co., 317 Mich. App. 517, 895 N.W.2d 188 (2016).
264. *Id.*
265. *Id.* at 519, 895 N.W.2d at 189.
266. *Id.*
267. *Id.*
268. *Id.* at 519–20, 895 N.W.2d at 189.
269. *Id.* at 520, 895 N.W.2d at 189; *see also* MICH. CT. R. 2.504.
270. *Dawoud,* 317 Mich. App. at 520, 895 N.W.2d at 189.
271. *Id.*
272. *Id.*

their claims.[273] The providers relied upon MCLA section 500.3112 and the holding of the *Wyoming Chiropractic Health Clinic v. Auto-Owners Insurance Co.* case for the proposition that their claims should survive.[274] The court of appeals readily distinguished the statute and issue presented in *Wyoming Chiropractic Health Clinic*, from the issue presented in the instant case.[275] In its analysis, the court of appeals considered the court rule permitting "an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party."[276] In conjunction, the court considered MCR 2.504(B)(3) to understand the effect of an involuntary dismissal.[277] The court of appeals ultimately affirmed that the dismissal of plaintiff's claims was an adjudication on the merits under the court rules and that where an insured's claim is barred on the merits, any derivative claims would also fail.[278] The court of appeals affirmed the trial court's grant of State Farm's motion for summary disposition. [279]

G. Unlawfully Taken Vehicles and Entitlement to PIP Benefits

The court of appeals considered whether a claimant's recovery of first-party PIP benefits is barred when using an unlawfully taken vehicle in *Monaco v. Home Owners Insurance Co.*[280] Plaintiff's fifteen-year-old daughter was injured in an automobile accident while driving a motor vehicle unaccompanied by a licensed adult over the age of twenty-one, as required by her learners' permit.[281] Plaintiff filed a claim for PIP benefits through Home Owners Insurance Company but admitted through the course of the claims investigation process that her daughter lacked permission to operate the vehicle when the accident occurred.[282] The insurer subsequently denied coverage under the statute.[283] Plaintiff filed suit and medical providers that provided care to plaintiff's daughter intervened in the action.[284] The insurer filed for summary disposition

273. *Id.* at 521, 895 N.W.2d at 190.
274. *Id.* (citing Wyo. Chiropractic Health Clinic v. Auto-Owners Ins. Co., 308 Mich. App. 389, 864 N.W.2d 598 (2014)).
275. *Id.* at 523, 895 N.W.2d at 191.
276. *Id.* at 523–24, 895 N.W.2d at 191 (quoting MICH. CT. R. 2.313(B)(2)(c)).
277. *Id.* at 524, 895 N.W.2d at 191–92.
278. *Id.*
279. *Id.* at 524–25, 895 N.W.2d at 191–92.
280. Monaco v. Home Owners Ins. Co., 317 Mich. App. 738, 896 N.W.2d 32 (2016).
281. *Id.* at 741–42, 896 N.W.2d at 34.
282. *Id.* at 742, 896 N.W.2d at 34.
283. *Id.*; MICH. COMP. LAWS ANN. § 500.3113(a) (West 2016).
284. *Monaco*, 317 Mich. App. at 738, 896 N.W.2d at 32

asserting that plaintiff had admitted that her daughter did not have permission to operate the vehicle at the time of the accident (despite subsequent deposition testimony by plaintiff asserting that she did give her daughter permission to operate the vehicle).[285] The defendant insurer also asserted that the vehicle was taken unlawfully even if plaintiff gave her daughter permission to use the vehicle because of the learners' permit restricted her daughter's ability to drive when unaccompanied by an adult with a driver's license.[286] In response, plaintiff cited to contradictory deposition testimony asserting that her daughter in fact had permission to operate the vehicle and that defendant's argument improperly equated unlawful use with unlawful taking.[287] The trial court denied defendant's motion for summary disposition finding that questions of fact and noted that plaintiff's argument regarding the distinction between unlawful taking and unlawful use was supported by statute.[288] The case proceeded to a trial and the jury found for plaintiff as to the issue of liability and defendant appealed.[289]

The court of appeals noted that its analysis of defendant's appellate arguments involved issues of statutory construction.[290] The court of appeals found no question of fact as to the driver's age at the time of the accident and, because of the limited nature of her learners' permit, it was "unlawful" for her to drive without a licensed adult.[291] The issue on appeal was whether the fact that the vehicle was unlawfully taken acted as a bar to the recovery of PIP benefits.[292] The court of appeal reviewed the supreme court's opinion in *Spectrum Health Hospital v. Farm Bureau Mutual Insurance Co. of Michigan*.[293] The court of appeals noted that the owner of a vehicle could never be liable for an unlawful taking because they would always be permitted to take their own vehicle, regardless of authorization.[294] The court of appeals ultimately held that the issue of whether a vehicle was unlawfully used or operated was a separate concern from whether a vehicle had been unlawfully taken.[295]

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285. *Id.* at 742–43, 896 N.W.2d at 34–35.

286. *Id.*

287. *Id.* at 743, 896 N.W.2d at 35.

288. *Id.*; *see also* MICH. COMP. LAWS ANN. § 500. 3113(a) (West 2016).

289. *Monaco*, 317 Mich. App. at 744, 896 N.W.2d at 35–36.

290. *Id.* at 746, 896 N.W.2d at 36.

291. *Id.* at 746–47, 896 N.W.2d at 36–37; *see also* MICH. COMP. LAWS ANN. § 257.310e(4) (West Supp. 2018).

292. *Monaco*, 317 Mich. App. at 746–47, 896 N.W.2d at 36–37; *see also* MICH. COMP. LAWS ANN. § 500.3113(a) (West 2016).

293. *Monaco*, 317 Mich. App. at 747, 896 N.W.2d at 37 (citing Spectrum Health Hosp. v. Farm Bureau Mut. Ins. Co. of Mich., 492 Mich. 503, 516, 821 N.W.2d 117 (2012)).

294. *Monaco*, 317 Mich. App. at 748, 896 N.W.2d at 37.

295. *Id.* at 749, 896 N.W.2d at 38.

The court noted that because, Plaintiff's daughter did not take possession of the vehicle contrary to law, the only violation occurred where plaintiff gave her daughter permission to operate the vehicle.[296] The opinion notes that taking and using are not interchangeable terms under the No-Fault Act.[297] The court of appeals held that the trial court did not err in denying summary disposition to defendant.[298]

H. Determining when a Treating Physician is Entitled to an Expert Fee

In *Spine Specialists of Michigan, P.C. v. State Farm Mutual Automobile Insurance Co.*,[299] the court of appeals clarified that a medical doctor who is an owner or employee of a medical provider claiming outstanding medical benefits is not entitled to be paid an expert witness fee for his deposition testimony, since he is essentially a fact witness for his facility's own claim.[300]

Spine Specialists sought overdue bills from State Farm for care provided to the underlying patient, yet when State Farm sought the deposition of its owner and main physician, Dr. Louis Radden, who demanded $5,000 as an expert fee for his deposition.[301] The trial court granted Spine Specialists' motion to enforce the fee, but did reduce the fee to $1,000 for the first ninety minutes and $250 for each additional fifteen minutes, reasoning that Dr. Radden may have a disincentive to treat patients from motor vehicle accidents if he would not receive compensation down the line for his supportive testimony.[302] In making this ruling, the trial court apparently ignored the fact that Spine Specialists filed two separate witness lists where Dr. Radden was not specifically identified as a medical expert.[303]

State Farm appealed the ruling, and the court of appeals reversed.[304] Dr. Radden could not charge a fee for testifying on behalf of Spine Specialists because he was an employee of the clinic.[305] Even though he might have offered an expert opinion regarding the patient's injuries and treatment, he was functioning as a fact witness in support of his facility's

296. *Id.* at 750, 896 N.W.2d at 38.
297. *Id.* at 749, 896 N.W.2d at 38; *see also* MICH. COMP. LAWS ANN. 500.3113(a) (West 2016).
298. *Monaco*, 317 Mich. App. at 751, 896 N.W.2d at 39.
299. Spine Specialists of Mich., P.C. v. State Farm Mut. Auto. Ins. Co., 317 Mich. App. 497, 894 N.W.2d 749 (2016).
300. *Id.*
301. *Id.* at 499, 894 N.W.2d at 750.
302. *Id.*
303. *Id.* at 500, 894 N.W.2d at 750.
304. *Id.* at 499, 894 N.W.2d at 750.
305. *Id.* at 502, 894 N.W.2d at 752.

claim, not an independent expert.[306] The court noted that a witness is not generally entitled to payment for their deposition, since such a rule would place obstacles in the pursuit of the facts of the case and in preparation for trial.[307] The exception to this rule is an expert who independently develops an opinion in anticipation for trial.[308] For this work in assisting the parties and the jury in their understanding of the case, the expert may receive a reasonable fee.[309] The court noted that this exception could not apply to Dr. Radden, who had acquired facts about the patient during his treatment of that patient, not in anticipation of trial.[310] The Michigan Court Rules could not be considered as awarding an expert fee to a party effectively testifying on his or her own behalf.[311] Since Dr. Radden had a financial stake in the outcome of the trial, as owner and employee of the provider suing State Farm, he could not be given an expert fee for his testimony.[312]

I. Determining the Actual "but for" Casual Relationship

In an unpublished opinion, *Conners v. State Farm Mutual Automobile Insurance Co.*,[313] the court of appeals addressed a situation in which a pedestrian was struck by a motor vehicle, immediately treated at the hospital for a right hip fracture, and received payment from State Farm for the immediate treatment.[314] After the initial hospital stay, however, the pedestrian continued to treat for other injuries, which State Farm argued did not arise out of the pedestrian-versus-motor vehicle accident.[315] The trial court agreed and granted summary disposition in favor of State Farm, but the court of appeals disagreed, finding that there was a question of fact as to whether the pedestrian's claimed "nonunion" of the fracture was a separate injury caused by the accident or caused by his own noncompliance with treatment recommendations.[316]

The court of appeals first noted that a revision surgery to correct the "nonunion" should be considered an accidental bodily injury arising out of a motor vehicle accident under MCLA section 500.3105(1) as it was

306. *Id.*
307. *Id.* at 501, 894 N.W.2d at 751.
308. *Id.*
309. *Id.*
310. *Id.* at 502, 894 N.W.2d at 751–52.
311. *Id.* at 504, 894 N.W.2d at 752.
312. *Id.* at 505, 894 N.W.2d at 753.
313. Conners v. State Farm Mut. Auto Ins. Co., No. 326465, 2016 WL 5887794 (Mich. Ct. App. Oct. 6, 2016).
314. *Id.* at *1.
315. *Id.*
316. *Id.* at *4.

essentially continuing treatment of the initial fracture, which the pedestrian sustained in the original accident.[317] The court of appeals recognized that, even if this was not the case, and the nonunion and surgery was treated as a separate, subsequent injury, the pedestrian still had presented sufficient evidence to create a question of fact.[318] While State Farm was correct in that there was evidence that the pedestrian may have exacerbated or created the nonunion by failing to follow his doctor's orders, there was no burden on the pedestrian to prove that the motor vehicle accident was the only cause of the claimed injury.[319] He need only prove that the accident was the "but for" cause.[320] Viewing the evidence in the light most favorable to the pedestrian, the accident was the "but for" cause of the nonunion, for, if the accident had not happened, there was no possibility that the nonunion would have happened, since his bone would have still been in one piece and not fractured in the first place.[321] According to the court, this was sufficient to defeat summary disposition, as it was reasonable that "the 'first injury'—the fracture—caused the 'second injury'—the nonunion—in a direct way."[322]

The court held similarly as to the pedestrian's claims for an altered mental state and fever sustained after the revision surgery.[323] The pedestrian conceded that these injuries were caused by drugs provided before and after the surgery, which State Farm argued meant that they could not have been caused by the accident itself.[324] However, the court again stated that the pedestrian was not required to establish the accident as the "sole" cause.[325] Again, since the revision surgery was required by the "first injury," the causal chain remained between the accident and the injuries of fever of altered mental state in a second surgery.[326] However, the court found that, as to a third claimed injury—a second fracture and subsequent foot pain—was not causally linked to the pedestrian accident.[327] There was no evidence that these injuries would not have been sustained "but for" the motor vehicle accident.[328]

317. *Id.* at *2.
318. *Id.* at *4.
319. *Id.* at *3.
320. *Id.*
321. *Id.* at *5.
322. *Id.*
323. *Id.* at *7–8.
324. *Id.* at *7.
325. *Id.*
326. *Id.* at *5.
327. *Id.* at *9.
328. *Id.*

J. Domicile and Determining "Resident Relative" Status

An unpublished opinion of the court of appeals involved a dispute over the claimant Curtis Stanley's domicile and which insurance company he would be entitled to claim benefits from as a "resident relative."[329] Conflicting evidence existed regarding whether, at the time of the accident, he lived with his wife and children in Canton or with his parents in Ypsilanti.[330] Stanley and his wife had been separated for nearly a year.[331] He had been living with his parents in Ypsilanti while his children, who were also injured in the subject motor vehicle accident, remained in Canton with his estranged wife.[332] If he was found to still be "domiciled" in Canton with his family, then Stanley's insurer, Westfield, would be the proper priority insurer for his children under MCLA section 500.3114(1), since they would qualify as resident relatives.[333] Westfield therefore argued that Stanley had to be considered "domiciled" with his parents, since he had been living with them for nearly a year.[334] However, the court of appeals drew a distinction between "residence" and actual "domicile" and determined that Stanley was only residing with his parents, not domiciled, since his intent was to reconcile with his wife and remain married to her.[335] He had testified as to his intent to return home, and that he and his wife had gone through periods of separation in the past and understood these periods to be temporary only.[336] Given Stanley's claimed intent to return home after a temporary separation, Westfield was the insurer responsible for payment of PIP benefits to his children because they and their father remained "domiciled" in the same household.[337]

Notably, the court of appeals ruled similarly in a second opinion involving domicile, holding that a claimant had not established a new domicile when he moved out of his grandparents' home even when he testified he did not intend to return there.[338] The claimant was essentially "couch surfing" at various friends' homes and the auto shop where he

329. Westfield Ins. Co. v. Progressive Mich. Ins. Co., No. 329822, 2016 WL 7233336 (Mich. Ct. App. Dec. 13, 2016).
330. *Id.* at *2.
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at *3.
337. *Id.*
338. Farm Bureau Gen. Ins. Co. of Mich. v. Progressive Mich. Ins. Co., No. 331215, 2017 WL 1495622, at *3 (Mich. Ct. App. Apr. 25, 2017).

worked.[339] Even if he did not intend to return to his grandparents' home, he had not shown any intent to establish a residency at any other home in the four months since he left their home.[340] Since there was not a new domicile, his grandparents' home essentially remained his domicile, and their insurer, Progressive, was obligated to pay him benefits.[341] Essentially, an insurer must prove that the claimant has established a new domicile to avoid liability on the basis that the claimant is no longer a resident relative of their insured.[342]

K. The "Course of Business" Exception

In a case addressing a somewhat less-explored area of insurance law—fire loss policies and the definition of a "business"—the court of appeals looked at a situation involving a fire loss occurring on April 15, 2014, in a barn owned by Williams Farms, LLC.[343] A farm employee, Ryan Keath, regularly used the barn to provide maintenance and repairs to farm vehicles, as well as the vehicles of family members.[344] In fact, Keath was using the barn and its equipment to repair his sister's vehicle when the fire began.[345] Plaintiff Hastings, the insurer of the farm property, paid nearly $700,000 in insurance proceeds to cover the significant loss.[346] However, it then filed a claim for the same amount against Grange, the no-fault insurer of the vehicle involved in the fire and being repaired by Keath.[347] Hastings filed suit when Grange denied subrogation.[348]

In its motion for summary disposition, Grange argued that, under MCLA section 500.3131(1), it was relieved from liability, as that statute provides that:

> Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor

339. *Id.* at *2.
340. *Id.*
341. *Id.*
342. *Id.* at *2–3.
343. Hastings Mut. Ins. Co. v. Grange Ins. Co. of Mich., 319 Mich. App. 579, 903 N.W.2d 400 (2017).
344. *Id.* at 582, 903 N.W.2d at 401.
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*

> vehicle subject to the provisions of this section and sections 3123, 3125, and 3127. However, accidental damage to tangible property does not include accidental damage to tangible property, other than the insured motor vehicle, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles.[349]

Grange therefore argued that Williams Farms, via Keath's act of repairing cars in the barn, sustained its loss within the course of a business of repairing, servicing, or maintaining motor vehicles.[350] However, the trial court ruled in favor of Hastings, finding that Williams Farms was simply a farm, not an auto-repair shop.[351]

The court of appeals first noted that a business "encompasses a person engaged in a service, activity, or enterprise for benefit, gain, advantage, or livelihood."[352] The court then defined "course of business" as "the normal routine in managing a trade or business."[353] Because of these definitions, the court determined that MCLA section 500.3121(1) and its "course of business exception" is meant to exclude property damage when the purpose—the essence—of the business in question is to maintain and repair motor vehicles, and that it is not intended to encompass any business that may peripherally participate in the servicing of vehicles.[354] In applying this intent of the statute to the facts at hand, the court further determined that, while Williams Farms undoubtedly benefitted from having Keath do any farm vehicle repairs in-house, rather than send them to a shop, its "enterprise for benefit, gain, advantage, or livelihood" was farming, not the servicing of vehicles.[355] As a result, the exception cited by Grange could not apply.[356] Specifically, "had the Legislature intended MCL 500.3121(1) to exclude repairing, servicing, or maintaining motor vehicles in any business environment, the Legislature could have chosen different language."[357] Instead, it specifically placed "the prepositional phrase" of "repairing, servicing, or otherwise maintaining motor vehicles" so that it modified

349. MICH. COMP. LAWS ANN. § 500.3121 (West 2016).
350. Hastings, 310 Mich. App. at 583, 903 N.W.2d at 401.
351. *Id.* at 582, 903 N.W.2d at 401.
352. *Id.* at 585, 903 N.W.2d at 403 (citing Terrien v. Zwit, 467 Mich. 56, 649 N.W.2d 602 (2002)).
353. *Id.*
354. *Id.*
355. *Id.* at 585, 903 N.W.2d at 403.
356. *Id.*
357. *Id.*

"a business."[358] Since that exception therefore only applied to vehicle-repair businesses, and since it was clear that Williams Farms was not a vehicle-repair business, Grange was liable for the property damage.[359]

Hastings had moved for attorney fees, arguing that Grange's denial in the first place had been unreasonable, in accordance with MCLA section 500.3148(1).[360] However, the court of appeals found that, Grange did not act unreasonably, even if their basis for denying the claim was ultimately wrong.[361] Given the "dearth of pertinent case law construing MCL 500.3121(1) and factual circumstances of the case," there was a legitimate question as to the claim, and Grange could not be punished for potentially interpreting that question incorrectly.[362]

IV. CONCLUSION

The *Survey* period brought forward significant changes to the rights of medical and service providers and reaffirmed the rights of insurers to defend against fraudulent claims. The plain language of the No-Fault Act should be at the forefront of practitioners minds when constructing arguments and analyzing the rights of insurers and claimants alike. Despite many significant changes, uncertainties were created by the rulings during the *Survey* period and additional direction and clarification will be sought from the Michigan Supreme Court and Michigan Court of Appeals in the future. The far-reaching implications of the changes instituted during this *Survey* period will likely bring forward additional significant changes to insurance law and no-fault litigation in particular.

358. *Id.*
359. *Id.*
360. *Id.* at 586–87, 903 N.W.2d at 403–04.
361. *Id.*
362. *Id.* at 588, 903 N.W.2d at 404 (citing Attard v. Citizens Ins. Co. of Am., 237 Mich. App. 311, 602 N.W.2d 633 (1999) (holding that a delay to pay benefits is not unreasonable if it is based on a legitimate question of statutory law, constitutional law, or factual uncertainty)).