MICHIGAN NO-FAULT SURVEY

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I. INTRODUCTION

The significant tide of change has continued in light of the significant Supreme Court decision in *Covenant Medical Center v. State Farm Mut. Automobile Ins. Co.* Specifically, during the *Survey* period, the Michigan Supreme Court and Michigan Court of Appeals analyzed some of the more nuanced questions raised in the wake of *Covenant*, including the recovery of attorney fees and the relationship between the claims of an injured party and their medical providers.

Fraud continues to be another area of focus in No-Fault litigation. Rescission and misrepresentations made during the course of a claim for PIP benefits were considered in addition to questions regarding the specificity of affirmative defenses. Cases regarding fraud continue to be of interest to practitioners and the Michigan Supreme Court and Michigan Court of Appeals alike. The *Survey* period also brought about refinement of notice issues, particularly with regard to what constitutes notice of an injury for purposes of the one-year back rule. As reform to the nofault statute continues to loom, the judiciary has taken to addressing questions left open under the No-Fault Act.

II. DECISIONS OF THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN SUPREME COURT

A. Fraud and MCLA § 500.3173(a)(2)

1. Acceptance of Rescission

In *Enriquez v. Rios-Carranza*, the Michigan Court of Appeals reversed a Wayne County Circuit Court decision and found that an

insurance policy was legally rescinded and that the insured accepted the rescission.[1]

Following a May 2015 motor vehicle accident, plaintiffs, an Everest National Insurance Company policyholder and her passenger, along with three intervening medical providers, filed suit against the insurance company.[2] Deposition testimony revealed that the insured lived with her boyfriend and 15-year-old daughter at the time she purchased her insurance policy[3] but failed to disclose her boyfriend and 15-year-old daughter as residents of her household on the policy application.[4] The application required the disclosure of this information.[5] Had the insured listed her teenage daughter, the premium would have increased substantially.[6] Everest refunded the policy premium to the insured plaintiff, and she then cashed the premium refund check.[7]

Subsequently, Everest filed a motion for summary disposition in the trial court, asserting that the policy had been rescinded and that such a rescission precluded plaintiffs and their medical providers from recovering benefits.[8] The trial court denied Everest's motion for summary disposition because the insured plaintiff could not speak English and had "no way . . . to truthfully answer the question" related to disclosure of household members.[9]

The Michigan Court of Appeals reversed the trial court's decision.[10] The court reasoned that the plaintiff's cashing of the premium refund check constituted an acceptance that no insurance coverage existed at the time of the accident.[11] The court noted that the language of the Everest policy application—making it "unacceptable" for an applicant to select "no" in response to the application query regarding whether all household members over the age of 14 had been identified—constituted a warning to applicants that listing all potential drivers was a prerequisite to coverage.[12] The Michigan Court of Appeals stated that the return of the policy premium to the insured plaintiff restored the status quo and

1. No. 336128, 2018 Mich. App. LEXIS 682 (Mich. Ct. App. Mar. 20, 2018) (per curiam).
2. *Id.* at *2.
3. *Id.* at *2–3.
4. *Id.* at *1–2.
5. *Id.*
6. *Id.* at *3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at *7.
11. *Id.* at *6–7.
12. *Id.* at *2.

confirmed the legal rescission of the policy.[13] The court's opinion also confirmed that the rescission of the policy precluded the claims of the plaintiff passenger and intervening medical providers.[14]

2. Shelton Expanded to Cover Employees Operating Employer-Furnished Vehicles

In *Marbly v. Robertson*, the injured plaintiff, Debra Marbly, was operating a vehicle furnished by her employer when she was involved in a rear-end accident.[15] As a result of the accident, Marbly alleged that she required assistance performing activities of daily living and that she agreed to pay her daughters for assisting with these activities.[16] She asserted these services as part of her claim for first-party Personal Injury Protection ("PIP") benefits.[17] The defendant insurer filed a motion for summary disposition pursuant to the fraud provision in its policy on the basis of surveillance footage obtained demonstrating Marbly performing many tasks she claimed to be unable to perform.[18] The trial court granted the defendant insurer's motion for summary disposition and dismissed plaintiff's claim along with the claims of intervening medical providers.[19] The intervening medical providers appealed, asserting that the trial court erred when it found the fraud provision of the policy to act as a complete bar to plaintiff's claims.[20]

In its analysis, the Michigan Court of Appeals considered its holding in *Shelton*,[21] finding that where a no-fault claim is asserted pursuant to statute, as opposed to a claim presented under a specific insurance policy, an exclusionary provision in a policy could not bar a statutory claimant's claim.[22] Under *Shelton*, the court of appeals limited its analysis of the issues presented in the instant case to whether Marbly's claim for PIP benefits was statutory or contractual in nature.[23] The court found that Marbly was entitled to PIP benefits from the defendant insurer pursuant to MCLA § 500.3114(2) or (3) or should claim benefits

13. *Id.* at *5–7.
14. *Id.* at *7 n.1.
15. No. 333826, 2018 Mich. App. LEXIS 103 (Mich. Ct. App. Jan. 16, 2018) (per curiam), *leave to appeal denied*, 502 Mich. 940, 915 N.W.2d 472 (2018).
16. *Id.* at *1–2.
17. *Id.*
18. *Id.* at *2.
19. *Id.*
20. *Id.*
21. Shelton v. Auto-Owners Ins. Co., 318 Mich. App. 648, 899 N.W.2d 744 (2017), *leave to appeal denied*, 501 Mich. 951, 904 N.W.2d 851 (2018).
22. *Marbly*, 2018 Mich. App. LEXIS 103, at *6.
23. *Id.* at *8.

pursuant to MCLA § 500.3114(4).[24] Here, the court of appeals found that, even if Marbly was entitled to benefits under MCLA § 500.3114(2) or (3) such that her claim would be contractual in nature and barred by the fraud provision in the policy, she would still be eligible to claim benefits under MCLA § 500.3114.[25] As Marbly would be entitled to claim benefits pursuant to statute, under *Shelton*, her claims could not be barred pursuant to the fraud provision in the policy.[26]

3. Pushing Back on Bahri

Though unpublished, the recent Michigan Court of Appeals decision in *Gonzalez v. Farm Bureau General Insurance Co.*, limited the availability of summary disposition on the basis of fraud.[27] Plaintiff, Rafael Gonzalez, was allegedly injured in a hit-and-run motor vehicle accident on November 2, 2014.[28] Gonzales filed a first-party personal injury protection claim against defendant, Farm Bureau, for the recovery of no-fault benefits.[29] Farm Bureau then filed a counterclaim seeking to void coverage on the basis of their allegation that Gonzalez had misrepresented his ability to work following the accident.[30] Farm Bureau's counterclaim was based on surveillance footage obtained in December 2014, which showed Gonzalez driving his tractor-trailer.[31] However, Gonzales admitted at his deposition that he returned to work in December 2014 to determine whether he was capable of returning to work full-time and realized he was not physically capable of returning to his job.[32] Gonzalez appealed asserting that the plaintiff did not violate the fraud provision in the defendant insurer's policy.[33]

Defendant based its position on the Michigan Court of Appeals decision in *Bahri v. IDS Property Casualty Insurance Co.*[34] In *Bahri*, the Michigan Court of Appeals held that a general fraud exclusion in an insurance policy could bar a claimant's claim for replacement service

24. *Id.* at *12.
25. *Id.*
26. *Id.*
27. No. 331956, 2018 Mich. App. LEXIS 11, at *12 (Mich. Ct. App. Jan. 4, 2018) (per curiam).
28. *Id.* at *1–2.
29. *Id.* at *2.
30. *Id.* at *2–3.
31. *Id.* at *3.
32. *Id.*
33. *Id.*
34. *Id.* at *8 (citing Bahri v. IDS Prop. Cas. Ins. Co., 308 Mich. App. 420, 864 N.W.2d 609 (2014).

benefits.[35] However, the *Gonzalez* court found the issues presented by plaintiff were readily distinguishable from those presented in *Bahri*.[36] The court of appeals found that the defendant insurer could not rely on Gonzalez's initial testimony that he had not returned to work, where he later admitted that he attempted to return to work in December, 2014.[37] The court of appeals also found that a genuine issue of material fact remained as to whether Gonzalez had misrepresented his ability to return to work.[38]

The Michigan Court of Appeals also considered the trial court's determination that Gonzalez had violated the fraud provision in the insurance policy when he submitted a wage loss form signed by an individual falsely identified as the chief Financial Officer (CFO) of plaintiff's employer.[39] In analyzing the deposition testimony of Gonzalez and the alleged CFO, the court of appeals found that a genuine issue of material fact existed.[40] The court also noted that the defendant insurer failed to establish that this misrepresentation regarding the individual purporting to be the CFO of plaintiff's company was material to the insurance loss.[41] The court of appeals reversed the decision of the trial court granting summary disposition in favor of the defendant insurer and remanded the case for proceedings consistent with its opinion.[42]

4. Innocent-Third Parties and Policy Fraud Exclusions

In *Meemic Insurance Co. v. Fortson*, the Michigan Court of Appeals found that a fraud exclusion in an insurance policy could not be used to void a claim where the person who committed the fraud was not an insured person under the policy.[43] In September, 2009, the defendants' son was injured in a motor vehicle accident.[44] The defendants presented a claim to the plaintiff insurer for attendant care benefits alleging that the defendants' son received twenty-four hours per day of attendant care seven days per week from 2009 until 2015.[45] In 2014, an investigation revealed that the allegedly injured individual had spent time in jail and

35. *Id.* (citing *Bahri*, 308 Mich. App. 420, 425, 864 N.W.2d 609, 612).
36. *Id.* at *9.
37. *Id.*
38. *Id.* at *10.
39. *Id.*
40. *Id.* at *11.
41. *Id.* at *11–12.
42. *Id.* at *16.
43. 324 Mich. App. 467, 922 N.W.2d 154 (2018).
44. *Id.* at 471, 922 N.W.2d at 157.
45. *Id.* at 472, 922 N.W.2d at 157.

had been admitted to an inpatient substance-abuse facility during the time frame for which attendant care services were claimed.[46] As a result, the insurer terminated benefits and filed suit against the defendants asserting that they "had fraudulently obtained payment for attendant care services."[47] The trial court granted summary disposition for the plaintiff insurer, and the defendants appealed.[48]

The court of appeals found that the trial court did not err when it determined that defendants had committed fraud in their submission of attendant care services based upon the facts identified during the investigation.[49] In its opinion, the court of appeals reasoned that the abrogation of the innocent-third party doctrine in *Bazzi v. Sentinel Insurance Co.* applies only to insurance policies rescinded as a result of fraud in the procurement of the policy.[50] The court found that, because there was a valid policy of insurance in effect when the defendants submitted their initial claim, *Bazzi* was not dispositive.[51]

Further, the court found that the fraud provision in an insurance policy becomes unenforceable after the policy expires.[52] The fraud provision becomes unenforceable because a policy no longer exists and, therefore, an "insured" person no longer exists.[53] Specifically, the court of appeals found the fraud provision of the policy invalid to the extent it conflicted with MCLA § 500.3114(1), which entitled the defendants' injured son to his statutory claim for benefits.[54]

5. Proof of Guaranteed Employment Required for Wage Loss Benefits

In *Hatfield v. Progressive Michigan Insurance Co.*, the Michigan Court of Appeals affirmed a grant of summary disposition in favor of the defendant, Progressive.[55] On February 9, 2014, the plaintiff, Hatfield, was involved in a motor vehicle accident.[56] Hatfield subsequently brought a claim against Progressive for wage loss benefits because the

46. *Id.*
47. *Id.*
48. *Id.* at 473, 922 N.W.2d at 157.
49. *Id.* at 473–74, 922 N.W.2d at 157–58.
50. *Id.* at 475–76, 922 N.W.2d at 158–59 (citing Bazzi v. Sentinel Ins. Co., 315 Mich. App. 763, 891 N.W.2d 13 (2013)).
51. *Id.* at 475–76, 922 N.W.2d at 158–59.
52. *Id.* at 477–79, 922 N.W.2d at 160–61.
53. *Id.*
54. *Id.* at 484, 922 N.W.2d at 163.
55. No. 341177, 2018 Mich. App. LEXIS 2936 (Mich. Ct. App. July 26, 2018) (per curiam).
56. *Id.* at *2.

injuries he sustained in the accident left him unable to start a new job at a painting company the day after the accident.[57] At his deposition, Hatfield testified that he would have made fifteen dollars per hour and worked forty hours per week at the new job.[58] In support of his wage loss claim, Hatfield submitted an employment verification form signed by the alleged owner of the painting company.[59] Progressive submitted testimony from the actual owner of the painting company that showed that the individual who signed the employment verification was not an owner of the painting company and that the plaintiff was never offered a job.[60] At trial, Progressive filed a motion for summary disposition arguing that uncontroverted evidence showed that plaintiff had not been offered a job before or after the accident and that his wage loss claim was, therefore, fraudulent.[61] The trial court granted the defendant's motion, and the plaintiff appealed.[62]

On appeal, the Michigan Court of Appeals found that a claimant must prove an actual guarantee of work to survive an insurer's motion for summary disposition.[63] Specifically, the court found the unsworn employment verification form insufficient to create a genuine issue of material fact.[64] The court's analysis focused on whether the plaintiff had demonstrated some guaranteed work.[65] Insurers will certainly take note of this case to defeat claims for wage loss benefits unsupported by sworn evidence.

6. No Differentiation between Michigan Assigned Claims Plan and Insurance Carriers with Respect to Fraud

In *Candler v. Farm Bureau Mutual Insurance*, the Michigan Court of Appeals held the trial court appropriately granted summary disposition against a plaintiff who knowingly submitted fraudulent calendars submitted in support of his claim because no reasonable jury could conclude that he was not aware of "submitting false information that was material to his claim for no-fault benefits."[66]

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57. *Id.*
58. *Id.* at *2.
59. *Id.* at *2–3.
60. *Id.* at *2–4.
61. *Id.* at *3.
62. *Id.*
63. *Id.* at *17–18.
64. *Id.* at *18.
65. *Id.* at *14–16.
66. 321 Mich. App. 772, 781–82, 910 N.W.2d 666, 671 (2017).

In *Candler*, a hit-and-run driver struck plaintiff, Kalvin Candler.[67] Because Candler did not have insurance at the time of the accident and the hit-and-run driver could not be identified, Candler's claim for PIP benefits was assigned to the Michigan Assigned Claims Plan (MACP) and then to the defendant, Farm Bureau.[68] Candler made a claim for replacement services and submitted replacement service calendars, purportedly signed by Candler's brother, for August, September, and October of 2015.[69] However, discovery revealed that Candler's brother stopped performing the replacement services in July 2015 when Candler moved into his girlfriend's house and the girlfriend began performing the replacement services.[70] Candler's counsel conceded that Candler had signed his brother's name to the replacement service calendars.[71] Farm Bureau filed a dispositive motion on the basis of the MACP's anti-fraud provision found in MCLA § 500.3173(a)(2).[72] The trial court denied Farm Bureau's motion, and Farm Bureau appealed.[73]

The anti-fraud provision of MCLA § 500.3173(a)(2) reads:

> (2) A person who presents or causes to be presented an oral or written statement...as part of or in support of a claim to the Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under MCL 500.4503 that is subject to the penalties imposed under MCL 500.4511. *A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.* [emphasis added.][74]

The court of appeals first addressed Candler's argument that MCLA § 500.3173(a)(2) only bars recovery of PIP benefits by claimants that submit fraudulent statements to the MACP, (formerly Michigan Automobile Insurance Placement Facility ("MAIPF")), rather than insurance carriers that are subsequently assigned the claims by the

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67. *Id.* at 775, 910 N.W.2d at 668.
68. *Id.*
69. *Id.* at 776, 910 N.W.2d at 668.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 778, 910 N.W.2d at 669; MICH. COMP. LAWS ANN. § 500.3173(a)(2) (West 2018).

MACP.[75] The court of appeals rejected this argument, finding that the statute does not require any particular recipient to have received the fraudulent statement as long as the fraudulent statement was used as part of or in support of a claim to the MACP.[76] The court of appeals further noted that, because the MACP's plan of operations explicitly states that servicing insurers, like Farm Bureau, act on behalf of the MACP, Candler's claim would be with the MACP not the servicing insurer, Farm Bureau.[77]

Next, the court found that no reasonable jury could conclude that, even with an alleged head injury, Candler did not know that he submitted false information material to his claim for PIP benefits—in this case, replacement services.[78] Candler's counsel conceded that Candler forged his brother's name on the calendars, despite having moved in with his girlfriend who supplied the replacement services that his brother previously performed.[79] Because there was no genuine issue of material fact that plaintiff's claim for benefits was supported by a fraudulent insurance act, the claim was "thereby ineligible for payment under the MACP," and summary disposition was appropriate.[80]

7. Social Media Evidence Establishes Knowing Misrepresentation

In *Yousif v. State Farm Mutual Automobile Insurance Co.*,[81] the Michigan Court of Appeals held that summary disposition on the basis of the MACP's anti-fraud provision was appropriate when plaintiff's Facebook posts revealed that his life was far from disabled or even sedentary.[82]

Plaintiff, Mario Yousif, was a passenger in his uninsured mother's vehicle when it was struck by another driver.[83] The MACP assigned the claim to the defendant, State Farm.[84] At his deposition, Yousif claimed that, for nearly a year following the accident, he had severe pain, could only walk short distances, and had to be monitored by his mother while walking.[85] He testified that, since the accident, he required extensive

75. *Candler*, 321 Mich. App. at 779–81, 910 N.W.2d at 670–71.
76. *Id.* at 781, 910 N.W.2d at 671.
77. *Id.*
78. *Id.* at 781–82, 910 N.W.2d at 671.
79. *Id.* at 776, 910 N.W.2d at 668.
80. *Id.* at 782, 910 N.W.2d at 671.
81. No. 336791, 2018 WL 1073273 (Feb. 27, 2018).
82. *Id.* at *1.
83. *Id.* at *1.
84. *Id.*
85. *Id.*

household replacement services and eight hours of daily attendant care from his mother, including help bathing twice a day, having his food brought to him twice a day due to being bedridden, help using the bathroom, and help getting in and out of bed.[86]

During the same period for which he brought claims for extensive attendant care and replacement services, "plaintiff regularly posted his activities on Facebook."[87] Yousif posted photographs posing with family members and classmates at his high school graduation, attending Detroit Tigers games, going out to restaurants, and showing his abs with comments that he needed to work out and stop eating Taco Bell.[88] Yousif also posted videos of himself quickly turning around and taking french fries off of others'' plates.[89] Yousif additionally had posts on Facebook depicting his travel since the accident.[90] He shared photos of himself walking through the rugged terrain of the Smokey Mountains in Tennessee.[91] Facebook photos posted just prior to his deposition, where he claimed to be essentially bedridden, showed that he traveled by car to Las Vegas and enjoyed the nightlife.[92] During this time, Yousif continued to claim replacement services and attendant care and submitted service provider logs, which claimed that care was being provided even when he travelled outside of Michigan.[93]

State Farm filed a dispositive motion based on MCLA § 500.3173(a)(2).[94] In response, Yousif submitted an affidavit claiming that the photos and videos did not show evidence of actions inconsistent with his claims and, moreover, claimed that his caregiver was present on the trips.[95] Yousif further argued that the issue of whether he had perpetuated fraud was an issue of credibility for the jury to decide.[96] The trial court disagreed and granted summary disposition for State Farm.[97] The plaintiff appealed.[98]

The court of appeals affirmed summary disposition and held that, because of discrepancies between Yousif's statements to State Farm and his social media, Yousif must have known that his statements were false

86. *Id.*
87. *Id.* at *2.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at *5.
96. *Id.*
97. *Id.*
98. *Id.*

and that State Farm adequately showed that plaintiff made a fraudulent insurance act.[99] As such, the fraudulent insurance act rendered plaintiff ineligible to receive insurance benefits through the MACP.[100] Moreover, while the issue of "whether a plaintiff has committed fraud may be a question of fact for the jury, when the defendant demonstrates that no rational trier of fact could reach a conclusion other than that the plaintiff engaged in fraud, summary disposition is appropriate."[101]

Lastly, the court rejected plaintiff's arguments that the photographs and video evidence merely showed plaintiff sitting and standing and, thus, were not inconsistent with his testimony.[102] Noting that plaintiff testified that he was in daily pain so extreme that he was often bedridden, needed his meals brought to him, needed eight hours of daily nursing care, and could not bathe or groom himself, the court found that the Facebook posts showing that he was socializing and traveling (including on days he sought payment for daily attendant care and replacement services) were inconsistent with his testimony.[103] Summary disposition was accordingly affirmed.[104]

8. A Reminder to Attorneys of the Importance of Pleading Fraud with Particularity as an Affirmative Defense

In *Baker v. Marshall*, the Michigan Court of Appeals held that the trial court erred when it granted summary disposition in favor of an insurer on the basis that the insured had committed fraud, where the insurer failed to plead fraud as an affirmative defense in its answer, amended answer, or a motion for summary disposition in lieu of answer, and thus had waived the defense under MCR 2.11(F).[105]

In *Baker*, plaintiff, Percy Baker, brought suit for PIP and Uninsured Motorist ("UM") benefits against her insurer, IDS Property Casualty Insurance Company ("IDS").[106] In its responsive pleadings, IDS generally denied the allegations in plaintiff's complaint, asserted numerous affirmative defenses, and reserved the right to amend affirmative defenses "as they may become known during the course of

99. *Id.* at *4.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at *4–6.
104. *Id.* at *6.
105. 323 Mich. App. 590, 919 N.W.2d 407 (2018), *leave to appeal denied*, 503 Mich. 861, 917 N.W.2d 385 (2018).
106. *Id.* at 593, 919 N.W.2d at 408.

investigation and discovery."[107] However, IDS did not plead an affirmative defense of contractual fraud.[108] In response, plaintiff filed a denial of each of the affirmative defenses and, per MCR 2.111(F)(3), demanded that IDS provide "a detailed statement of fact constituting each and every affirmative defense" and the legal basis for same.[109] Baker later amended her complaint, adding claims against additional parties; in its answer to the amended complaint, IDS again generally denied the allegations and asserted numerous affirmative defenses, but again "failed to raise contractual fraud as an affirmative defense."[110] Later in litigation, IDS moved for partial summary disposition of the UM claim, asserting that the other drivers had insurance policies; IDS, which directed the court to the subject policy, again made no reference to any fraud provisions in this motion.[111] Before the trial court decided this motion, IDS filed an entirely new dispositive motion, this time on the basis of fraudulently misrepresented facts and the fraud-exclusion clause in the policy, which IDS asserted barred plaintiff from receiving any coverage.[112] Although plaintiff "argued that IDS had waived its fraud defense by failing to raise it as required by MCR 2.111(F)," the trial court granted summary disposition due to the fraud-exclusion clause.[113] The plaintiff appealed.[114]

The court of appeals reversed and remanded the trial court's ruling holding that it "has long been established that under MCR 2.111(F), the failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense."[115] The court noted that the primary function of pleadings in Michigan is to give the other party sufficient notice of the nature of the claims or defenses, so that the opposing party can take a responsive position.[116] As directed by MCR 2.111(F)(2), "a defense not asserted in the responsive pleading or by motion as provided" in the court rules is waived, "except for the defense of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted."[117] The court rules further

107. *Id.*
108. *Id.*
109. *Id.* at 593–94, 919 N.W.2d at 409.
110. *Id.* at 594, 919 N.W.2d at 409.
111. *Id*
112. *Id.*
113. *Id.*
114. *Id.* at 592, 919 N.W.2d at 408.
115. *Id.* at 595, 919 N.W.2d at 409.
116. *Id* (quoting Stanke v. State Farm Mut. Ins. Co., 200 Mich. App. 307, 317, 503 N.W.2d 758, 862 (1993)).
117. *Id.*

state that affirmative defenses must be stated in a party's responsive pleading.[118] As IDS did not raise its reliance on the fraud-exclusion clause in its affirmative defenses to either the original or the amended complaint, nor did it first raise the affirmative defense in a motion filed under MCR 2.116 in lieu of a responsive pleading, the defense was waived.[119]

The court further rejected IDS's argument that the fraud-exclusion clause was not an affirmative defense (and therefore could not be waived) because it directly controverted plaintiff's prima facie case.[120] The court disagreed with IDS's position, finding that the fraud-exclusion clause did not controvert plaintiff's case, as in order for fraud to bar Baker's claim, she must first have a claim that would otherwise prevail but for the fraud-exclusion clause preventing same.[121] Consequently, the fraud defense is an affirmative defense.[122] Accordingly, as IDS failed to raise the fraud-exclusion clause, IDS waived that defense.[123]

B. Third-Party Beneficiaries

In *Michigan Head & Spine Institute, P.C. v. Blue Cross Blue Shield of Michigan,* Bryan Croteau was involved in a serious truck versus motorcycle accident in 2009 and was insured by Auto-Owners Insurance Company at the time.[124] Michigan Head & Spine Institute (MHSI) provided surgical care to Mr. Croteau and billed Blue Cross Blue Shield of Michigan (BCBSM) for its services.[125]

Later, Mr. Croteau filed his own separate no-fault action against Auto-Owners, which the parties settled in 2012.[126] Per the terms of the settlement agreement's partial release, Auto-Owners was to pay Mr. Croteau's medical providers for treatment rendered.[127] Upon learning of this partial release, BCBSM sent Auto-Owners a demand letter seeking reimbursement for treatment expenses it paid.[128] Auto-Owners refused to reimburse BCBSM, citing the one-year-back rule in MCLA § 500.3145.[129]

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118. *Id.*
119. *Id.* at 595–96, 919 N.W.2d at 410.
120. *Id.* at 597–98, 919 N.W.2d at 410–411.
121. *Id.*, 919 N.W.2d at 411.
122. *Id.*
123. *Id.*
124. No. 331859, 2017 Mich. App. LEXIS 1289, at *1 (Aug. 10, 2017).
125. *Id.*
126. *Id.* at *2.
127. *Id.*
128. *Id.* at *3.
129. *Id.*

BCBSM then "clawed back" its payments from MHSI, which prompted MHSI to file a breach of contract suit alleging that BCBSM waited too long to repay itself.[130] Auto-Owners was also added as a defendant, as MHSI claimed to be a third-party beneficiary of the settlement agreement reached between Mr. Croteau and Auto-Owners.[131]

MHSI moved for summary disposition against Auto-Owners, arguing that, under the terms of the settlement agreement, Auto-Owners was responsible for paying all claims for medical care owed to medical providers.[132] The trial court granted the motion and ordered Auto-Owners to pay BCBSM's bills.[133] The trial court further ruled that if Auto-Owners wanted to preserve its defenses under the No-Fault Act—including the one-year statute of limitations—the terms should have been included in the settlement agreement's partial release.[134]

The court of appeals reversed the lower court's ruling, finding that while the release may not have explicitly stated that Auto-Owners' defenses under the No-Fault Act were preserved, the release also did not signal that Auto-Owners agreed to *waive* all of the defenses that it might have to future claims.[135] The release was silent as to Auto-Owners' right to assert defenses such as the application of the one-year-back rule or that the medical charges were unrelated, unreasonable, or unnecessary.[136] The court of appeals concluded that, under MHSI's third-party beneficiary theory, MHSI not only accepted the benefits of the contract between Mr. Croteau and Auto-Owners, but MHSI was also bound by the burdens of that agreement.[137] As such, Auto-Owners was able to use the one-year-back rule as a defense against MHSI's claim.[138]

C. Compulsory Coverage and MCLA §§ 500.3101 and 500.3113

1. Merely Assuring that a Vehicle is Insufficient for an Owner or Registrant to Comply With MCLA § 500.3101(1)

In *Salmo v. Oliverio,* the Michigan Court of Appeals held that summary disposition of plaintiff's tort claim against a third party driver who injured him in an accident, as well as plaintiff's claim for

130. *Id.* at *4 (Mich. Ct. App. Aug. 10, 2017).
131. *Id.*
132. *Id.* at *3–4.
133. *Id.* at *4.
134. *Id.*
135. *Id.* at *8–9.
136. *Id.* at *8.
137. *Id.* at *7–9.
138. *Id.* at 9.

underinsured motorist ("UIM") benefits against the vehicle's insurer, was proper as plaintiff did not personally insure the vehicle.[139] This case is derived from the court of appeals' holding in *Barnes v. Farmers Insurance Exchange*.[140]

In *Salmo*, plaintiff, Junior Salmo, owned a Chevy Malibu.[141] Although plaintiff owned the Malibu, he personally had not insured it.[142] The Malibu was instead insured by Auto-Owners through the business policy of plaintiff's ex-wife.[143] Salmo was injured while driving the Malibu when a Ford Mustang driven by the defendant, Sean Oliverio, failed to yield at an intersection.[144] Salmo thereafter filed a tort claim against Oliverio, as well as against the Mustang's owner, Jennifer Emerick.[145] Additionally, Salmo filed suit for UIM benefits against Auto-Owners.[146] Auto-Owners filed a motion for summary disposition on the basis that plaintiff's failure to personally insure the vehicle disqualified him from recovering tort and UIM benefits.[147] The trial court granted summary disposition on the basis that plaintiff was "operating his own motor vehicle at the time the injury occurred *and did not have in effect for that motor vehicle the security required* by MCLA § 500.3101 at the time the injury occurred."[148] Summary disposition was also granted for the driver and owner of the Mustang.[149] Salmo appealed, arguing that the "language of MCL § 500.3101 required only that the owner 'maintain' insurance on his vehicle" and that he had done so by allowing his ex-wife's business to insure the vehicle.[150]

Citing the *Barnes* court's holding that an owner or registrant is precluded from recovering no-fault PIP benefits if the owner or registrant fails to maintain the insurance required on a vehicle, the court of appeals in *Salmo* affirmed summary disposition and held that the same restrictions would apply in tort and UIM cases.[151]

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139. No. 333214, 2017 Mich. App. LEXIS 1648, at *1 (Mich. Ct. App. Oct. 17, 2017) (per curiam).

140. *Id.* (citing Barnes v. Farmers Ins. Exch., 308 Mich. App. 1, 862 N.W.2d 681 (2014)).

141. *Id.*

142. *Id.* at *1–2.

143. *Id.* at *1.

144. *Id.*

145. *Id.*

146. *Id.* at *1–2.

147. *Id.* at *3.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at *5–9.

The court of appeals pointed to MCLA § 500.3101(1) as the beginning of the statutory analysis as to the compulsory coverage component of the no-fault act.[152] According to MCLA § 500.3101(1), "the owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under [PIP], property protection insurance, and residual liability insurance."[153] Failure to abide by the requirements of MCLA § 500.3101(1) triggers consequences throughout the no-fault act, including MCLA § 500.3125(2)(c)'s preclusions of tort claims.[154] MCLA § 500.3135(2)(c) states:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement . . . damages shall not be assessed *in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by [MCL 500.3101] at the time the injury occurred.*[155]

The court therefore held, pursuant to *Barnes*, that, because "plaintiff was the sole owner of the vehicle he was driving when injured" and had not purchased no-fault coverage for that vehicle, tort damages may not be assessed in his favor.[156]

2. Owner Required to Maintain PIP Insurance on Vehicle Even When Parked

In *Russ v. Michigan Assigned Claims Facility* ("MACF"), the Michigan Court of Appeals held that summary disposition was proper when a plaintiff failed to maintained PIP coverage as required by MCLA § 500.3101(1), and that plaintiff was not excused from the compulsory coverage requirement because the accident occurred at a moment when his vehicle was parked.[157]

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152. *Id.* at *8.
153. *Id.*
154. *Id.* at *5–9.
155. *Id.* at *8–9 (quoting MICH. COMP. LAWS ANN. § 500.3135(2)(c) (West 2018)).
156. *Id.* at *9.
157. No. 334565, 2017 Mich. App. LEXIS 1531, at *6–7 (Oct. 10, 2017) (per curiam), *leave to appeal denied*, 2018 Mich. LEXIS 1849 (Sept. 28, 2018).

In *Russ*, plaintiff Gordie Russ's vehicle was registered in Michigan.[158] Russ drove his vehicle to his fiancé's house in Detroit, parked in front of her home, and spoke to his fiancé.[159] While parked, plaintiff's vehicle was rear-ended by another vehicle.[160] Russ claimed to have sustained injuries in the accident.[161] During litigation, Russ testified that he was in the process of moving to Arizona and had obtained "an Arizona car insurance policy through GEICO."[162] However, GEICO denied coverage because the policy did not cover PIP benefits.[163] The MACF accordingly filed a motion for summary disposition on the basis that plaintiff failed to maintain PIP coverage, contrary to the requirements of MCLA § 500.3101(1).[164] In response, Russ argued that MCLA § 500.3113, which states that an owner of a motor vehicle is not entitled to PIP benefits if the security required by MCLA § 500.3101 is not in effect, did not apply because his vehicle was parked at the time of loss.[165] Russ further argued that MCLA § 500.3101(1) and MCLA § 500.3113 are only effective when a vehicle is driven or moved on a highway.[166] The trial court disagreed with plaintiff's arguments and granted the MACF's motion for summary disposition.[167] The plaintiff appealed.[168]

The court of appeals affirmed summary disposition, holding that plaintiff "was required to maintain PIP insurance 'during the period the motor vehicle is driven or moved on a highway.'"[169] At the time of the accident, "plaintiff worked three jobs in Michigan and stayed at one of two homes in Michigan."[170] The only car insurance plaintiff had was his Arizona car insurance policy with GEICO that did not cover PIP benefits.[171] Accordingly, Plaintiff failed to comply with MCLA § 500.3101's security requirement and he was not entitled to PIP benefits, pursuant to MCLA § 500.31113(b).[172]

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158. *Id.* at *1.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at *2.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at *1.
169. *Id.* at *5 (quoting MICH. COMP. LAWS ANN. § 500.3101(1)).
170. *Id.*
171. *Id.*
172. *Id.*

The court of appeals further rejected plaintiff's "argument that he was not required to have PIP insurance because his vehicle was in park at the time of the accident."[173] The court of appeals distinguished the instant case from *Shinn v. Michigan Assigned Claims Facility*, where "an individual had her uninsured vehicle repaired, then moved her vehicle to another location, then parked her vehicle, and then was involved in an accident 'several days later.'"[174] The court of appeals found that this was in contrast to the present fact pattern, where plaintiff had driven to his fiancé's home, placed the vehicle in park, and then the accident occurred.[175] The court further noted that interpreting the security requirement as plaintiff suggested—a vehicle must maintain security for PIP benefits while "it is driving or moving on a Michigan roadway", but did not need to "maintain the required security once the driver shifted the vehicle in park"—would lead to an absurd result.[176] Thus, plaintiff was ineligible for PIP benefits.[177]

D. Notice of Injury and MCLA § 500.3145

1. Notice of Injury Need Not Include All Specific Symptoms

In *Dillon v. State Farm Mutual Automobile Insurance Co.*, the Michigan Supreme Court held that a description of symptoms that are traceable to a diagnosed injury is sufficient to constitute notice to an insurance carrier under the one-year-back provisions of MCLA § 500.3145.[178]

In *Dillon*, plaintiff, Jessica Dillon, "was injured in August 2008 when she was struck by a motor vehicle while walking across the street."[179] Following the accident, Dillon was taken to the hospital by EMS because of complaints related to her upper and lower back.[180] Diagnostic imaging studies revealed no significant injuries.[181] Dillon subsequently spoke to a representative of State Farm and complained of injuries to her lower back and left shoulder but made no mention of any

173. *Id.*
174. *Id.* at *6 (citing Shinn v. Mich. Assigned Claims Facility, 314 Mich. App. 765, 767–75, 887 N.W.2d 635, 636–41 (2016)).
175. *Id.* at *6.
176. *Id.* at *6–7.
177. *Id.* at *7
178. 501 Mich. 915, 902 N.W.2d 892 (2017).
179. 315 Mich. App. 339, 340, 889 N.W.2d 720, 721 (2016).
180. *Id.*
181. *Id.*

hip complaints.[182] Nearly three years later, in March 2011, Dillon began treatment for hip pain.[183] She resumed treatment for hip pain in December 2011, which culminated with arthroscopic hip surgery in 2012 secondary to "a left anterosuperior quadrant labral tear and detachment."[184] Plaintiff's doctor pointed out that the hip pain could have created the lower back pain.[185]

Dillon sought payment for the hip treatment from State Farm, arguing that the injury stemmed from the 2008 accident.[186] State Farm filed a dispositive motion on the basis that it was not given notice of the hip injury within one year of the accident as required by the one-year-back rule under MCLA § 500.3145.[187] The trial court denied State Farm's motion, and Dillon obtained a successful verdict at trial.[188] State Farm then appealed.[189]

The court of appeals affirmed the trial court's denial of State Farm's motion for summary disposition and found that the legislative intent did not support imposing a requirement that notice be given of a definite or particular injury but rather that an accident resulted in *some* injury.[190]

MCLA § 500.3145(1) reads, in 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*... The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and *nature of his injury*.[191]

The court of appeals examined the use (or lack thereof) of the definite article "the" in the statute by drawing attention to how the phrase "notice

182. *Id.*
183. *Id.*
184. *Id.* at 340–41, 889 N.W.2d at 721.
185. Dillon v. State Farm Mut. Auto. Ins. Co., 501 Mich. 915, 915, 902 N.W.2d 892, 894 (2017).
186. *Dillon*, 315 Mich. App. at 341, 889 N.W.2d at 721.
187. *Id.*, 889 N.W.2d at 721–22.
188. *Id.*, 889 N.W.2d at 722.
189. *Id.*
190. *Id.* at 344, 889 N.W.2d at 723.
191. *Id.* at 341, 889 N.W.2d at 722 (quoting MICH. COMP. LAWS ANN. § 500.3145(1) (West 2018)).

of injury" does not include a definite article but the phrase "benefits for *the* injury" does.[192] The court found that this was not a mere grammatical oversight but was indicative of the legislature intending for "notice of injury" to refer to injury in the general sense rather than a particular injury.[193] Moreover, the court of appeals found that the plain meaning of the use of the word "nature" in the last sentence of MCLA § 500.3145(1) was indicative of a general, not specific, injury.[194] Accordingly, as Dillon gave notice of injury within one year of the accident, she was allowed to pursue payment of benefits for any loss incurred within one year of commencement of the action.[195] State Farm appealed the court of appeal's holding to the Michigan Supreme Court.[196]

In a unanimous opinion, the Michigan Supreme Court rejected the court of appeals' interpretation of MCLA § 500.3145 because it failed to account for the remainder of the phrase "unless written notice of injury *as provided herein.*"[197] The Michigan Supreme Court held that, if the legislature intended for notice of general injury to suffice, it would simply have ended the sentence with "notice of injury" rather than include "as provided herein."[198] The Michigan Supreme Court found that, under the statute, the "herein" includes notice with "the name and address of the claimant and in ordinary language . . . the name of the person injured and the time, place and nature of his injury."[199] The Michigan Supreme Court held that the legislature intended the "in ordinary language" phrase to allow claimants to give notice of injuries without specific diagnoses from specialists and that "nature of his injury" refers to an injury's inherent characteristics.[200]

Under its newly formed interpretation, the court found that "a description of symptoms that are traceable to a diagnosed injury is sufficient to constitute" notice for the purposes of MCLA § 500.3145(1).[201] Because Dillon's doctor stated that "the hip injury could have created the lower back pain, her initial notice related to the lower

192. *Id.* at 344, 889 N.W.2d at 723.
193. *Id.*
194. *Id.*
195. *Id.* at 345, 889 N.W.2d at 724.
196. *See* Dillon v. State Farm Mut. Auto. Ins. Co., 501 Mich. 915, 902 N.W.2d 892 (2017).
197. *Id.* at 916, 902 N.W.2d at 893 (emphasis added) (quoting MICH. COMP. LAWS ANN. § 500.3145(1) (West 2018)).
198. *Id.* (quoting MICH. COMP. LAWS ANN. § 500.3145(1)).
199. *Id.* (quoting MICH. COMP. LAWS ANN. § 500.3145(1)).
200. *Id.* (quoting MICH. COMP. LAWS ANN. § 500.3145(1)).
201. *Id.* at 917, 902 N.W.2d at 893.

back pain could be traced to the eventual injury and was sufficient for purposes" of MCLA § 500.3145(1).[202]

2. Dillon Distinguished: Notice of Injury Must Describe the Nature of Injury

In *Green v. Home-Owners Insurance Co.*,[203] the Michigan Court of Appeals relied upon the Michigan Supreme Court's holding in *Dillon* and found that "notice of injury requires specificity sufficient to describe the nature of the injury."[204] Accordingly, Green's notice to the insurance carrier that he had broken his leg was insufficient notice of a possible fractured neck vertebra.[205]

In *Green*, the plaintiff sustained a fractured right fibula in a March 2012 accident.[206] Following the accident, he presented to the hospital and complained of associated knee pain but did not complain "of associated neck pain, associated chest pain, associated abdominal pain, or associated back pain."[207] Ten days later, Green applied for PIP benefits from Home-Owners, describing his injury only as a "broken right leg."[208] Green had a few follow-up appointments with physicians concerning his right leg, which was healing appropriately.[209] In May 2012, Green complained of hip pain, which was ultimately diagnosed as hip arthritis.[210] By December 2013, Green was no longer receiving treatment for injuries from the accident.[211]

In March 2015, three years post-loss, Green presented to the hospital with complaints of arm pain.[212] He further complained that, since the accident, he had ongoing back pain, pain and numbness in the upper extremities, and a thoracic spine compression fracture.[213] Green was ultimately "diagnosed with mild chronic compression deformity of the superior endplates of T1 and T2," in the thoracic spine, which plaintiff claimed that his physicians advised him was related to the 2012 accident.[214] Home-Owners refused to pay for PIP benefits related to

202. *Id.*, 902 N.W.2d at 894.
203. No. 333315, 2018 Mich. App. LEXIS 3 (Jan. 2, 2018) (per curiam).
204. *Id.* at *3 (internal quotations and citations omitted).
205. *Id.* at *11.
206. *Id.* at *1.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at *2.
214. *Id.*

Green's neck injuries, and Green filed suit.[215] Home-Owners prevailed on a motion for summary disposition with the district court finding that MCLA § 500.3145 "barred plaintiff's claim because he did not provide notice within one year of the accident that was" sufficiently specific to inform Home-Owners "of the nature of the injury."[216] The circuit court affirmed the district court's decision, and Green appealed.[217]

The court of appeals affirmed the lower courts' decisions and found that Green's notice to Home-Owners of a leg injury was an insufficient description of the symptoms related to a fractured neck vertebra.[218] The court of appeals found that giving notice to Home-Owners of the broken leg did not refer to the inherent characteristics of fractured vertebrae in the neck, and it could not be reasonably said that symptoms associated with Green's broken leg were in any way secondary to a neck injury.[219]

Accordingly, the court of appeals distinguished the matter from the fact pattern in *Dillon*, where the plaintiff initially reported and received treatment for injuries to the left shoulder and lower back and later for a left hip injury which her doctors attributed to the accident.[220] In other words, the hip injury in *Dillon* "could have been the underlying cause of the shoulder and back pain," but, in *Green*, the symptoms associated with plaintiff's broken leg could not reasonably be traced to plaintiff's neck injury discovered three years later.[221]

E. Covenant Fallout

1. Anti-Assignment Language in Insurance Policy Unenforceable

In a recent published opinion, the Michigan Court of Appeals reversed a circuit court decision granting the defendant insurance company's motion for summary disposition where the insurer asserted its anti-assignment clause as a defense to medical providers' claims.[222] In *Jawad Shah M.D., PC v. State Farm Mutual Auto Insurance Co.*, four medical providers filed suit to recover for medical treatment provided to defendant's insured, George Hensley as a result of injuries allegedly

215. *Id.* at *2.
216. *Id.*
217. *Id.*
218. *Id.* at *8.
219. *Id.* at *9–10.
220. *Id.* at *9.
221. *Id.* at *9–10.
222. Jawad A. Shah, M.D., PC v. State Farm Mut. Auto. Ins. Co., 324 Mich. App. 182, 920 N.W.2d 148 (2018).

sustained in a motor vehicle accident.[223] The plaintiffs filed their complaint against State Farm on February 24, 2017.[224]

After the Michigan Supreme Court issued its May 25, 2017 opinion in *Covenant Medical Center, Inc. v. State Farm Mutual Automobile Insurance Co.*,[225] defendant filed a motion for summary disposition asserting that pursuant to *Covenant* the plaintiff medical providers lacked a statutory cause of action.[226] Following *Covenant,* plaintiffs obtained an assignment of rights, dated July 11, 2017, from George Hensley and sought to amend their complaint to assert the assignment of rights as the basis for their claims.[227] In reply, defendant asserted a number of arguments including that the anti-assignment clause in its policy rendered the assignment void, that even if the assignment was valid, plaintiffs' claims or a portion thereof would be barred by the one-year-back rule of MCLA § 500.3145(1), and that the relation-back doctrine could not apply to plaintiffs' proposed amended complaint as the assignment did not exist at the time they filed their original complaint.[228]

The trial court upheld the anti-assignment clause in the defendant insurer's policy, finding that plaintiffs did not acquire any rights by virtue of the assignment due to the prohibition on assignments in the policy.[229] The trial court also indicated that that, even if the assignment was valid, plaintiffs' claims were barred by the one-year-back rule because the accident occurred more than one year before the date of the assignment.[230]

In its opinion, the court of appeals clarified a number of legal issues raised in the wake of *Covenant.*[231] First, the court of appeals stated that *Covenant* is to be applied retroactively.[232] Next, the opinion addressed the anti-assignment clause in the policy and relied upon *Roger Williams Insurance Co v. Carrington*,[233] in finding the anti-assignment clause void.[234] The court in *Roger Williams* found that a cause of action accrued by an insured could be assigned after a loss and that an anti-assignment clause restricting such an assignment would be void as against public

223. *Id.* at 182, 920 N.W. 2d at 152.
224. *Id.*
225. 500 Mich. 191, 895 N.W.2d 490 (2017).
226. *Jawad A. Shah, M.D., PC*, 324 Mich. App. at 186–87, 920 N.W.2d at 152.
227. *Id.* at 187–88, 920 N.W.2d at 152–53.
228. *Id.* at 189–90, 920 N.W.2d at 154.
229. *Id.* at 190–91, 920 N.W.2d at 154.
230. *Id.* at 191, 920 N.W.2d at 154.
231. *See id.* at 191–210, 920 N.W.2d at 155–66.
232. *See id.* at 191–96, 920 N.W.2d at 155–57.
233. 43 Mich. 252, 5 N.W. 303 (1880).
234. *See* Jawad A. Shah, M.D., PC, 324 Mich. App. at 196–201, 920 N.W.2d at 157–160 (citing *Roger Williams*, 43 Mich. at 254, 5 N.W. at 304).

policy.[235] Here, the court of appeals reasoned that plaintiffs' assignment was valid where George Hensley had accrued a cause of action against defendant and had already received the medical treatment at issue prior to executing the assignment.[236]

Finally, the court of appeals addressed the relation-back issues raised by defendant.[237] The court affirmed that George Hensley could only assign the rights available to him on the date the assignment was executed.[238] Therefore, the court held that plaintiffs did not obtain the right to pursue any portion of the benefits incurred more than one year before the date of the alleged assignment.[239]

2. Retroactivity of Covenant

The Michigan Court of Appeals in *WA Foote Memorial Hospital v. Michigan Assigned Claims Plan* confirmed the retroactive effect of the Michigan Supreme Court's decision in *Covenant*.[240] Plaintiff, WA Foote Memorial Hospital, appealed the trial court's denial of its motion for summary disposition and the granting of the defendant's cross-motion for summary disposition.[241] Zoie Bonner was injured in an automobile accident while a passenger in a vehicle owned by her aunt and uncle and insured under their Citizens Insurance Company of the Midwest policy. [242] The day after the accident, Bonner sought treatment at plaintiff's facility. [243] Ultimately, plaintiff filed suit against the MACP because they were unable to identify a priority insurer.[244] During the course of litigation, Citizens was identified as the insurer of the involved vehicle, and the presented claim was eventually denied because it was presented beyond the one-year-back deadline.[245] As a result, defendant MACP filed for summary disposition asserting that they were not required to assign plaintiff's claim where an insurance carrier in priority for benefits under

235. *Id.* at 200, 920 N.W.2d at 159 (citing *Roger Williams*, 43 Mich. at 254, 5 N.W. at 304).

236. *Id.*

237. *See id.* at 202–05, 920 N.W.2d at 157–60.

238. *Id.* at 205, 920 N.W.2d at 161.

239. *Id.*

240. *See* WA Foote Mem'l Hosp. v. Mich. Assigned Claims Plan, 321 Mich. App. 159, 909 N.W.2d 38 (2017).

241. *Id.* at 164, 909 N.W. 2d at 40.

242. *Id.*

243. *Id.* at 165, 909 N.W.2d at 41.

244. *Id.* at 165–166, 909 N.W.2d at 41.

245. *Id.* at 167, 909 N.W.2d at 41 (citing MICH. COMP. LAWS ANN. § 500.3145 (West 2018)).

MCLA § 500.3114(4) existed.[246] In response, plaintiff moved for summary disposition asserting that the MACP was required to assign the claim promptly and had failed to do so.[247] The trial court denied plaintiff's motion and found that they had failed to show that they could not have identified the applicable Citizens policy at the time they presented a claim to defendant.[248] In turn, the trial court granted defendant's motion for summary disposition. [249]

The plaintiff appealed and, while the appeal was pending, the Michigan Supreme Court issued its opinion in *Covenant*.[250] In *Covenant*, the Michigan Supreme Court found that the Michigan No-Fault Act did not afford medical providers with a direct cause of action for the recovery of first-party personal injury protection benefits.[251] The *Covenant* decision changed the course of the *W A Foote* appeal and supplemental briefs were filed addressing the impact of the *Covenant* decision on the instant case.[252] As a result of the supplemental briefing and the Michigan Supreme Court's decision in *Covenant*, the court of appeals in *W A Foote* did not address the underlying question of whether the MACP had a duty to assign plaintiff's claim.[253] Instead, the court of appeals found that the defendant MACP had adequately preserved the issue of the plaintiff medical provider's lack of standing in their affirmative defenses.[254] The *Covenant* decision and defendant's affirmative defenses rendered the question of their duty to assign moot and allowed the court to resolve the issue on the basis of plaintiff medical provider's lack of a direct cause of action against defendant.[255]

The Michigan Court of Appeals next addressed the issue of the prospective versus retroactive applicability of the *Covenant* decision.[256] This involved an analysis of the interplay between federal and state law concerning the retroactive effect of judicial decisions.[257] The court reasoned that *Harper v. Virginia Department of Taxation* was dispositive

246. WA Foote Mem'l Hosp. v. Mich. Assigned Claims Plan, 321 Mich. App. 159, 167, 909 N.W.2d 38, 41 (2017).
247. *Id.*, 909 N.W.2d at 41–42.
248. *Id.*, 909 N.W.2d at 42.
249. *Id.*
250. *Id.* at 167–68, 909 N.W.2d at 42 (citing Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co., 500 Mich. 191, 195–96, 895 N.W.2d 490, 493 (2017)).
251. *Id.* (citing *Covenant*, 500 Mich. at 195–96, 895 N.W. 2d at 493).
252. *Id.* at 168, 909 N.W.2d at 42.
253. *See id.* at 169, 909 N.W.2d at 42.
254. *Id.* at 173–174, 909 N.W.2d at 45.
255. *Id.* at 172–173, 909 N.W.2d at 44–45.
256. *Id.* at 176.
257. *Id.* at 177-179.

as to whether interpretations of federal law have retroactive effect.[258] The court went on to note that, under *Harper*, state courts had to decide whether interpretations of state law would be effective retroactively.[259] Ultimately, the court of appeals referred to the Michigan Supreme Court's favorable treatment of the *Harper* decision in *Spectrum Health v. Farm Bureau*.[260] As a result, the court of appeals found that, since the *Covenant* decision resolved an issue of statutory interpretation, it was entitled to retroactive effect.[261] The plaintiff medical provider's claim was dismissed as they lacked a direct statutory cause of action to pursue against the defendant.[262]

3. Intervening Providers' Derivative Claims Without Standing When Underlying Claimant's Claims Dismissed Due to Discovery Violations

In one of the first opinions following the landmark ruling in *Covenant*, the Michigan Court of Appeals in *Eubanks v. State Farm Mutual Auto Insurance Co.*, held that, in accordance with *Covenant*, intervening plaintiff providers had no statutory right of action for PIP benefits against State Farm.[263] Accordingly, in a matter where the underlying plaintiff's claims for PIP benefits were dismissed with prejudice due to discovery violations, the intervening plaintiffs' derivative claims were also precluded.[264]

In *Eubanks*, plaintiff, George Eubanks, was a passenger in a vehicle that was struck by a hit and run driver.[265] Eubanks, who did not have insurance, applied for PIP benefits through the Michigan Assigned Claims Plan ("MACP"), which later assigned the claim to State Farm.[266] Eubanks filed suit against State Farm seeking PIP benefits.[267] Thereafter, Get Well Medical Transport, Advanced Care Rehab, and Sinai Diagnostic Group ("intervening plaintiffs") were granted intervention seeking payment for medical services allegedly provided to the plaintiff for injuries arising out of the accident.[268] "After plaintiff failed to comply

258. *Id.* at 179, 909 N.W.2d at 48.
259. *Id.*
260. *Id.* at 182, 909 N.W.2d at 49.
261. *Id.* at 196, 909 N.W.2d at 57.
262. *Id.*
263. No. 330078, 2017 LEXIS 1135, at *7 (July 18, 2017).
264. *Id.*
265. *Id.* at *1.
266. *Id.*
267. *Id.*
268. *Id.* at *1–2.

with discovery and failed to appear, the trial court...dismiss[ed] plaintiff's claims with prejudice. [State Farm then] moved for summary disposition" against the intervening plaintiffs.[269] The trial court denied the dispositive motion, finding that intervening plaintiffs' claims "were not extinguished by the dismissal of plaintiff's claim."[270] State Farm appealed.[271]

The court of appeals noted that the Michigan Supreme Court had "conclusively resolved" the issue of whether medical providers had the right to bring a claim for PIP benefits, and held that, in light of *Covenant*, healthcare providers do not have a statutory cause of action against insurers.[272] Accordingly, without the underlying plaintiff remaining in the case, the intervening plaintiffs had no statutory cause of action against State Farm.[273] Thus, summary disposition was appropriate.[274]

Notably, the opinion makes no reference to the issue of assignments, which would quickly become the focus of much of the post-*Covenant* opinions. Still, *Eubanks* offers insight into how *Covenant* immediately changed the landscape of no-fault law.

F. Attorney Liens

In *Adler Stilman, PLLC v. Oakwood Healthcare, Inc.*, the court addressed an issue that has become more prevalent in the post-*Covenant* landscape: whether the injured person or the medical provider is the proper recipient of attorney fees in the face of an attorney charging lien.[275] The court of appeals in *Stilman* held that, even though he had a lien on any recovery of benefits on behalf of the injured person, the attorney for the injured person was not entitled to one-third of the attorney fees owed to a medical provider that had actively participated in discovery and had vigorously protected its own interests in litigation.[276]

In *Stilman*, law firm Adler Stilman, PLLC represented a patient in connection with injuries the patient received on the job in January 2014.[277] Defendant, Oakwood Hospital, provided medical treatment to the patient.[278] State Farm was the assigned insurer by the MACP.[279]

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269. *Id.* at *2.
270. *Id.*
271. *Id.*
272. *Id.* at *4, *7.
273. *Id.* at *7.
274. *Id.*
275. No. 333538, 2018 Mich. App. LEXIS 238, at *1 (Feb. 13, 2018).
276. *Id.* at *3–4, *10.
277. *Id.* at *1.
278. *Id.*

Through written correspondence, Alfred Stilman, PLLC, informed Oakwood that the law firm represented the patient, sought No-Fault benefits on his behalf including fees owed to Oakwood, and asserted a lien on any recovery under the contingent-fee arrangement between Alfred Stilman, PLLC and the injured patient.[280] Alfred Stilman was entitled to one-third recovery.[281] Oakwood did not contest this correspondence.[282] After the patient filed suit, Oakwood intervened and sent its *own* correspondence to the MACP asserting that it had its own separate legal counsel and expressly disavowed Adler Stilman, PLLC's right to payment of any attorney fees.[283] The parties went to case evaluation, and all three parties accepted the awards.[284] Alfred Stilman, PLLC then sued Oakwood and State Farm, asserting "that (1) Oakwood should have paid [Alfred Stilman, PLLC] one-third of its case evaluation award against State Farm as an attorney fee, and (2) that State Farm paid Oakwood directly without regard to [Alfred Stilman, PLLC's] claimed charging lien for attorney fees."[285] Both Oakwood and State Farm filed a dispositive motion "in lieu of responsive pleadings," which were granted.[286] Adler Stilman, PLLC appealed.[287]

The *Stilman* Court, noted that a "charging lien is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit . . . The charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services."[288]

The court of appeals noted that "there [was] no dispute that Oakwood was not plaintiff's client," nor had Oakwood and plaintiff "entered into a retainer agreement or contingent fee agreement. Accordingly . . . plaintiff is not entitled to payment from Oakwood for any alleged services rendered to Oakwood on plaintiff's own initiative."[289] The court particularly noted that "shortly after [Alfred Stilman, PLLC] filed suit on behalf of [the patient], [Oakwood] expressly disavowed plaintiff's attempts to render legal services on its behalf in the

279. *Id.* at *2.
280. *Id.* at *1.
281. *Id.*
282. *Id.*
283. *Id.* at *2.
284. *Id.*
285. *Id.* at *3.
286. *Id.*
287. *Id.* at *1.
288. *Id.* at *5 (quoting Souden v. Souden, 303 Mich. App. 406, 411, 844 N.W.2d 151, 156 (2013) (internal citations and quotations omitted)).
289. *Id.* at *6.

recovery of PIP benefits."[290] The court of appeals recognized that Oakwood "vigorously protected its own interests" throughout the original lawsuit.[291] Therefore, the court of appeals did not find support for plaintiff's "attempt to recover what [was] essentially a contingent fee under a theory of unjust enrichment."[292]

The court in *Stilman* further distinguished its facts from *Miller v. Citizens Insurance Co.*, where the court of appeals held that "the plaintiff's attorneys were 'entitled to have attorney fees deducted from the payment' that a medical provider earned in a no-fault case."[293] The court in *Stilman* noted that:

> [T]he medical providers in [*Miller*] could have brought independent legal actions against the no-fault insurer, but did not do so and 'thus they were spared the expense of litigating their own claims' . . . without the plaintiff's attorneys' actions in facilitating a settlement, the medical providers in that case would likely not have received as favorable a settlement as they ultimately did.[294]

Moreover, the *Stilman* court noted that the medical provider in *Miller* "could have advised the no-fault insurer not to pursue payment for [the medical provider's] services or advised the no-fault insurer that the plaintiff's attorneys did not represent its interests, but the [medical provider] did neither."[295]

G. Third-Party Claims

1. Objectively Manifested Impairments and the Threshold Injury Requirement

In *Patrick v. Turkelson*, the Michigan Court of Appeals addressed a third-party negligence case wherein the injured party claimed hearing loss and tinnitus as a result of the accident.[296] As a result of a February 12, 2013 motor vehicle accident, plaintiff, Lindsey Patrick, filed a third-

290. *Id.* at *10.
291. *Id.*
292. *Id.*
293. *Id.* (quoting Miller v. Citizen's Ins. Co., 288 Mich. App., 794 N.W.2d 622 (2010)).
294. *Id.* at *11 (citing *Miller*, 288 Mich. App. 424, 437–38, 794 N.W.2d 622, 629–30).
295. *Id.*
296. 322 Mich. App. 595, 599–600, 913 N.W.2d 369, 373–74 (2018), *leave to appeal denied*, 919 N.W.2d 280 (2018).

party negligence claim against the defendant driver.[297] Patrick testified at her deposition that she experienced muffled hearing as a result of the accident and that her doctor informed her that the hearing loss was the result of airbag deployment.[298] Defendant subsequently filed a motion for summary disposition asserting that Patrick had not suffered a serious impairment and that any alleged injury was not caused by the subject accident.[299] The trial court granted defendants motion for summary disposition, finding that Patrick had not shown her subjective complaints of hearing loss to be objectively manifested and that she had failed to demonstrate a physical basis for her complaints of hearing loss.[300] As a result, Patrick appealed.[301]

On appeal, the court of appeals reversed the trial court's grant of summary disposition.[302] First, the court of appeals found that the hearing loss claimed by Patrick constituted an objectively manifested impairment.[303] Specifically, the court of appeals reasoned that, although hearing testing necessarily includes a patient's subjective report of symptoms, the testing also includes objective elements.[304] The court of appeals also noted that the trial court erred when it evaluated the "persuasiveness of the medical evidence."[305]

The court of appeals next addressed causation arguments presented by defendant who asserted that Patrick was required to show that her injuries were caused by the subject accident.[306] In its analysis of the causation issues, the court of appeals considered the facts needed to create a question of fact as to causation with respect to injuries allegedly sustained in a motor vehicle accident.[307] In its analysis, the court addressed the need for a "logical sequence of cause and effect."[308] The court of appeals found that a genuine issue of material fact existed as to both the factual and legal causes of Patrick's hearing loss and as such, reversed the trial court.[309]

297. *Id.* at 604, 913 N.W.2d at 376.
298. *Id.* at 602, 913 N.W.2d at 375.
299. *Id.* at 604, 913 N.W.2d at 376.
300. *Id.*
301. *Id.*
302. *Id.* at 621.
303. *Id.* at 608–09, 913 N.W.2d at 378–79.
304. *Id.* at 610–611, 913 N.W.2d 379–80.
305. *Id.* at 611, 913 N.W.2d at 380.
306. *Id.* at 615, 913 N.W. 2d at 382.
307. *Id.*
308. *Id.* at 617, 913 N.W. 2d at 383.
309. *Id.* at 620–621, 913 N.W.2d at 385.

2. Negligent Entrustment as to Non-Owners

In *Bennett v. Russell*, the Michigan Court of Appeals reversed the trial court's ruling that a negligent entrustment claim is available only to the "owner" of a vehicle.[310] In *Bennett*, the court of appeals ruled that a plaintiff could pursue a negligent entrustment claim against an individual who rented a car and then lent the rental car to the driver that caused the subject accident. [311]

The plaintiff was injured in a motor vehicle accident when their vehicle was struck by a vehicle driven by an individual who falsely identified herself as Carrie Russell on November 16, 2013.[312] The vehicle involved was an Enterprise Leasing Company of Detroit vehicle leased to Dennis Hogge at the time of the accident.[313] Suit was filed against defendant Hogge and defendant filed a motion for summary disposition asserting that he could not be liable for the driver's negligence as he failed to meet the statutory definition of an "owner".[314] The trial court agreed and granted defendant's motion for summary disposition, finding that he did not meet the definition of an owner under MCLA § 257.37.[315] The plaintiff appealed and asserted that whether defendant met the statutory definition of an owner was not dispositive because the "common-law tort of negligent entrustment" imposes liability on a negligent supplier, regardless of ownership of the item supplied.[316] The court of appeals considered the holding of the Michigan Supreme Court in *Perin v. Peuler* in its analysis of the case at hand.[317]

An issue arose during the court of appeals' consideration of the claim concerning plaintiff's complaint, which only asserted negligence under MCLA § 257.401, governing the statutory liability of an owner.[318] Ultimately, the court of appeals preserved the question of whether plaintiff should be permitted to amend their complaint to include a common-law negligent entrustment count for the discretion of the trial court under MCR 2.118.[319] This decision is important for practitioners to consider in regard to the availability of negligent entrustment claims

310. 322 Mich. App. 638, 640, 913 N.W.2d 364, 365 (2018).
311. *Id.* at 640–41, 913 N.W.2d at 365.
312. *Id.* at 640, 913 N.W.2d at 365.
313. *Id.* at 640–41, 913 N.W. 2d at 365.
314. *Id.* at 641, 913 N.W.2d at 365.
315. *Id.* at 641, 913 N.W.2d at 366.
316. *Id.* at 641–42, 913 N.W.2d at 366.
317. *Id.* at 644, 913 N.W.2d at 367 (citing Perin v. Peuler, 373 Mich. 531, 130 N.W.2d 4 (1964).
318. *Id.* at 646, 913 N.W.2d at 368.
319. *Id.* at 646–647, 913 N.W.2d at 368–69.

against individuals not falling within the statutory definition of an owner under MCLA § 257.1.[320]

III. CONCLUSION

In the lead-up to the Michigan Supreme Court's landmark ruling in *Covenant Medical Center v. State Farm Mut. Automobile Ins. Co.*, attorneys on both sides of the aisle braced themselves for what was sure to be a seismic change of the landscape of insurance law in the nation's most anomalous No-Fault state. A year later, there remained more questions than answers, as the Michigan courts looked everywhere from footnotes in *Covenant,* to cases from the 19th century, to real-world practicality, to determine who, exactly, could bring a suit for No-Fault benefits, leading to sometimes contradictory results. As the dust clears from the fall-out of *Covenant,* and the specter of tort reform nears closer, the next *Survey* period is sure to introduce more refinement of insurance law in the Great Lakes State, as the courts continue to analyze the validity of assignments, third-party beneficiary theory, and attorney lien issues.

The *Survey* period also saw the first wave of decisions issued in light of the *Bahri*, *Bazzi*, and *Shelton* decisions, as the courts weighed public concerns of fraud with protecting the rights of policyholders and non-policyholders alike. As the influence of social media continues to permeate into society, these issues will likely only become more magnified moving forward.

320. *Id.* at 641, 913 N.W.2d at 365.