STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Macomb County Circuit Court
(Hon. Richard L. Caretti)

DOREEN JOSEPH,

Plaintiff-Appellee,

Supreme Court Case No. 142615
Court of Appeals Case No. 302508
Macomb Co. Circ. Ct. Case No.: 09-5726-CK

v.

A.C.I.A.,

Defendant-Appellant.

PLAINTIFF-APPELLEE'S
BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

PROOF OF SERVICE

THOMAS A. BISCUP (P40380)
Law Offices of Paul Zebrowski & Associates
Attorney for Plaintiff-Appellee
45581 Village Boulevard
Shelby Township, MI 48315
(586) 566-7266

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COUNTER-STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

Plaintiff-Appellee does not dispute that this Court exercised its power under MCR 7.302(H)(2) to grant leave to appeal directly from the Macomb County Circuit Court's Opinion and Order on ACIA's motion for partial summary disposition. Ms. Joseph urges that leave was improvidently granted, but nonetheless urges affirmation of the trial court's decision and of *University of Mich Regents v Titan Ins Co,* 487 Mich 289; 791 NW2d 897 (2010).

COUNTER-STATEMENT OF STANDARDS OF REVIEW

This Court reviews decisions on summary disposition *de novo*. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Statutory interpretation is a question of law that this Court reviews *de novo*. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005); *Paige v City of Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (2006).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. IS THE ONE YEAR BACK RULE INAPPLICABLE TO ALLOWABLE EXPENSES WHERE THE PLAIN LANGUAGE OF THE ONE YEAR BACK PROVISION IN MCL 500.3145(1) APPLIES TO "THE LOSS," NOT TO "ALLOWABLE EXPENSES?"

Plaintiff-Appellee says, "Yes."

II. SHOULD THIS COURT AFFIRM THE DECISION OF THE TRIAL COURT AND REAFFIRM *UNIVERSITY OF MICH REGENTS v TITAN INS CO* AS CORRECTLY DECIDED, WHERE THE PLAIN LANGUAGE OF THE ONE YEAR BACK RULE IS A TEMPORAL LIMITATION PERIOD SUBJECT TO MCL 600.5851, NOT A DAMAGES CAP, AND WHERE ALLOWABLE EXPENSES ARE ALWAYS UNLIMITED IN AMOUNT AS LONG AS THEY CONSTITUTE "ALL REASONABLE CHARGES?"

Plaintiff-Appellee says, "Yes."

III. SHOULD THIS COURT AFFIRM THE DECISION OF THE TRIAL COURT AND REAFFIRM *UNIVERSITY OF MICH REGENTS v TITAN INS CO* AS CORRECTLY DECIDED, WHERE THE PLAIN LANGUAGE OF THE NO FAULT ACT PROVIDES THAT BENEFITS UNDER THE ACT BELONG TO THE INJURED PARTY?

Plaintiff-Appellee says, "Yes."

IV. SHOULD THIS COURT AFFIRM THE DECISION OF THE TRIAL COURT AND REAFFIRM *UNIVERSITY OF MICH REGENTS v TITAN INS CO* AS CORRECTLY DECIDED BASED ON *STARE DECISIS*, WHERE THE DECISION IN THAT CASE REFLECTED THE CERTAINTY OF OVER THIRTY YEARS OF THE APPLICATION OF THE PLAIN LANGUAGE OF THE STATUTE?

Plaintiff-Appellee says, "Yes."

COUNTER-STATEMENT OF FACTS

On June 14, 1977, Doreen Joseph was catastrophically injured in a motor vehicle accident resulting in a severe traumatic brain injury and paralysis. (Brief In Support of Plaintiff's Answer To Defendant's Motion For Partial Summary Disposition, 36a). Since being discharged from the hospital, Doreen Joseph has received attendant care and case management from her family members, including her mother, Marilyn Joseph. (*Id.*). ACIA is the first party insurer that covered Doreen Joseph and has known what Marilyn and others have done for Doreen since the accident. (*Id.*)

In addition to direct care, Marilyn Joseph has, with the help of her husband and other family members, for the past 30 plus years, provided the following: set up medications; attend therapy, doctor and legal appointments; daily monitoring of health and health issues; daily update and communication to staff for continuity of care between all care givers; acquire and set up all medications and medical supplies; weekly review of care giver charting for feedback to doctors on medication outcome/needs; contact with doctors for all health issues and needs; write summary notes for doctor visits on Doreen's current status and concerns; translate for Doreen's spelling system to new staff and others; training and supervision and assistance of new staff; administration of care givers - contacting, acquiring, scheduling; track/log care hours used for rolling bank form for insurance company; schedule all therapies, activities, appointments and procedures; providing training to Doreen on computer and augmentative communication systems and to all care givers; provide all driving transportation; correspondence; banking; coordinate equipment maintenance and repairs;

coordinate vehicle maintenance and repairs; etc. (*Id.*) These facts were and are known to ACIA. (37a).

Although ACIA only recently made a payment to the Joseph family for case management services, ACIA's payment was not comparable to commercially reasonable agency market rates (ACIA paid $35.00 hour, while agency rates are $85.00 to $115.00) and was not for all the case management provided by Mrs. Joseph. (38a).

There is no dispute that Ms. Joseph suffered a severe closed head injury in the automobile accident. (36a). There is no dispute that Ms. Joseph's closed head injury is a condition of mental derangement that negatively affects her cognitive capabilities and executive function skills and prevents her, and has prevented her, from comprehending her rights, as attested to by her long-time treating physician, Dr. Owen Perlman. (January 5, 2011 Opinion and Order, 92a).

ACIA had filed for summary disposition on various grounds. (Motion For Partial Summary Disposition, 12a). The trial court granted summary disposition to ACIA on certain claims, but denied the motion as to the one year back rule, finding a factual issue exists as to Doreen Joseph's "insanity" under MCL 600.5851. (January 5, 2011 Opinion and Order, 94a-97a).[1] This Court granted ACIA's by-pass appeal application.

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[1]The trial court properly found that there was a genuine issue of material fact for the jury regarding Ms. Joseph's "insanity" and the applicability of the one year back rule. *Davidson v. Baker-Vander Veen Const. Co.*, 35 Mich. App. 293; 192 N.W.2d 312 (1971); *Hill v. Clark Equipment Co.*, 42 Mich. App. 405; 202 N.W.2d 530 (1972); *see Makarow v. Volkswagen of America, Inc.*, 157 Mich. App. 401; 403 N.W.2d 563 (1987); *Hogan v. Allstate Ins. Co.*, 124 Mich. App. 465; 335 N.W.2d 6 (1983).

ARGUMENT

I. THIS COURT SHOULD APPLY THE PLAIN LANGUAGE OF THE NO FAULT ACT AND HOLD THAT THE "ONE YEAR BACK" RULE OF MCL 500.3145(1) APPLIES BY ITS PLAIN LANGUAGE TO SPECIFIC "LOSSES" AND NOT TO "ALLOWABLE EXPENSES" UNDER MCL 500.3107(1).

ACIA seeks a ruling from this Court that the one year back rule applies to limit Ms. Joseph's claims for allowable expenses. This suit does not seek wage loss or survivor's loss. By its plain language, the one year back rule only applies to "loss," not "expenses."[2]

MCL 500.3145(1) provides:

> 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. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable **expense**, work **loss** or survivor's **loss** has been incurred. However, the claimant may not recover benefits for any portion of the **loss** incurred more than 1 year before the date on which the action was

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[2]Although not raised before the trial court, this issue is vital to this Court's determination of the issues raised in the Order granting leave. Many practitioners assume that the one year back rule applies, without a careful review of the langauge of the statute itself. Before deciding whether the one year back rule is a limitations period or a damages cap, this Court must determine whether the one year back rule applies at all in this case involving allowable expenses. *Smith v Foerster-Bolser Const, Inc,* 269 Mich App 424, 427; 711 NW2d 421 (2006)(appellate courts "may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented....")(citation omitted). Here, the issue is one of statutory interpretation and the only relevant fact is not disputed: the benefits sought are "allowable expenses." Indeed, the very issue whether the one year back rule is a limitations period or a damages cap was raised by the Court, not the parties, during oral argument in *Cameron v Auto Club Ins Ass'n,* 476 Mich 55; 718 NW2d 784 (2006).

> commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. 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.

(Emphasis added). The language of the one year back rule does not apply to claims for allowable expenses.

The No Fault Act defines the benefits available to insureds and others injured in automobile accidents. The statute defines specific categories of benefits:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) **Allowable expenses** consisting of all reasonable **charges** incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. ...
>
> (b) **Work loss** consisting of **loss of income** from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any **loss** after the date on which the injured person dies. Because the benefits received from personal protection insurance for **loss** of income are not taxable income, the benefits payable for such **loss** of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work **loss** sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work **loss**. ...
>
> (c) **Expenses** not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

MCL 500.3107(1)(emphasis added). "Allowable expenses" include hospital bills, doctor bills, attendant care, room and board, and other medical and "care, recovery, or rehabilitation" expenses. *See, e.g., Manley v DAIIE,* 425 Mich 140; 388 NW2d 216 (1986); *see* MCL 500.3107a (reinforcing term "work loss"); MCL 500.3107b (reinforcing "expenses" as applicable to allowable expenses). The No Fault Act also provides for "survivor's loss" as a benefit. MCL 500.3108.

In the No Fault Act, the Legislature distinguished between loss and expense, the former involving a cessation or decrease of an asset or income (work loss for decreased income and survivors loss including loss of contribution of support the survivors "would" have received), and the former involving increased liabilities, outflows, expenditures, costs, etc. In *Griffith v State Farm Mut Auto Ins Co,* 472 Mich 521; 697 NW2d 895 (2005), this Court recognized this dichotomy, noting that the "food" expenses sought were really "wage loss" benefits that were "specifically addressed elsewhere in the no-fault act." 472 Mich at 540 (citations omitted).

The distinction is consistent with the ordinary sense of these words. *See Jarosz v DAIIE,* 418 Mich 565, 584-85; 345 NW2d 563(1984) ("[w]ork-loss benefits are paid for loss of income from loss of work."); *Escanaba Lake Superior RR Co v Keweenaw Land Ass'n Ltd,* 156 Mich App 804, 817; 402 NW2d 505 (1986)(interpreting "expenses" in Uniform Condemnation Procedures Act or "to mean money paid out that otherwise would not have been paid had a condemnation proceeding not been undertaken."); *see also State ex rel Leis v Ferguson,* 149 Ohio St 555, 557; 80 NE2d 118 (1948)("In Black's Law Dictionary (3 Ed.),

... 'expense' is defined as 'that which is expended, laid out or consumed; an outlay; charge; cost; price.'"); *Proudfoot v State Farm Mut Ins Co,* 469 Mich 476, 484; 673 NW2d 739 (2003)(expense is incurred when insured becomes "liable" for it).

In the limitations provision of the No Fault Act, the Legislature imposed the one year back rule on wage loss and survivor's loss, not on allowable expenses. MCL 500.3145(1) requires that suit be filed within one year of the date of the accident unless the insurer has received notice of the injury or made a payment of benefits. This tolling of the limitations period extends until "1 year after the most recent allowable **expense,** work **loss** or survivor's **loss** has been incurred." MCLA 500.3145(1)(emphasis added). The very next sentence, the so-called "one year back rule," limits recovery temporally, but specifically refers to "the loss:" "However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." The Legislature's use of the word "loss" in the sentence modifying and immediately following the specification of three types of benefits (expense, loss, and loss) imposed a limitation only the specific, parallel items, the losses.

"It is a general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent, unless there is something in the subject matter or dominant purpose which requires a different interpretation." *Winokur v Michigan State Bd of Dentistry,* 366 Mich 261, 266; 114 NW2d 233 (1962)(citation omitted). Here, the parallel use of the word "loss" in the tolling sentence and in the limiting sentence indicates that the meanings are the same. The use of the word "the" before loss in the limiting sentence (the

one year back sentence) also indicates that the reference is to the specific losses identified in the antecedent sentence, since "the" is a very specific term. In *Massey v Mandell,* 462 Mich 375; 614 NW2d 70 (2000), this Court stated:

> The use of the word "the" has a meaning that is different than the word "a." Subd. (1)(a)(i) does not say "a defendant" resides, has a place of business, or conducts business in the county. Nor does it say "one of the defendants." Rather, it says "the defendant." Thus, in order for the camp's and Mandell's position to prevail, we would have to read "the" as if it said "a." This we decline to do. "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an)...." Random House Webster's College Dictionary, p. 1382. Moreover, when, as in subd. (1)(a), the Legislature has qualified the same word with the definite article "the" in one instance (subd. [1][a][i]) and the indefinite article "a" in another instance (subd. [1][a][ii]), and both are within the same subsection of a statute, even more clearly there can be no legitimate claim that this Court should read "the" as if it were "a."

462 Mich at 382 n5; *see Attorney General v Kent County Road Comm'n,* 184 Mich App 525; 459 NW2d 11 (1990); *Robinson v City of Detroit,* 462 Mich 439, 458-59; 613 NW2d 307 (2000)("The Legislature's use of the definite article "the" clearly evinces an intent to focus on one cause. The phrase "the proximate cause" is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury.").

In *Robinson v City of Lansing,* 486 Mich 1, 782 NW2d 171 (2010), this Court reviewed the highway exception to governmental immunity, in particular, MCL 691.1402a. This Court, viewing the syntax and language of the statute, interpreted the language "the highway" as referring to a specific highway ("county highway"), not to any highway. This Court enforced the Legislature's use of the limiting word "the" in finding that the statutory

provision was limited to county highways. As in *Robinson,* here too this Court should enforce the plain, limited language the Legislature used in the one year back rule and find that the rule does not apply to allowable expenses under MCL 500.3107(1).[3] Thus, the relief sought by ACIA is unavailable, regardless of *Titan*.

II. THIS COURT SHOULD AFFIRM THE DECISION OF THE TRIAL COURT AND REAFFIRM *UNIVERSITY OF MICH REGENTS v TITAN INS CO* AS CORRECTLY DECIDED, WHERE THE PLAIN LANGUAGE OF THE ONE YEAR BACK RULE IS A TEMPORAL LIMITATION PERIOD SUBJECT TO MCL 600.5851, NOT A DAMAGES CAP, AND WHERE ALLOWABLE EXPENSES ARE ALWAYS UNLIMITED IN AMOUNT AS LONG AS THEY CONSTITUTE "ALL REASONABLE CHARGES."

Even if the one year back rule were applicable to "allowable expenses," the decision in *Regents v Titan* properly interpreted Section 3145(1) of the No-Fault Act. That section contains two separate statutes of limitation. The first time limitation is the "notice rule," which provides that the auto accident victim cannot file a lawsuit for PIP benefits more than one year after the accident unless the no-fault insurer has been provided with written notice of the injury or unless the insurer has paid PIP benefits for the injury. The second time limitation is the "one-year-back rule," which provides that the auto accident victim cannot recover no-fault PIP benefits for losses incurred more than one year before the insured filed suit against the no-fault insurer. These two separate statutes of limitations are set forth above.

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[3] "Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning...." *Vanderlaan v Tri-County Community Hosp,* 209 Mich App 328, 332; 530 NW2d 186 (1995)(citations omitted); *see* MCL 8.3a.

In *Regents v Titan,* this Court held:

> To begin with, we conclude that the approach in *Cameron* was flawed because it read the statutory language in isolation. MCL 600.5851(1) does not create its own independent cause of action. It must be read together with the statute under which the plaintiff seeks to recover. In no-fault cases, for example, MCL 600.5851(1) must be read together with MCL 500.3145(1). Doing so, the statutes grant infants and incompetent persons one year after their disability is removed to "bring the action" "for recovery of personal protection insurance benefits ... for accidental bodily injury...." On the basis of its language, MCL 600.5851(1) supersedes all limitations in MCL 500.3145(1), including the one-year-back rule's limitation on the period of recovery.

487 Mich. at 298 (footnote omitted). The Court "restore[d] the proper understanding of the interaction between MCL 600.5851(1) and the one-year-back rule. We hold that the 'action' and 'claim' preserved by MCL 600.5851(1) include the right to collect damages." 487 Mich. at 299.

The one-year-back rule is a statute of limitations for the simple reason that failure to file suit within 365 days of an incurred loss bars recovery for that loss. It is a classic time bar that operates in exactly the same manner as any other statute of limitations. The term "statute of limitations" is defined as "legislative enactments as prescribe the periods within which actions may be brought upon certain claims or **within which certain rights may be enforced**...." Black's Law Dictionary (7th ed)(emphasis added). In *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 574; 702 NW2d 539 (2005), this Court recognized that all three sentences contain temporal limitations. A statute of limitations takes away "the remedy of the party....because he is unreasonably negligent in the assertion of his rights." *Toll v Wright,* 37 Mich 93, 102 (1877); *see also Austin v Anderson,* 279 Mich 424; 272 NW 730 (1937);

Bement v Grand Rapids & Indiana Railway Co, 194 Mich 64; 160 NW 424 (1916). The one year back rule of MCL 500.3145(1) is literally a "period of limitation" that limits the injured party's remedy.

The one-year-back rule is a statute of limitations because, if an injured person cannot recover damages for their injuries, then having the ability to initiate a cause of action is meaningless. Indeed, if there are no damages, then the injured person cannot state a claim upon which relief can be granted because one of the essential elements of the cause of action for PIP benefits is missing.

This Court's conclusion in *Cameron, supra,* that the one year back rule is a "damages cap" is not supported by the plain language of the statute. The language of the statute does not include the word "cap." A "cap" is defined as "an upper limit (as on expenditures) ["ceiling" is a synonym]."[4] There is no dollar limitation in the no fault act on allowable expenses. MCL 500.3107(1) requires an insurer to pay "**all** reasonable charges." (Emphasis added). Thus, depending on the severity of the injuries, many hundreds of thousands or millions of dollars in medical expenses could be incurred in a single year, even if the one year back rule were applied to allowable expenses. A "damages" cap would by its very terms limit the amounts of damages available, as opposed to the temporal limitation of the one year back rule. By its plain language, MCL 600.5851 applies to such temporal limitations.

The decision in *Regents v Titan* properly restored thirty years of precedent that treated

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[4]www.merriam-webster.com/dictionary/cap

the one-year-back rule the same as the other limitations periods in Section 3145. *Rawlins v Aetna Casualty & Surety Co*, 92 Mich App 268, 274-277; 284 NW2d 782 (1979); *Hartman v Ins Co of Am*, 106 Mich App 731, 743-744; 308 NW2d 625 (1981); *Geiger v Detroit Auto Inter-Ins Exch*, 114 Mich App 283, 289-90; 318 NW2d 833 (1982); *Regents of the University of Michigan v State Farm Mut Auto Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002). The label does not matter, only the effect of the provision. *Regents v Titan* properly restored that understanding, an understanding based on the language of the statutes and an understanding that serves the purposes of the statutes.

The Legislature's purpose in enacting the tolling provision of the Revised Judicature Act was described by the Court of Appeals in *Klida v Braman*, 278 Mich App 60; 748 NW2d 244 (2008). The Court in *Klida* stated that "'[t]he purpose of a savings or tolling statute for persons under a disability is to protect the legal rights of those who are unable to assert their own rights and to mitigate the difficulties of preparing and maintaining a civil suit while the plaintiff is under a disability.'" 278 Mich App at 71 (quoting 51 Am. Jur. 2d, Limitation of Actions, § 218, p. 591).

Michigan law has long allowed for tolling for minors and incompetent persons. The Revised Judicature Act's tolling provision provides that

> (1) Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

MCL 600.5851(1). There is nothing in the Revised Judicature Act that limits the kind of case to which it applies. Indeed, the Court noted in *Lambert v Calhoun*, 394 Mich 179, 191; 229 NW2d 332 (1975), that there is "scant reason" to say that the Legislature intended to distinguish between common law and statutory causes of action when it enacted the tolling provision of the Revised Judicature Act. Minors and mentally incompetent persons are under the same disability regardless of whether their actions arise from the common law or statute, while the defendant in a statutory-based suit is generally in no greater need of protection from delay in the commencement of the action than a defendant in a common law action. *Id.* at 191. The Court, thus, applied the Revised Judicature Act's tolling provision to causes of action created by Michigan statute. *Lambert, supra* at 192; *see also Prof'l Rehab Assocs v State Farm Mut Auto Ins Co*, 228 Mich App 167, 175; 577 NW2d 909 (1998).

In applying the Revised Judicature Act's tolling provision to the one-year-back rule, the Court of Appeals in *Geiger* noted that the tolling provision serves a similar purpose with respect to both the No Fault Act's one-year-notice rule and the one-year-back rule – "a person should not lose his claim during his minority, when he has no legal capacity to act on his own behalf." *Geiger, supra* at 291, citing *Rawlins, supra.* The *Geiger* Court concluded that the tolling provision of Section 5851 did apply to the No-Fault Act's one-year-back rule, reasoning:

> A contrary rule would severely limit the utility of the minority saving provision and could deprive a person of benefits to which he would otherwise be rightfully entitled. In the present case, James Geiger, injured at the age of 16, incurred substantial medical expenses over the 2 years following the accident. He commenced this action approximately two weeks before his nineteenth

> birthday. Although his right to commence the action is preserved under *Rawlins, supra,* **if we do not apply the minority saving provision to the "one year back" rule of § 3145, plaintiff would be effectively precluded from recovering PIP benefits for the medical expenses incurred during the two years immediately following the accident.** In order to advance the policy of RJA § 5851 and *Rawlins, supra*, we conclude that an insured who is injured during his minority and commences an action before his nineteenth birthday is entitled to collect PIP benefits for expenses and losses incurred from the date of the accident.

Geiger, supra, at 291 (emphasis added). In enacting the Revised Judicature Act, the Legislature has provided the directive that the Act "is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof." MCL 600.102; *Klida, supra* at 73-74. Failure to apply tolling to the one year back rule for minors and incompetent persons frustrates the legislative purposes in creating tolling. This Court in *Regents v. Titan* restored this logic and sanity to the language of the two statutes.

ACIA relies on various policy arguments and references to other laws in support of its argument. ACIA's reference to the Uniform Motor Vehicle Accident Reparations Act is irrelevant to the issues before this Court. First, the plain language of the Michigan statute as enacted controls. Second, ACIA is asserting policy issues that are the province of the Legislature. Third, UMVARA is inapplicable in that it did not contain a one year back provision and in that it did not address the issue of a separate statute governing disability tolling. That the Michigan Legislature did not enact certain provisions of UMVARA provides no guidance or alteration of the plain language of the statute. *See Roberts ex rel Irwin v Titan Ins Co,* 485 Mich 935; 773 NW2d 905 (2009)(Corrigan, J., dissenting), in which Justice Corrigan quoted from Justice Griffin's opinion in *Priesman v Meridian Mut*

Ins Co, 441 Mich 60; 490 NW2d 314 (1992):

> Given the Legislature's consideration of several versions of MCL 500.3113(a) and its decision to depart from the language of the UMVARA, Justice Griffin
>
> > [could not] conclude that the Legislature intended any result other than the result required by the clear and unambiguous language of the statute: Any person who takes a vehicle unlawfully is excluded from no-fault coverage if he is injured while using that vehicle. Like the joyriding statute, § 3113(a) contains no exception for minors or family members. [Id. at 75–76, 490 N.W.2d 314.]

ACIA's attempt to color the plain language of the statutes by references to UMVARA provisions not enacted and to laws of other states is inappropriate and unsupported.

ACIA's citation to other states' laws is misleading. ACIA cites New Jersey as its shining example of a state in which the courts have held that disability tolling does not apply to no fault claims. ACIA suggests that this Court should read something into this because New Jersey has the second most generous PIP benefits in the country. ACIA's argument is misleading, ignores the fundamental principles of statutory interpretation, and ignores the very language of the No Fault Act and of MCL 600.5851.

New Jersey's disability tolling provision is unlike the broad, all-encompassing language of MCL 600.5851. In *Cruz-Diaz v Hendricks,* 409 NJ Super 268; 976 A2d 1092 (AD,2009), cited by ACIA, the Court held:

> In *McLaughlin v. Metzner,* 201 N.J.Super. 51, 54, 492 A.2d 696 (App.Div.1985), we explicitly held that the tolling language of N.J.S.A. 2A:14-21 only applies to the specified actions mentioned. The PIP statute is not mentioned in N.J.S.A. 2A:14-21. Moreover, the specific PIP statute must be read to override the more general tort law provisions when the two conflict. *Metzner, supra,* 201 N.J.Super. at 54, 492 A.2d 696. There is no tolling provision in the PIP statute.

409 NJ Super at 281-82. The language of the New Jersey disability tolling provision only applies to "specified actions." Contrary to supporting its position, the New Jersey situation, if it had any relevance to Michigan, would support a finding that MCL 600.5851 applies to the temporal limitation of the one year back rule because of the breadth of the language of MCL 600.5851 and the Legislature's specific statement regarding liberal interpretation of the Revised Judicature Act. MCL 600.102.

ACIA in essence is arguing that this Court should determine what the Michigan Legislature meant in its plain words by looking to what other state Legislature enacted or did not enact. Such methodology is inappropriate.

ACIA also seeks to have this Court slant its view of the plain language of the one year back rule by unsubstantiated assertions about the downfall of the insurance industry. The documents provided by ACIA do not support its claims, were never before the trial court, and have no business here. They are not evidence in this case, but instead reflect an attempt by ACIA to have this Court make policy decisions in the face of the plain language of the statute. The documents do not support the proposition for which they are asserted.

ACIA attaches a document showing MCCA payouts increasing after the decision in *Cameron, supra.*, the opposite of what one would expect following *Cameron*. ACIA provides nothing to establish that the *Regents v Titan* decision caused any increase in expenditures for insurance companies or MCCA (and to exclude other factors from the equation, such as general increase in health care costs). More importantly, there is nothing to show that, even if there were an increase, such increase was not accounted for by the

actuarials when premiums were set. After all, the tolling of the one year back rule by MCL 600.5851 was the law for nearly thirty years. If the insurers did not take that into account, then shame on them and it is not the function of the appellate courts to provide corporate bailouts. On the contrary, one expects that the insurers took such law into account.

The purpose of the No Fault Act was "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Kelley,* 402 Mich 554, 579; 267 NW2d 72 (1978). The No Fault Act was not designed to provide insurers the ability to play "gotcha" with benefits or to reap windfalls. ACIA complains about "family provided attendant care claims," but in many instances, such benefits have not been paid when the insurer knew such care was being provided, were grossly underpaid, or were not paid because of fraudulent statements made by the insurers. The No Fault Act was not designed to reward insurers for negligent or fraudulent conduct designed to pad their bottom lines. Many of these family provided attendant care cases involve the most severely injured individuals, such as quadriplegics and those suffering from severe closed head injuries. The insurers typically maintain their claims files and keep good records on claims made under their policies. The reality is that the insurers benefit when family members provide the care because, even if the insurer pays some amount for the care, the pay is not commensurate with the cost of hiring an outside agency, when in fact it should be in line with those charges. Again, when the insurers conducted their actuarial exercises, presumably the insurers planned that the type of lifetime care needed by the catastrophically injured would be provided by outside agencies, once again providing a windfall for insurers when they

underpay or do not pay for the care provided by family members.

ACIA provides no study, no data, no financial books, and no analysis, other than tired, repetitive, unsubstantiated assertions, to show that the no-fault system is "hemorrhaging millions." If ACIA, MCCA, and other insurers want to open their books completely and provide unfettered access to them to forensic accountants and other experts to determine the veracity of these unsubstantiated assertions, then they are more than welcome to do so. Even so, even if the system was "bleeding" millions,[5] it is not the function of the courts to alter the statutory language and provide for corporate welfare, but instead the courts must read such language in context and give it full effect. *Regents v Titan* did just that.

III. THIS COURT SHOULD AFFIRM THE DECISION OF THE TRIAL COURT AND REAFFIRM *UNIVERSITY OF MICH REGENTS v TITAN INS CO* AS CORRECTLY DECIDED, WHERE THE PLAIN LANGUAGE OF THE NO FAULT ACT PROVIDES THAT BENEFITS UNDER THE ACT BELONG TO THE INJURED PARTY.

According to Section 3112 of the No-Fault Act, "Personal protection insurance benefits are **payable to or for the benefit of an injured person**...." MCL 500.3112 (emphasis added). As to the auto accident victim's claim, Section 3112 "expressly confers a cause of action on the injured party to collect PIP benefits for expenses incurred as a result of his injury." *Geiger, supra,* at 287; *Hatcher v State Farm Mut Auto Ins Co,,* 269 Mich App 596, 600; 712 NW2d 744 (2005). The Court of Appeals correctly decided *Geiger* – it is plaintiff's claim for her medical care and her benefits. In general, plaintiff has a vested

[5]Interestingly, while ACIA leads the charge of the "sky is falling" regarding first party no-fault benefits, the reality is that the largest portion of premium dollars go to collision and comprehensive coverage by far.

interest in making sure that her medical providers – professional or otherwise – are paid for their services. ACIA's attempt to separate an injured party from her benefits is incorrect.

The patient is liable for the expenses incurred when medical providers render treatment to the patient. *Community Resource Consultants, Inc v Progressive Michigan Ins Co,* 480 Mich 1097, 1098; 745 NW2d 123 (2008)(citing *Proudfoot, supra*); *Booth v Auto-Owners Ins Co,* 224 Mich App 724; 569 NW2d 903 (1997)(family provided care); *Bonkowski v Allstate Ins Co,* 281 Mich App. 154; 761 NW2d 784 (2008)(same).

Under current case law, medical providers have a right to sue no-fault insurers directly and in the name of the provider in order to recover unpaid expenses under the statute, even though MCL 500.3112 does not state that providers have the right to sue. *Regents of University of Michigan v State Farm, supra,* 250 Mich App at 733, recognized that the right of medical providers to bring such claims is ***derivative***. Indeed, a medical provider does not "incur" an expense because it is not liable for a charge that the provider is assessing. *Proudfoot, supra.* In *Lakeland Nuerocare Centers v State Farm Mut Auto Ins Co*, 250 Mich App 35, 38; 645 NW2d 59 (2002), the Court reiterated that provides may sue insurers directly. Neither case, however, holds that a provider has the exclusive right, as ACIA claims.

MCL 500.3112 does not deprive an insured of her right to benefits and does not give providers an exclusive right to seek benefits. Indeed, the ability to bring an action by providers is not mandatory. Yet ACIA's position was alter the statutory language to make the provider the exclusive person or entity with a right to seek benefits and would make an

action by providers mandatory, to the exclusion of the injured party's rights. ACIA's argument is unsustainable under the plain language of the no-fault act.[6]

The Legislature empowered injured insureds with the ability to seek payment of benefits. The Court of Appeals extended that right to create a derivative ability of providers to bring suit directly. This Court should not countenance ACIA's attempts to distort the statutory language and to pit insureds against their providers.

IV. THIS COURT SHOULD AFFIRM THE DECISION OF THE TRIAL COURT AND REAFFIRM *UNIVERSITY OF MICH REGENTS v TITAN INS CO* AS CORRECTLY DECIDED BASED ON *STARE DECISIS*, WHERE THE DECISION IN THAT CASE REFLECTED THE CERTAINTY OF OVER THIRTY YEARS OF THE APPLICATION OF THE PLAIN LANGUAGE OF THE STATUTE.

Stare decisis should not be a concern here where the plain language of the statute establishes that the one year back rule is inapplicable to allowable expenses and where the one year back rule is a temporal period of limitations. However, to the extent that this Court would disregard the plain statutory language and reverse *Titan*, Ms. Joseph urges this Court not to do so.

Titan restored thirty years of certainty under the No Fault Act, certainty that benefited

[6]ACIA has made similar arguments before, arguing that where a person who is "insane" under MCL 600.5851 also has a guardian, that tolling does not apply because the guardian is not "insane." In those situations, the proper plaintiff in any given action is the real party in interest. A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Stephenson v Golden*, 279 Mich 710, 766; 276 NW 849 (1937). In *Cooper v ACIA*, 481 Mich 399, 751 NW2d 443 (2008), this Court authorized the injured children, in an action brought by their mother, as next friend, to assert a fraud claim against a no-fault insurer, even though the misrepresentations giving rise to the fraud claim were made to the next friends, not the actual insureds.

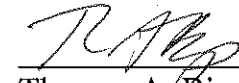
both insureds and also insurers in the setting of rates and determination of risks. As discussed above, *Titan* is faithful to the language of the No Fault Act and thus was correctly decided. *Robinson v. Detroit, supra,* at 464.

However, assuming arguendo that this Court views *Titan* as wrongly decided, the other factors in *Robinson* come into play, such as the effect on reliance interest and hardships. Because *Titan* restored thirty plus years of a consistent view of the relationship between the one year back rule and MCL 600.5851, overruling *Titan* would create an undue hardship and hinder reliance interests. This applies to injured individuals, providers, and insurance companies themselves. To impose additional hardships on those suffering from disabilities and to remove the protections that the Legislature afforded to them is not just.

CONCLUSION

For all the aforementioned reasons, this Court should affirm the trial court's decision, should reaffirm *Titan,* and should hold that the one year back rule is inapplicable to allowable expenses.

Respectfully submitted,



Thomas A. Biscup (P40380)
Attorney for Plaintiff-Appellee
45581 Village Blvd.
Shelby Twp., MI 48315
(586) 566-7266

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