STATE OF MICHIGAN

IN THE SUPREME COURT

CODY BONTER AND KAYTLIN JACKMAN,

Plaintiffs/Counter-Defendants/Appellants,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Cross-Plaintiff/Appellee,

and

TAYLON WILLIAMS,

Cross-Defendant.

SC No. 166182
COA No. 360411
L.C. No. 21-115568-CK
(Genesee County Circuit Court)

APPELLEE PROGRESSIVE MARATHON INSURANCE COMPANY'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

APPENDIX

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee Progressive Marathon Insurance Company ("Progressive") agrees that this Court has discretion to exercise jurisdiction in this case as set forth by Plaintiffs-Appellants Cody Bonter and Kaytlyn Jackman ("Plaintiffs").

COUNTER-STATEMENT OF THE QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY INTERPRET THE LEGISLATIVE AMENDMENTS TO MCL 500.3009 AS NOT AUTOMATICALLY IMPOSING HIGHER LIMITS ON EXISTING POLICIES AS OF JULY 2, 2020, BUT REQUIRING HIGHER LIABILITY LIMITS ONLY ON POLICIES ISSUED OR RENEWED AS OF THAT DATE?

The Court of Appeals would answer "yes."

Progressive answers "yes."

Plaintiffs answer "no."

Cross-Defendant Taylor Williams does not answer.

RESPONSE TO STATEMENT REGARDING GROUNDS FOR APPEAL

Plaintiffs correctly state that the issue they purport to raise in this case is essentially identical to the issue resolved by the Court of Appeals in *Progressive Marathon Ins Co v Pena,* ___Mich App___; ___NW2d___ (2023). As Plaintiffs note, the Defendants in *Pena* filed an application for leave to appeal to this Court. On October 18, 2023, this Court issued an order noting that the application is considered and directing the Clerk to schedule oral argument on the application.

If the application in *Pena* is denied, Plaintiffs' application in the instant case should be denied, as it essentially presents the same issue. But there is also no basis to grant the application in the instant case while the application remains pending in *Pena.* Inasmuch as the Court of Appeals' Opinion in *Pena* is published and the opinion in the instant case was not, there is no jurisprudential basis for action by the Court in this case.

For the reasons set forth below, the applications in both cases should be denied because they urge this Court to misinterpret the legislative amendments to MCL 500.3009 in a way that would cause serious deleterious consequences to insurers and insureds alike.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Introduction

For many years, auto policy applicants in Michigan were allowed to purchase policies with liability limits as low as $20,000 per person, $40,000 per accident. That was part of a statutory framework that also required no-fault insurers to pay unlimited personal injury protection ("PIP") benefits that could not be recovered in tort. Legislative amendments to MCL 500.3009 enacted in 2019 raised the minimum liability limits on auto policies issued or renewed after July 1, 2020. The amendments were part of an Act by

which the Legislature re-worked the no-fault/auto liability framework for policies issued after July 1, 2020. The Act created two statutes that allow applicants the option to purchase limited, or no, PIP coverage for auto policies issued or renewed after July 1, 2020. The Act amended the statute addressing tort claims, MCL 500.3135, to allow injured persons to recover, in tort, PIP benefits in excess of any limits they selected for their own policies. And the Act amended MCL 500.3009, the statute at issue, to raise the minimum liability limits, from $20,000/$40,000 to as much as $250,000/$500,000 (subject to an applicant selecting limits as low as $50,000/$100,000), on policies delivered or issued for delivery after July 1, 2020.

Progressive issued an automobile policy to Williams that was in effect from June 20, 2020, to December 20, 2020. The policy included a limit of $20,000/$40,000. On July 6, 2020 Williams made a vehicle change on the policy, substituting a 2017 Dodge Charger for a 2014 Jeep Grand Cherokee. On July 25, 2020, Williams was in an accident in which Plaintiffs sustained injury. Progressive agreed to pay the liability limits on the policy, but Plaintiffs filed this suit arguing that the limit on the Progressive policy was automatically increased to the highest default limit of $250,000/$500,000 under MCL 500.3009.

The trial court granted summary disposition in favor of Plaintiffs and against Progressive. The court reasoned that the policy was "modified" by the change in vehicle and was "delivered" after the effective date. Consequently, held the trial court, Progressive is required to provide liability limits of $250,000/$500,000 on the policy.

Plaintiffs, strangers to the insurance contract, cast their argument as benevolently seeking to help Williams, the tortfeasor who injured them. They claim Williams needed the protection of the highest default liability limits on his policy as of July 2, 2020. But

Williams has never made that request and has never suggested that the limits should be anything other than the $20,000/$40,000 in limits that he purchased when he entered into the applicable insurance contract with Progressive. Thus, Plaintiffs would have the Court order an amendment to an existing insurance contract that the insured himself did not even want—or want to pay for. Plaintiffs also gloss over the fact that Progressive is required to pay unlimited PIP benefits under the policy by virtue of the fact that it was issued prior to July 2, 2020. Needless to say, Plaintiffs do not argue that those PIP benefits were subject to automatic alteration on July 2, 2020. They just want the liability limits altered on that date, despite the fact that the Legislature used the same basic phrasing in all amendments, requiring changes regarding both liability limits and PIP benefits *only for policies issued or renewed after July 1, 2020.*

The trial court in this case erroneously agreed with Plaintiffs. The Court of Appeals correctly reversed and correctly interpreted MCL 500.3009 to require higher limits only on policies issued or renewed after July 1, 2020. The Court of Appeals essentially followed the controlling decision in *Pena*. The Court of Appeals also recognized that Plaintiffs raised a "wrinkle" in this case in that Williams changed vehicles on the policy after July 1, 2020, and Plaintiffs argued that that vehicle change required the liability limit to be adjusted from $20k/$40k to $250k/$500k despite Williams having made no request. The Court of Appeals rejected that argument because a change to a vehicle on a policy does not constitute "deliver[ing] or issu[ing] for delivery a *policy* to Williams after July 1, 2020." (Court of Appeals Opinion, p. 4, Plaintiffs' Apx 114a). Plaintiffs do not renew the argument based on this "wrinkle" in their application.

Because the Court of Appeals Opinion is correct for a host of reasons, there is no

basis for this Court's review, and Plaintiffs' application should be denied.

B. Substantive facts

The material facts are undisputed. Progressive issued a six-month automobile policy to Taylon Williams that became effective on June 20, 2020, Policy No. 939510962 ("the Policy"). Progressive and Williams contractually agreed on the premium and that the Policy would provide bodily injury liability coverage with a limit of $20,000 per person and $40,000 per accident, which, at the time, was the minimum amount that Mr. Williams could elect. (Progressive's Motion for Summary Disposition ("MSD") – Exhibit A, Auto Insurance Coverage Summary dated June 19, 2020 attached to Plaintiffs' Answers to Progressive's First Set of Interrogatories and Requests for Production of Documents, **Apx 061b-062b**). Before the Policy came into effect, Progressive mailed an Auto Insurance Coverage Summary to Mr. Williams that stated, in pertinent part:

> Your coverage begins on June 20, 2020 at the later of 12:01 a.m. or the effective time shown on your application. This policy period ends on December 20, 2020 at 12:01 a.m.
>
> Your insurance policy and any policy endorsements contain a full explanation of your coverage. The policy contract is form 9611D MI (11/15). The contract is modified by form A245 MI (10/17).

(*Id.* at **Apx 061b**).

On July 6, 2020, Mr. Williams changed the insured vehicle on the Policy. He added a 2017 Dodge Charger and removed a 2014 Jeep Grand Cherokee to Policy No. 939510962, the policy in effect from June 20,2020 to December 20, 2020. (*Id.,* Auto Insurance Coverage Summary dated July 6, 2020, **Apx 066b-067b**). To note the change, Progressive mailed an Auto Insurance Coverage Summary to Mr. Williams. (*Id*.) The Auto Insurance Coverage Summary stated that such change was to Mr. Williams' existing Policy:

> Your coverage began on June 20, 2020 at the later of 12:01 a.m. or the effective time shown on your application. This policy period ends on December 20, 2020 at 12:01 a.m.
>
> This coverage summary replaces your prior one. Your insurance policy and any policy endorsements contain a full explanation of your coverage. The policy contract is form 9611D MI (11/15). The contract is modified by form A245 MI (10/17).

(*Id*. at **Apx 066b**).

A few weeks later, Family First Credit Union was added as having an additional interest on the 2017 Dodge Charger. (*Id.*, Auto Insurance Coverage Summary dated July 22, 2020, **Apx 052b-053b**). This notation was made on the same Policy, Policy No. 939510962 in effect June 20, 2020 – December 20, 2020. Progressive again mailed an Auto Insurance Coverage Summary to Mr. Williams, noting the change. (*Id*.) And, again, Progressive informed Mr. Williams that the change was to the existing Policy:

> Your coverage began on June 20, 2020 at the later of 12:01 a.m. or the effective time shown on your application. This policy period ends on December 20, 2020 at 12:01 a.m.
>
> This coverage summary replaces your prior one. Your insurance policy and any policy endorsements contain a full explanation of your coverage. This policy contract is form 9611D MI (11/15). The contract is modified by form A245 MI (10/17).

(*Id*. at **Apx 052b**).

On July 25, 2020, Williams was driving the 2017 Dodge Charger in Flint, when he was involved in a collision with a vehicle driven by Bonter in which Jackman was a passenger. (Complaint, ¶ 9, **Apx 006b**). Bonter and Jackman sustained injuries from the collision. (*Id.*). They have both sought bodily injury liability coverage from Progressive under the Policy. Progressive offered to provide such coverage up to the Policy limits—$20,000 per person and $40,000 per accident. (Progressive's MSD – Exhibit A, March 3,

2021 Email Correspondence attached to Plaintiffs' Answers to Progressive's First Set of Interrogatories and Requests for Production of Documents, **Apx 065b**).

C. Pertinent proceedings

Plaintiffs filed suit on April 30, 2021 against Progressive and Williams. Plaintiffs alleged that Williams instructed or directed Progressive to cancel his automobile policy with respect to the 2014 Jeep Grand Cherokee and to issue a new policy for the 2017 Dodge Charger. (Complaint, ¶ 8, **Apx 006b**). Plaintiffs alleged that the new policy was delivered after July 6, 2020, and that Williams did not opt out of the default limits of liability coverage in effect under the amendments to MCL 500.3009, and, therefore, the default limits of $250,000 per person and $500,000 per accident automatically were imposed on the policy. (*Id.* ¶¶ 11-13). Plaintiffs seek a declaration that the purported new policy has liability limits of $250,000/$500,000. (*Id.* ¶ 14).

Progressive filed an answer and counterclaim on June 9, 2021. (**Apx 008b-023b**). Progressive pointed out that, contrary to the allegations of Plaintiffs' complaint, a new policy was not issued by Progressive after July 1, 2020; all that happened was a vehicle change was made on the existing policy. The removal of the 2014 Grand Cherokee and addition of the 2017 Dodge Charger constituted a change to the existing policy that was issued before the amendments to MCL 500.3009 took effect. (Counterclaim, ¶¶ 15-16, **Apx 017b**). Because no new policy was issued or renewed after July 1, 2020, Progressive sought a declaration that the limits for liability coverage remain the limits that were purchased by Williams, namely $20,000/$40,000. (*Id.* ¶ 19, **Apx 018b**).

Progressive filed a motion for summary disposition, arguing that there is no genuine issue of material fact and that Progressive is entitled to judgment as a matter of law.

(Progressive's MSD, **Apx 024b-072b**). Plaintiffs filed a brief in opposition to Progressive's motion in which they sought summary disposition in their favor. (Plaintiff's Answer and Affirmative Request for Judgment as a Matter of Law Under MCR 2.116(I)(2), **Apx 073b-088b**). Plaintiffs argued that the liability limits on the Progressive policy *automatically increased* on July 2, 2020 based solely on the fact that the policy was *in existence* after that date. (*see Id.* at pp. 10-11, **Apx 081b-083b**). Plaintiffs argued that the Progressive policy should be reformed to include a liability limit of $250,000/$500,000, rather than the $20,000/$40,000 that Williams had purchased. (*Id.* at **APX 083b-084b**).

Progressive filed a reply brief on January 20, 2022. (Progressive's Reply, **Apx 089b-094b**). Progressive argued that Plaintiffs' position that the limits on the Progressive policy automatically increased not only is contrary to the statute but, if accepted, would render the statute in violation of the Contract Clauses of both the Michigan and United States Constitutions. (*Id.* at pp. 2-3, **Apx 090b-091b**).

The court held oral argument on the motion on January 24, 2022. (Jan. 24, 2022 Transcript, **Apx 095b-107b**). The court ruled in favor of Plaintiffs, granting summary disposition in their favor. The court reasoned as follows:

> …I think this is an issue that is probably going to be resolved in the Court of Appeals at some point but, in my view today, I believe that the--and I'm going to just characterize it in my own terms for purposes of the record, that the policy was modified by the change in the vehicle and that policy was delivered under paragraph 1 of 500.3009 after the effective date of these changes and it was delivered without the required statutory references in subparagraph (6) and so the increase in the coverage that is required was triggered and so I'm going to grant the Plaintiffs' request under 2.116(I)(2) in terms of declaratory relief are requested regarding the policy limits for the reasons I've just stated and have been argued here on the record and I understand that other jurisdictions have decided that differently and that, ultimately, I think some cases in this state is going to have to be decided and then we'll have an answer from the Court of Appeals.

(*Id.* at p. 11, **Apx 105b**).

An order memorializing the trial court's ruling was entered on February 14, 2022. (Feb. 14, 2022 Order, **Apx 001b-002b**). Thereafter, Progressive filed its appeal to the Court of Appeals.

On August 17, 2023, the Court of Appeals issued an unpublished opinion reversing and remanding for the trial court to enter summary disposition in favor of Progressive. The court cited the controlling *Pena* decision, which correctly recognized that "it is clear that the Legislature did not intend for the increased minimums to apply automatically to policies that had been delivered prior to July 2, 2020." (Court of Appeals Opinion, p. 3, Plaintiff's Apx 114a), quoting *Pena*. The court also rejected Plaintiffs' argument that a different result is warranted by virtue of Williams having changed the vehicle on the policy after July 1, 2020. *Id*. at *3.

Plaintiffs then applied for leave to appeal to this Court.

COUNTER-STATEMENT OF STANDARD OF REVIEW

Progressive agrees with the Plaintiffs that the standard of review on appeal is *de novo*.

ARGUMENT

THE COURT OF APPEALS CORRECTLY INTERPRETED THE LEGISLATIVE AMENDMENTS TO MCL 500.3009 AS NOT AUTOMATICALLY IMPOSING HIGHER LIMITS ON EXISTING POLICIES AS OF JULY 2, 2020, BUT REQUIRING HIGHER LIABILITY LIMITS ONLY ON POLICIES ISSUED OR RENEWED AS OF THAT DATE

The parties agree that, under MCL 500.3009, auto policies delivered or issued for delivery after July 1, 2020, must offer liability limits of $250,000/$500,000, along with the choice for the insured to select limits as low as $50,000/$100,000. For policies issued after July 1, 2020, if an effective choice has not been made, the default limits are $250,000/$500,000. The issue in this case is whether the legislation imposes an automatic increase, to the default highest minimum limit of $250,000/$500,000, for liability limits on all policies that were in effect on July 2, 2020, and were delivered prior to that date.

The Court of Appeals correctly recognized that the legislation does not automatically increase the liability limits on policies issued prior to July 2, 2020; but rather that the higher limits (and the offered choice of *which* higher limits) required by the amendments to MCL 500.3009 apply only to policies delivered or issued for delivery after July 1, 2020. That is what the plain language of the statute provides. It is the only interpretation that does not render nugatory significant portions of the statute. It is the only interpretation that properly effectuates the Legislature's purposes in enacting the Act. It is the only interpretation that would avoid enormous practical problems. And it is the interpretation that avoids a significant Contract Clause violation, unlike Plaintiffs' interpretation.

A. Statutory changes made by the Act, including to MCL 500.3009.

To properly understand the legislative changes to MCL 500.3009, it is helpful to consider those changes within the context of other legislative changes made by the Legislature in the same Act.

One significant thing the Act did was to allow auto policy applicants to purchase limited PIP coverage, i.e., to eliminate the requirement that every auto policy is required to provide unlimited PIP coverage. The Act simultaneously increased minimum liability limits for tort claims arising out of auto accidents and allowed for tort recovery of PIP benefits in excess of limits an injured person purchases on his or her own policy. All these changes apply only to policies that were issued or delivered after July 1, 2020, as the text of the pertinent statutes makes clear.

The four statutes that accomplished these objectives are MCL 500.3009, which addresses liability limits; MCL 500.3107c and MCL 500.3107d, which address PIP benefits; and MCL 500.3135, which addresses tort liability and, as noted, was amended to allow for recovery of excess PIP benefits in tort.

MCL 500.3009, the statute at issue in this case, was revised to state, in pertinent part:[1]

> (1) * * * Subject to subsections (5) to (8), an automobile liability or motor vehicle liability policy * * * that insures against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle * * * must not be delivered or issued for delivery in this state with respect to any motor vehicle

[1] This quoted version is pasted from the Act and includes the alterations made by the Legislature. Underlined asterisks are used as ellipsis for removed text; underlined text reflects additions to the statute.

registered or principally garaged in this state unless the liability coverage is subject to all of the following limits:

(a) * * * Before July 2, 2020, a limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident, and after July 1, 2020, a limit, exclusive of interest and costs, of not less than $250,000.00 because of bodily injury to or death of 1 person in any 1 accident.

(b) * * * Before July 2, 2020 and subject to the limit for 1 person in subdivision (a), a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident, and after July 1, 2020, and subject to the limit for 1 person in subdivision (a), a limit of not less than $500,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.

* * *

(5) After July 1, 2020, an applicant for or named insured in the automobile liability or motor vehicle liability policy described in subsection (1) may choose to purchase lower limits than required under subsection (1)(a) and (b), but not lower than $50,000.00 under subsection (1)(a) and $100,000.00 under subsection (1)(b). To exercise an option under this subsection, the person shall complete a form issued by the director and provided as required by section 3107e, that meets the requirements of subsection (7).

(6) After July 1, 2020, on application for the issuance of a new policy or renewal of an existing policy, an insurer shall do all of the following:

(a) Provide the applicant or named insured the liability options available under this section.

(b) Provide the applicant or named insured a price for each option available under this section.

(c) Offer the applicant or named insured the option and form under this subsection.

* * *

(8) After July 1, 2020, if an insurance policy is issued or renewed as described in subsection (1) and the person named in the policy has not made an effective choice under subsection (5), the limits under subsection (1)(a) and (b) apply to the policy.

MCL 500.3009.

MCL 500.3107c addresses new options for limited PIP coverage available for purchase for policies issued or renewed after July 1, 2020. That section was created in its entirety by the Act, and states in pertinent part:

> (1) Except as provided in sections 3107d and 3109a, and subject to subsection (5), for an insurance policy that provides the security required under section 3101(1) and is issued or renewed after July 1, 2020, the applicant or named insured shall, in a way required under section 3107e and on a form approved by the director, select 1 of the following coverage levels for personal protection insurance benefits under section MCL 500.3107(1)(a):
>
> (a) A limit of $50,000.00 per individual per loss occurrence for any personal protection insurance benefits under section 3107(1)(a). The selection of a limit under this subdivision is only available to an applicant or named insured if both of the following apply:
>
> (*i*) The applicant or named insured is enrolled in Medicaid, as that term is defined in section 3157.
>
> (*ii*) The applicant's or named insured's spouse and any relative of either who resides in the same household has qualified health coverage, as that term is defined in section 3107d, is enrolled in Medicaid, or has coverage for the payment of benefits under section 3107(1)(a) from an insurer that provides the security required by section 3101(1).
>
> (b) A limit of $250,000.00 per individual per loss occurrence for any personal protection insurance benefits under section 3107(1)(a).
>
> (c) A limit of $500,000.00 per individual per loss occurrence for any personal protection insurance benefits under section 3107(1)(a).
>
> (d) No limit for personal protection insurance benefits under section 3107(1)(a).

MCL 500.3107c.

The Act also created MCL 500.3107d, which allows applicants to elect to not

maintain any coverage for PIP benefits payable under MCL 500.3107(1)(a), i.e. medical expenses. But, as with § 500.3107c, this option is available only for policies that are "issued or renewed after July 1, 2020." MCL 500.3107d(1).[2]

MCL 500.3135, which is the statute that preserves tort liability for noneconomic loss arising out of motor vehicle accidents, was also amended by the Act to allow tort claimants to recover amounts that were only payable as PIP benefits under the pre-amended statutory scheme. Specifically, MCL 500.3135(3)(c) was amended in pertinent part as follows (underlined text was added):

> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110, including all future allowable expenses and work loss, in excess of any applicable limit under section 3107c or the daily, monthly, and 3-year limitations contained in those sections, or without limit for allowable expenses if an election to not maintain that coverage was made under section 3107d or if an exclusion under section 3109a (2) applies.

MCL 500.3135(3)(c).

As discussed in greater detail in subsection **C.3**, it is abundantly clear when considering the Act as a whole that the changes to PIP coverages and liability limits were all intended to apply only to policies issued after July 1, 2020, and did not purport to change terms of existing policies that were issued prior to that date.

[2] The Act also created MCL 500.3109a(2), which requires insurers to offer to applicants that select a personal protection benefit limit under MCL 500.3107c an exclusion related to qualified health coverage—but only for "an insurance policy issued or renewed after July 1, 2020." MCL 500.3109a(2).

B. Applicable rules of statutory interpretation

The Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Estate of Shinholster v Annapolis Hosp,* 471 Mich 540, 548; 685 NW2d 275 (2004); *Murphy v Michigan Bell Tel Co,* 447 Mich 93, 98; 523 NW2d 310 (1994).

In discerning legislative intent, a court must "give effect to every word, phrase, and clause in a statute." *Shinholster,* 471 Mich at 549; *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002). The court must consider both the plain meaning of the critical words or phrases "as well as [their] placement and purpose in the statutory scheme." *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999). Courts construing statutes presume that every word has some meaning and must avoid any construction that would render any part of the statute surplusage or nugatory. *People v Borchard-Ruhland,* 460 Mich 278, 285; 597 NW2d 1 (1999). Also, the Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws. *Walen v Department of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993).

Two statutes that relate to the same subject or share a common purpose are in pari materia and must be read together. *People v Web,* 458 Mich 265, 275; 580 NW2d 884 (1998). The goal of the in pari materia rule is to give effect to the legislative purpose found in the harmonious statutes. *Id.* When two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.*

If the language of a statute is clear and unambiguous, the Court must apply the statute as written. *Borchard-Ruhland,* 460 Mich at 284. However, a "dogged literalism should not be employed to defeat the Legislature's intent." *Goodridge v Ypsilanti Township Board,* 451 Mich 446, 453, n 8; 547 NW2d 668 (1996). If reasonable minds could differ

regarding the meaning of a statute, the Court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. *Marquis v Hartwood Accident & Indemnity (After Remand),* 444 Mich 638, 644; 513 NW2d 799 (1984).

Two additional rules of statutory interpretation bear emphasis in this case. First, statutes in derogation of common law should be construed to make the least possible change to the common law. *Nation v WDE Elec Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). Second, if possible, the Court "must interpret statutes to avoid constitutional issues." *People v Anderson,* 330 Mich App 189, 198 n.5; 946 NW2d 825 (2019), citing *Does 11-18 v Department of Corrections,* 323 Mich App 479, 505; 917 NW2d 730 (2018).

C. In enacting amendments to MCL 500.3009 the Legislature intended that auto policies issued after July 1, 2020, offer or default to higher limits—not that higher limits were automatically imposed on all policies in existence on that date.

MCL 500.3009 provides for higher liability limits on auto policies delivered or issued for delivery after July 1, 2020. It does not automatically impose higher limits on policies that were delivered or issued for delivery prior to that date but remained in effect after that date. This can be seen in several important ways, as discussed below.

1. The language of MCL 500.3009(1) is clear that liability limits on existing policies were not automatically increased on July 2, 2020.

As the Court of Appeals correctly recognized, the language of MCL 500.3009 itself is clear that the statute did not purport to impose an automatic increase to the liability limits on existing policies as of July 2, 2020, that were delivered or issued for delivery prior to that date. This is especially clear when the language of the statute as a whole is considered.

Subsection (1) states as follows:

> (1) Subject to subsections (5) to (8), an automobile liability . . . policy . . . must not be delivered or issued for delivery in this state . . . unless the liability coverage is subject to all of the following limits:
>
> (a) Before July 2, 2020, a limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident, and after July 1, 2020, a limit, exclusive of interest and costs, of not less than $250,000.00 because of bodily injury to or death of 1 person in any 1 accident.
>
> (b) Before July 2, 2020 and subject to the limit for 1 person in subdivision (a), a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident, and after July 1, 2020, and subject to the limit for 1 person in subdivision (a), a limit of not less than $500,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.

MCL 500.3009(1).

Subsection (1) sets forth the applicable limits on a policy depending on when it is "delivered or issued for delivery." Policies that are "delivered or issued for delivery" before July 2, 2020, must include limits of not less than $20,000 per person, $40,000 per injury. Policies "delivered or issued for delivery" after July 1, 2020, must include limits of $250,000/$500,000, subject to subsections (5) to (8), which include the option for selecting lower limits. As the Court of Appeals correctly held, nothing in subsection (1) alters the limits on policies that were delivered before July 2, 2020; that subsection merely sets forth required limits depending on when a policy is delivered or issued for delivery.

This is how DIFS interprets the statute. DIFS even issued a bulletin confirming what the amended statute plainly states: the new bodily injury requirements did not automatically apply on July 2, 2020; they became effective for policies that were issued or renewed **after** July 1, 2020:

> **Choice of Bodily Injury Liability Coverage Limits Form**
> Section 3009(5) of the Insurance Code, MCL 500.3009(5), requires automobile insurers to use DIFS' BI Form. The BI Form is attached to this bulletin. Automobile insurers are required to use this form when offering applicants and insureds no-fault automobile insurance that will be issued or renewed after July 1, 2020. The BI Form must be offered to all insureds at each renewal after July 1, 2020.

(Bulletin 2020-03-INS, **Apx. 120b-122b**).

DIFS's website also addresses the issue in its Frequently Asked Questions, which conveys DIFS's understanding that changes to MCL 500.3009 do not impact auto policies delivered prior to July 2, 2020. (Webpage Printout, **Apx. 123b-127b**). As DIFS explained with regard to the key question:

> 3. When does section 3009 requiring a change in Bodily Injury limits become effective? Does it go in effect for new policies written and existing policies renewing after July 1, 2020, or does it go in effect for all policies on that date?
>
> [Answer:] The new BI limits did not automatically apply on July 2, 2020. They become effective for policies that are issued or renewed after July 1, 2020.

(*Id.* at **Apx 123b-124b**).

While perhaps not the most artfully drafted statute, subsection (1) itself is clear that liability limits on policies that preexisted July 2, 2020, and continued to be in effect on that date were not automatically increased by a factor of more than 12, from $20,000/$40,000 to $250,000/$500,000. The Court of Appeals correctly so held.

2. Plaintiffs' interpretation renders superfluous several crucial provisions in the statute and fails to effectuate the intent of the Legislature specifically expressed in the statute.

The flaw in Plaintiffs' interpretation of MCL 500.3009 is further exposed, perhaps *best* exposed, by the fact that it 1) renders several key terms superfluous, and 2) fails to give effect to the intent of the Legislature as expressed in the statute. For example, their

interpretation effectively reads out of the statute the phrases "must not be" and "unless the liability coverage." In other words, the statute would read exactly the same way—and would be stated more efficiently—if those phrases were removed and the statute stated as follows:

> (1) Subject to subsections (5) to (8), an automobile liability . . . ~~must not be~~ delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state ~~unless the liability coverage~~ is subject to all of the following limits:

As noted above, the operative verbal clause in subsection (1) is "must not be delivered or issued for delivery." And the crucial companion clause to that verbal clause is "unless the liability coverage is subject to all of the following limits." An interpretation that guts these key provisions and renders significant portions of them literally superfluous is flawed on its face. It also plainly violates the rule that courts are to presume that every word in a statute has some meaning and must avoid any construction that would render any part of the statute surplusage or nugatory. *Borchard-Ruhland,* 460 Mich at 285.

Plaintiffs' interpretation also renders superfluous another critical provision in the statute—one that lays bare the Legislature's intent to apply the statute only to policies delivered after July 1, 2020. One of the clearest indicators of the Legislature's intent that liability limits on existing policies were not automatically raised on July 2, 2020, and that the changes only applied to policies issued or renewed after that date, is found in subsection (8), which states:

> (8) After July 1, 2020, if an insurance policy **is issued or renewed as described in subsection (1)** and the person named in the policy has not made an effective choice under subsection (5), the limits under subsection (1)(a) and (b) apply to the policy.

MCL 500.3009(8) (emphasis added).

Plaintiffs' interpretation renders superfluous the important, bolded phrase "is issued or renewed as described in subsection (1)" and effectively replaces it with "exists" or "is in effect." Under Plaintiffs' interpretation, the liability limits on all policies in effect on July 2, 2020, are the limits under subsection (1)(a) and (b) in the absence of a contrary choice—*whether the policies were issued or renewed before or after that date*. That interpretation completely nullifies the very language that plainly expresses the Legislature's intent that MCL 500.3009 applies only to policies "issued or renewed" after July 1, 2020.

The inclusion of subsection (8), and in particular the important components referring to policies "issued or renewed" "[a]fter July 1, 2020," explicitly sets forth the point in time after which the issuance of an insurance policy invokes the default higher liability limits absent a contrary choice. These provisions are unmistakable confirmation that the Legislature intended those limits to apply only to policies "issued or renewed" "[a]fter July 1, 2020"—and not to policies issued or renewed prior to that date.[3]

Thus, even if subsection (1) read in isolation were deemed susceptible to Plaintiffs' interpretation, that interpretation simply cannot be squared with other portions of the statute. The Court of Appeals correctly recognized as much and correctly concluded that this important grammatical context removes any potential ambiguity in the statute. (Court of Appeals Opinion, Plaintiff's Apx 113a-115a).

[3] It is also important to note that subsection (1) begins by stating that it is "subject to subsections (5) to (8)." Aside from subsection (8), subsections (5)-(7) address additional steps that must be undertaken by insurers and applicants for policies issued or renewed after July 1, 2020.

3. Legislative amendments to other statutes in the Act further confirm Plaintiffs' interpretation fails to effectuate the Legislature's intent.

Another important clue to the Legislature's intent in amending MCL 500.3009 is found in the amendments to, and creation of, other statutes in the Act that amended MCL 500.3009. The main thrust of the Act was to allow auto policy applicants to obtain limited PIP coverage (presumably in order to lower the cost of auto policies). The Act includes the creation and passage of MCL 500.3107c, which allows insurance applicants to purchase limited PIP coverage, and MCL 500.3107d, which allows applicants who are qualified persons to decline PIP coverage altogether.

With the passage of MCL 500.3107c, the Legislature allowed auto insurance applicants to choose between unlimited PIP benefits, or benefits with a limit of $50,000, $250,000, or $500,000. MCL 500.3107c(1). Importantly, however, these options were not made available for policies in effect prior to July 1, 2020. Rather, the options apply only to "an insurance policy that… is issued or renewed after July 1, 2020… ." MCL 500.3107c(1).

Likewise, the passage of MCL 500.3107d allows applicants who are qualified persons to elect to not maintain any coverage for PIP benefits payable under MCL 500.3107(1)(a). But, as with § 500.3107c, this option is available only for policies that are "issued or renewed after July 1, 2020." MCL 500.3107d(1). The Act also created MCL 500.3109a(2), which requires insurers to offer to applicants that select a personal protection benefit limit under MCL 500.3107c an exclusion related to qualified health coverage—but only for "an insurance policy issued or renewed after July 1, 2020." MCL 500.3109a(2).

The legislative changes regarding MCL 500.3009, 500.3107c, 500.3107d, and

500.3109a(2) were all part of the same Act and are interrelated. The increase in minimum liability limits presumably was intended to correlate with the amendment to MCL 500.3135 to allow recovery of excess PIP benefits (above limits allowed by MCL 500.3107c and 500.3107d). This expansion of the type of damages a tort claimant can recover for injuries arising out of an auto accident coincides with the higher minimum liability limits required on auto policies delivered or issued for delivery after July 1, 2020. The "applicable limit[s] under § 3107c" referenced in § 3135(3)(c) cannot exist under any policy that was issued prior to July 2, 2020, since applicants were not permitted to limit PIP benefits for policies issued prior to July 2, 2020.

The Act's changes regarding MCL 500.3107c, 500.3107d, and 500.3109a(2) all unquestionably apply only to policies that were issued or renewed after July 1, 2020. No serious argument could be made that the Legislature, in enacting those three statutes, allowed for PIP benefits automatically to be reduced on an existing policy as of July 1, 2020. Plaintiffs' suggestion that the Legislature intended those three statutes to apply only to policies issued or renewed after July 1, 2020, yet also intended the increase in minimum liability limits of 500.3009 *not* to apply only to policies that were issued or renewed after July 1, 2020, respectfully, is absurd.

Under the rule of in pari materia, all these statutory amendments, which were passed in the same Act, should be construed to effectuate the legislative intent—particularly since they used similar language. *Web,* 458 Mich at 275. In all these sections, the Legislature provided that for policies delivered, or issued, or renewed after July 1, 2020, policy applicants could obtain limited PIP coverage, but were also required to purchase higher liability limits absent a different choice. The interrelatedness of those

amendments requires that they be interpreted to be in harmony, which is what the Legislature plainly intended. It is manifestly evident that the Legislation intended a combination of changes to available PIP benefits, tort recovery, and liability limits for policies "issued or renewed after July 1, 2020." MCL 500.3107c, MCL 500.3107d.

4. Plaintiffs' interpretation would impose enormous practical difficulties on insurers and insureds.

Plaintiffs also ignore the enormous practical difficulties that would befall both insurers and insureds if their interpretation were adopted. According to Plaintiffs, every insurer was required to assume that DIFS misinterpreted the statute and to issue policies that either expired on July 1, 2020, or that provided one set of liability limits before July 1, 2020, then the highest default limits beginning on July 2, 2020, then any lower limits selected by the insured thereafter for the remainder of the policy period. How would an insurer determine the premiums for such policies? Plaintiffs do not say because, of course, that is not their concern, since they are neither the insurer nor the insured that would have to deal with that problem.

It bears emphasizing that an insured on a policy that was in effect both before and after July 1, 2020, would not be permitted to choose anything lower than the highest default liability limit until after July 1, 2020. MCL 500.3009(5) states, "*[a]fter* July 1, 2020, an applicant . . . may choose to purchase lower limits than [$250,000/$500,000]." (emphasis added). Nothing in MCL 500.3009 allows an applicant to choose lower limits than the default highest limit before July 2, 2020. So, according to Plaintiffs, for any policy issued prior to July 2, 2020, that continued in place as of that date, liability limits as low as $20,000/$40,000 would exist on the policy up until July 1, 2020 (assuming that is what the

applicant purchased). The default highest limits would then be the limits on July 2, 2020, until an insured and insurer completed the process for selecting lower limits, after which the limits would change again if the insured so chose. How an insurer could be expected to determine the premiums on such policies is anyone's guess.

Plaintiffs' interpretation would also visit deleterious consequences on insureds. Nothing in MCL 500.3009 allows an insurer to make such changes on an existing policy after July 1, 2020. The process for an insured to choose lower limits outlined in MCL 500.3009(5)-(7) applies only "[a]fter July 1, 2020, on application for the issuance of a new policy or renewal of an existing policy." MCL 500.3009(6). Thus, under Plaintiffs' interpretation, all policies that remained in effect after July 1, 2020, are to be reformed to provide the highest default limits and must continue to provide those highest default limits until the end of the policy period, *whether the insured wants it or not*. And the only way to avoid that problem would be to have all policies expire on July 1, 2020. So, if an applicant wishes to purchase a six-month policy on, say June 5, 2020, an insurer must either (1) refuse that request and offer a 26-day policy, then require the person to apply for a new policy after July 1, 2020; or (2) provide the liability limits of the insured's choosing for 26 days, then the highest default limit for the last five months and four days whether the insured wants it or not.

The notion that the Legislature intended such a bizarre, unworkable scheme, which would harm, not benefit, insurers *and* insureds, is not well taken. Plaintiffs are not impacted by the many practical problems their interpretation would foist on both insurers and insureds because they are not parties to the insurance contract. While the considerable practical problems that would accompany their interpretation are of no

concern to non-parties to that contract, they are of great concern to insurers and insureds. It is no wonder DIFS interprets MCL 500.3009 the way Progressive does, even setting aside that that is the correct interpretation.

5. Plaintiffs' interpretation would render MCL 500.3009 unconstitutional in violation of the Contract Clause and, therefore, should not be adopted.

Another problem with Plaintiffs' interpretation of MCL 500.3009 as automatically increasing the liability limits on existing policies on July 2, 2020, is that it would make the statute unconstitutional in violation of the Contract Clauses of both the United States and Michigan Constitutions. While the Court of Appeals found it unnecessary to address this issue in both this case and in *Pena,* it is another impediment to Plaintiffs' interpretation.

The Clause in Const. 1963, Art. I, § 10, provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted," which is substantially identical to the federal constitution, U.S. Const., Art I, § 10, which provides that "[n]o state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ." *See Attorney Gen v Michigan Pub Serv Com'n*, 249 Mich App 424, 434; 642 NW2d 691, 698 (2002). The purpose of the Contract Clause "is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." *Studier v Michigan Pub School Employees' Retirement Bd,* 260 Mich App 460, 474; 679 NW2d 88 (2004).

Neither a court nor the Michigan Legislature can impose such a profound alteration to an existing insurance contract as a more than 12-fold increase in the policy limits—much less do so without a concomitant increase in premiums. It is hard to envision a more blatant violation of the Contract Clause than that.

Indeed, the Court of Appeals has specifically held—twice—that a statute providing that no automobile liability policy "shall be delivered or issued" unless it contains certain provisions cannot apply to policies already in existence—or else it would plainly violate the Contract Clause of the Michigan and United States Constitutions. The court so held in *Wells v DAIIE*, 29 Mich App 235; 185 NW2d 147 (1970), and did so again in *Rowland v Detroit Auto Inter-Ins Exch*, 34 Mich App 267; 191 NW2d 56 (1971), aff'd 388 Mich 476; 201 NW2d 792 (1972). The statute at issue in those cases provided that no auto liability policy could be delivered or issued unless it included uninsured motorist coverage. In both *Wells* and *Rowland* the Court held that the statute should not be construed as imposing such a requirement on existing policies—but added that if the statute were so construed, it would violate the Contract Clause and, therefore, be unconstitutional.

The instant case involves the exact same scenario—and then some. In fact, to understand the severity of the Contract Clause violation that the trial court's interpretation of the statute brings about, imagine the flip side of the same coin. Imagine the Legislature passing a law that unilaterally increased an insured's premium on an existing policy by a factor of more than 12, e.g., instead of the agreed-to premium of $1,000, the Legislature required the premium to be increased to over $12,000 with no corresponding increase in coverage. Could the Legislature pass such a law in keeping with the Contract Clause? The question answers itself and the answer obviously is no.

Plaintiffs also argue that the terms of an insurance contract can be "reformed" to coincide with what is required by the law, citing *Corwin v DaimlerChrysler Ins Co,* 296 Mich App 242; 819 NW2d 68 (2012). But the problem with the policy in *Corwin* was that the named insured had literally no insurable interest. The auto policy was issued to a retiree of

Chrysler for a vehicle he obtained through a Chrysler lease program. *Id.* at 248. Corwin was not named as an insured; the named insureds were DaimlerChrysler Corporation and its United States subsidiaries. *Id.* at 248-249. Setting the policy up in that fashion "enable[d] Chrysler Insurance to avoid primary liability for PIP benefits that are payable to injured people that Chrysler personally insures, i.e. the Corwins." *Id.* at 262. Despite avoiding primary liability for PIP benefits, Chrysler Insurance nevertheless charged insurance premiums to the Corwins. *Id.* at 262–63. The Court of Appeals applied the settled principle that "public policy forbids the issuance of an insurance policy where the insured lacks an insurable interest." *Id.* at 258 (punctuation and citation omitted). The court also recognized that a policy is void when there is not an insurable interest. Based on this set of circumstances, the court refused to enforce the policy in a way that enabled the insurer to avoid liability for PIP benefits, and, instead, reformed the policy to require the persons effectively insured by it, the Corwins, to be named insureds. *Id.* at 264.

Needless to say, *Corwin* is nothing like the instant case. The most apt statement in *Corwin* for purposes of the instant case is this one:

> When reasonably possible, this Court is obligated to construe insurance contracts that conflict with the no-fault act and, thus, violate public policy, in a manner that renders them "compatible with the existing public policy as reflected in the no-fault act."

Id. at 257, quoting *Cruz v State Farm Mut Auto Ins Co,* 466 Mich 588, 599; 648 NW2d 591 (2002). That is to say, courts are not to reform auto policies to include terms that are not included unless it is not reasonably possible to square the terms of the policy with the terms of the no-fault act.

Here, it is, of course, reasonably possible to square the terms of the Progressive policy with MCL 500.3009 without "reforming" the policy to state something that the policy

does not state. One need do nothing more than interpret MCL 500.3009 1) in accordance with its plain terms; 2) in accordance with how DIFS interprets it; 3) in a way that does not render any provisions superfluous; 4) in a way that effectuates the clearly expressed legislative intent, as shown by other amendments adopted in the same Act; 5) in a way that does not create other interpretive and practical problems; and 6) in a way that does not make the statute violate the Contract Clause. That interpretation would be required even if there were no rule favoring it over an interpretation that requires the policy to be dramatically reformed.

The Court of Appeals correctly interpreted the statute based on the statutory language and found it unnecessary to address the many other flaws in Plaintiffs' interpretation. For the reasons set forth in the Court of Appeals' Opinion and for any of the additional reasons set forth herein, the Court of Appeals ruled correctly, and this Court should deny Plaintiffs' application.

RELIEF

For the reasons set forth herein, Progressive requests that this Court deny Plaintiffs' application or affirm the judgment of the Court of Appeals. Progressive further requests any and all other relief to which it is entitled.

Respectfully submitted,

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Dated: November 16, 2023

WORD COUNT CERTIFICATE

JEFFREY C. GERISH, being first duly sworn, certifies and states the following:

1. He is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached answer to application for leave to appeal;

2. The answer prepared by his office complies with the type-volume limitation;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the answer, using Cambria size 12 font; and

4. The word processing system counts the number of words in the answer as 8,097.

s/Jeffrey C. Gerish
JEFFREY C. GERISH

STATE OF MICHIGAN

IN THE SUPREME COURT

CODY BONTER AND KAYTLIN JACKMAN,

Plaintiffs/Counter-,
Defendants/Appellants,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant/Counter-Plaintiff/
Cross-Plaintiff/Appellee,

and

TAYLON WILLIAMS,

Cross-Defendant.

SC No. 166182
COA No. 360411
L.C. No. 21-115568-CK
(Genesee County Circuit Court)

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

Robin M. Larson, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on November 16, 2023, she caused to be served a copy of our Answer to Application for Leave to Appeal, Appendix and Proof of Service/Statement Regarding E-Service as follows:

Steven Hicks (P49966) steve@chair2consulting.com	**Counsel was E-Served Via MiFile**
Michael Behm (P48435) behmandbehm@ameritech.net	**Counsel was E-Served Via MiFile**

/s/Robin M. Larson
ROBIN M. LARSON

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