STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals:
Murphy, P.J., and Meter and Davis, JJ.

AMYRUTH L. COOPER, by her Next Friend, **SHARON L. STROZEWSKI and LORALEE A. COOPER**, by her Next Friend, **SHARON L. STROZEWSKI**,

Plaintiffs/Appellants,

-vs-

AUTO CLUB INSURANCE ASSOCIATION,

Defendant/Appellee.

Supreme Court No. 132792
Court of Appeals No. 261736
Washtenaw County Case No. 03-367-NF
Lower Court Judge: Donald E. Shelton

PLAINTIFFS/APPELLANTS' BRIEF ON APPEAL

"ORAL ARGUMENT REQUESTED"

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STATEMENT REGARDING ORDER APPEALED FROM AND RELIEF SOUGHT

The Plaintiffs/Appellants seek an order reversing the decision of the Court of Appeals dated November 21, 2006. **APPENDIX EXHIBIT A.** The Court of Appeals held that the one year back rule found in MCL 500.3145(1) applied to a cause of action for fraud and limited the damages recoverable in a fraud claim to one year from the date the lawsuit had been filed. The Court of Appeals reviewed the case under MCR 2.116(C)(8). The Court of Appeals relied upon and extended the holding in Grant v AAA Michigan/Wisconsin, Inc., (On remand), 272 Mich App 142; 724 NW2d 498 (2006), lv. den. 477 Mich 1043 (2007) in support of it's decision. The application of the Grant holding to a common law fraud claim is contrary to this Court's decision in Devillers v Auto Club Ins. Ass'n., 473 Mich 562; 702 NW2d 539 (2005) where this Court stated that MCL 500.3145(1) would not preclude a recovery of damages where there was an allegation of fraud.

There are currently many cases pending throughout the State of Michigan concerning the legal issue of whether or not fraud would provide a valid exception to the one year back rule found in MCL 500.3145(1). This issue currently arises frequently in litigation and this Court needs to provide clear guidance to practitioners handling cases in the no-fault arena. Insurers argue that the one year back rule found in MCL 500.3145(1) is a substantive limit on recovery which applies to all causes of action involving no-fault claims. The practical ramifications of this argument are quite serious for insureds in the State of Michigan.

Under the reasoning of the Cooper decision, a no-fault insurer can deceive it's insured and face no legal consequences so long as the fraud occurred more than one year before the date that the subject lawsuit was filed. In other words, there is no remedy for fraud in the State of Michigan where the fraud occurs during the handling of a no-fault insurance claim according to the Cooper decision. The legislature did not intend that MCL 500.3145(1) would be used as a shield against fraudulent conduct. The No-Fault Act does not contain an exclusive remedy provision. Therefore, the Plaintiffs request an order directing the Court of Appeals to reinstate the Judgment and hold that a common law cause of action for fraud is not limited by the one year back rule of MCL 500.3145(1).

STATEMENT OF JURISDICTIONAL BASIS

This Honorable Court granted Plaintiffs/Appellants Application for Leave to Appeal on May 23, 2007. This Court has jurisdiction pursuant to MCR 7.301(2).

STATEMENT OF QUESTION INVOLVED

I. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN THE COURT REVERSED THE TRIAL COURT'S DECISION TO DENY THE DEFENDANT/APPELLEE'S MOTION FOR SUMMARY DISPOSITION DECIDED UNDER MCR 2.116(C)(8) WHERE THE COURT OF APPEALS DETERMINED THAT A CAUSE OF ACTION BASED ON FRAUD IS SUBJECT TO THE NO-FAULT ACT'S ONE YEAR BACK RULE OF MCL 500.3145(1)?

Plaintiffs/Appellants say:	"Yes."
Defendant/Appellee says:	"No."
The Trial Court Would Answer:	"Yes."
The Court of Appeals Answered:	"No."

STATEMENT OF STANDARD OF REVIEW

This appeal is subject to a de novo standard of review. Kreiner v Fischer, 471 Mich 109, 129; 683 NW2d 611 (2004). The trial court and Court of Appeals reviewed this case under MCR 2.116(C)(8). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone, and the motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could justify a right to recovery. Lane v Kindercare Learning Ctrs., Inc., 231 Mich App 689; 588 NW2d 715 (1998). When reviewing a motion based on MCR 2.116(C)(8), the appellate court must review the evidence and all legitimate inferences from the evidence in a light most favorable to the non-moving party. Sniecinski v Blue Cross Blue Shield of Michigan, 469 Mich 124, 131; 666 NW2d 186 (2003).

This appeal also involves review of MCL 500.3145(1) and whether the one year back rule applies to a common law fraud claim. Statutory interpretation is a question of law for this Court's de novo review. DiPonio Construction Co. Inc. v Rosati Masonary Co. Inc., 246 Mich App 43, 47; 631 NW2d 59, (2001). The fundamental rule of statutory construction is to determine the legislative intent. If the statutory language is unambiguous, the statute should be enforced as written. Weakland v Toledo Engineering Co., Inc., 467 Mich 344, 347; 656 NW2d 175 (2003). The court should not assume that the legislature inadvertently used one word or phrase instead of another. Detroit v Redford Twp., 253 Mich 453, 456; 235 NW 217 (1931). The words in a statute must be given their plain or commonly-understood meaning. Veenstra v Washtenaw Country Club, 466 Mich 155, 159-160; 645 NW2d 643 (2002). Courts

should presume that every word is used for a purpose and attempt to "give effect to every clause and sentence." Pohutski v City of Allen Park, 465 Mich 675, 683; 641 NW2d 219 (2002). The structure, subject and context of the statute ordinarily provide information regarding this meaning. People v Vasquez, 465 Mich 83, 89; 631 NW2d 711 (2001). Courts are bound to give effect to all the words in a statute, and if possible, harmonize any conflicts that exist. See Nowell v Titan Ins. Co., 466 Mich 478, 482; 648 NW2d 157 (2002); Pohutski v City of Allen Park, supra.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a lawsuit arising out of a tragic motor vehicle accident which occurred on January 12, 1987. **APPENDIX EXHIBIT B**, docket entry dated April 2, 2003, Complaint, 13a. Loralee Cooper, date of birth March 6, 1984 and Amyruth Cooper, date of birth April 15, 1985, suffered severe brain injuries in the accident. Id. The Plaintiff's initial Complaint alleged breach of contract and requested declaratory relief against the Defendant. Id. On August 5, 2004, the Plaintiff's filed an Amended Complaint which alleged a cause of action based on fraud to recover damages that dated back to 1990. **APPENDIX EXHIBIT C**, 22a. The Defendant filed three (3) motions for summary disposition in the lower court arguing that the Plaintiffs' claims were barred for different legal reasons. **APPENDIX EXHIBIT B**, docket entries dated February 4, 2004, March 18, 2004 and April 21, 2004, 10a-11a. The trial court denied the motions on November 10, 2004. **APPENDIX EXHIBIT D**, motion transcript dated November 10, 2004, 48a. The trial court in the pertinent part held that the RJA tolling provision MCL 600.5851 applied to a common law fraud action and that Plaintiff's amended Complaint stated a cause of action for fraud. Id. A Judgment was entered between the parties which determined the amount of damages going back to 1990 and allowed the Defendant to appeal the lower court's rulings regarding the motion for summary disposition. **APPENDIX EXHIBIT E**, Judgment entered on March 7, 2005, 51a.

At the time of the accident, Sharon Strozewski, mother of the injured children was working a full-time job at GTE, earning $9.20 an hour and full benefits. **APPENDIX EXHIBIT F**, deposition of William Strozewski, 56a. The injured children were eventually discharged from

the University of Michigan Hospital to their home in Three Rivers, Michigan. Id. Initially, Amyruth and Loralee Cooper received skilled nursing care through an agency at home. Id. Loralee needed constant supervision was fed with a feeding tube and needed suctioning. Id., 58a. After Loralee's condition improved, Mr. Strozewski testified that the AAA claims adjuster told them that if Ms. Strozewski did not quit her job and take care of Loralee, the family would have to pay for the commercial nursing care for Loralee. Id., 56a-57a. The Strozewski's were advised by the adjuster that AAA was only obligated to pay $50.00 per day to provide 24 hour attendant care because it was the Strozewski's parental responsibility to take care of Loralee. Id., 59a. Whenever the Strozewski's complained about the arrangement, they were told it was their parental responsibility to care for Loralee. Id.

Ms. Strozewski confirmed that she was told by the AAA adjuster that she would have to quit her job to care for Loralee Cooper or she would have to pay for the nursing care out of her own pocket. **APPENDIX EXHIBIT G**, deposition of Sharon Strozewski dated February 13, 2004, 64a. Ms. Strozewski was also told that family members have parental responsibility to care for their children regardless of the injury that a child may have suffered in an auto accident. **APPENDIX EXHIBIT H**, Strozewski deposition dated March 24, 2004, 67a. Ms. Strozewski was told that if she did not agree to take care of Loralee at the $50.00 a day rate, Ms. Strozewski would have to pay for the agency care. **APPENDIX EXHIBIT I**, Strozewski deposition dated October 8, 2004, 69a. Ms. Strozewski testified that she believed the claims adjuster. Id. As a result, Ms. Strozewski quit her job at GTE. Id. The misrepresentations made by the Defendant were set forth in the Amended Complaint. Id., **APPENDIX EXHIBIT C**, Count

III, para. 17, 22a.[1]

The Auto Club adjuster James Hankamp confirmed in his testimony that the issue of parental responsibility was discussed as a reason for the payment rate. **APPENDIX EXHIBIT J**, Hankamp deposition, 73a-74a, 76a-77a. The adjuster testified that Loralee Cooper required 24-hour attendant care above and beyond what an uninjured child would need during the entire time he handled the claim. Id., 72a. Loralee suffers from oral motor apraxia which makes it difficult for her to form words in any meaningful fashion. **APPENDIX EXHIBIT K**, Deposition of Owen Perlman, M.D., 83a. Loralee has a walking abnormality and ongoing cognitive and behavioral deficits. Id. Dr. Perlman testified that Loralee has required 24-hour attendant care and cueing for almost all activities from the early years after her injury at a level that was above and beyond the attention an uninjured child would require from a parent. Id., 84a.

The Defendant paid attendant care in the amount of $50.00 per day or at $2.08 an hour in exchange for the Strozewski family providing 24-hour attendant care on a daily basis.[2] Id., **APPENDIX EXHIBIT J**, 75a. The Defendant further agreed to pay for health insurance for the Strozewski family. **APPENDIX EXHIBIT H**, 66a-67a. The Defendant had been paying other families a much higher attendant care rate for the same level of care during the relevant time

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[1]The factual allegations which supported the claim of fraud were made before there was any legal controversy concerning whether a no-fault claim was tolled by the savings provisions of MCL 600.5851(1).

[2]The Defendant argues that Ms. Strozewski earned the same amount of money working at GTE as she did taking care of Loralee. The Defendant Auto Club's calculates this figure based on net pay at GTE for eight hours of work in comparison to 24-hours of providing attendant care to a disabled child.

period. ($7.00 an hour). **APPENDIX EXHIBIT J**, 75a.

On November 21, 2006, the Court of Appeals reversed the stipulated Judgment and held that a cause of action alleging fraud was subject to the no-fault one year back rule of MCL 500.3145(1). Id., **APPENDIX EXHIBIT A**, 3a. On May 23, 2007, this Honorable Court granted leave to appeal the November 21, 2006 decision of the Court of Appeals so that the Court could address the issue of whether a common law cause of action for fraud is subject to the one year back rule of MCL 500.3145(1).

ARGUMENT

I. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN THE COURT REVERSED THE TRIAL COURT'S DECISION TO DENY THE DEFENDANT/APPELLEE'S MOTION FOR SUMMARY DISPOSITION DECIDED UNDER MCR 2.116(C)(8) WHERE THE COURT OF APPEALS DETERMINED THAT A CAUSE OF ACTION BASED ON FRAUD IS SUBJECT TO THE NO-FAULT ACT'S ONE YEAR BACK RULE OF MCL 500.3145(1).

MCL 500.3145(1) states as follows:

> "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 afer 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 commenced..."
>
> (MCL 500.3145(1) - Emphasis supplied)

* * *

The statute contains two limitations on the time for commencing an action to recover no-fault benefits and one limitation on the period for which benefits may be recovered. The recovery of damages is limited to losses incurred during the year before the filing of the action. Cameron v Auto Club Ins. Assoc., 476 Mich 55, 718 NW2d 784 (2006). This Court in Devillers v Auto Club Ins. Ass'n., 473 Mich 562; 702 NW2d 539 (2005), recognized that an allegation of fraud would provide a lawful exception to the Statutory provisions of MCL 500.3145(1). This Court stated in the pertinent part as follows:

"Although courts undoubtedly possess equitable power[63], such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake.[64] A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking, as Justice CAVANAGH implies.[65]

Section 3145(1) plainly provides that an insured 'may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.' There has been no allegation of fraud, mutual mistake, or any other 'unusual circumstance' in the present case. Accordingly, there is no basis to invoke the Court's equitable power."

(Id, p. 590-591 - Emphasis supplied)

* * *

In footnote 64, this Court cited the case of Cincinnati Ins. Co. v Citizens Ins. Co., 454 Mich 263, 270; 562 NW2d 648 (1997), in support of the Devillers decision. In Cincinnati, supra., this Court refused to apply the one year back provision of MCL 500.3145(2) in a subrogation claim between insurance companies where the doctrine of equitable estoppel applied. In Cincinnati, this Court stated as follows:

"One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an estoppel absent intentional or *negligent* conduct designed to induce a plaintiff to refrain from bringing a timely action. *Id.* at 177. Negotiations intended to forestall bringing an action have been considered an inducement sufficient to invoke the doctrine, however."

(Id., p. 270)

* * *

"We agree with the dissenting judge in the Court of Appeals that summary disposition was not appropriate. Where Cincinnati had submitted a timely claim to Citizens for the primary contents loss, and the two insurers had agreed to cooperate regarding the processing of the matter in its entirety, Citizens was estopped from asserting the statute of limitations as a bar to Cincinnati's circuit

court action. Because of our resolution of the estoppel issue, we need not address the question of judicial tolling."

(Id., at pp. 272-273)

* * *

This Court in Devillers also cited Flynn v Korneffel, 451 Mich 186, 199; 547 NW2d 249 (1996). In Flynn, this Court recognized that the equitable right of redemption under MCL 600.5744(6) requires that a vendee in default has ninety days to redeem and that the Court must apply the clear language of the Statute unless there were unusual circumstances or fraud. The Court noted that if there was evidence of fraud, a court could exercise it's equitable power to effectuate a redemption where one had not been executed within the Statutory period, despite contrary Statutory language.

This Court's analysis in Devillers, supra., is also supported by MCL 600.5855 concerning the statutory tolling provision for fraudulent concealment of an action. MCL 600.5855 states in the relevant part as follows:

"Sec. 5855. If a person who is or may be liable for any claim fraudulently conceals the existence of the claim...from the knowledge of the person entitled to sue on the claim, the action may be commenced any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim..., although the action would otherwise be barred by the period of limitations."

* * *

The purpose of this statute is to protect people, in particular mentally incompetent individuals such as the Cooper children from fraud perpetuated against them. This statutory provision is designed to prevent a party from benefitting from fraudulent conduct. The Courts have consistently held that the statute of limitations are not intended to protect or shield a party

from the enjoyment of the fruits of fraud. See Schram v Burt, 111 F. 2d 557 (1940).

Michigan law recognizes that failure to disclose a material fact necessary to prevent a false impression is as much a fraud as a positive misrepresentation. It is not essential that the pretenses by which a fraud is accomplished be expressed in words. Michigan National Bank v Martson, 29 Mich App 99, 104; 185 NW2d 47 (1970). In Michigan law, even without a fiduciary relationship, a party is under a duty to use diligence in making a complete disclosure of facts because partial disclosure may convey false impressions and mislead the plaintiff. Half truths or non-disclosures are considered as concealment of facts and therefore, misrepresentations. Groening v Opsata, 323 Mich 73; 34 NW2d 560 (1948); Equitable Life Ins. Co. v Halsey, Stuart & Co., 312 U.S. 410, 425-426; 61 S. Ct. 623 (1941). The parties need not be in a fiduciary relationship, all that is required is that circumstances exist such that one party "in good faith is duty bound to disclose" a particular fact. M & D, Inc. v McConkey, 231 Mich App 22, 28; 585 NW2d 33 (1998).

In Hearn v Rickanbacker, 428 Mich 32; 400 NW2d 90 (1987), this Court addressed a similar issue concerning whether a fraud claim was limited by a one year back provision contained in the applicable insurance policy. In Hearn, the Plaintiff's property was destroyed by a fire. The insurance company refused to pay the claim contending that the policy had been canceled for non-payment. The Plaintiff filed suit alleging breach of contract, fraud and negligence. The fraud claim as in the instant case was based on the misrepresentations of the Defendant. The insurance policy contained a one year back provision indicating that all lawsuits needed to be filed within one year of the loss as specified in the policy. This Court addressed the issue of whether the Plaintiff's fraud claim was subject to the one year back

provision contained in the policy. This Court held that the Plaintiff's fraud claim was not a claim based on the policy but rather the tortious conduct of the Defendant and not subject to the one year back provision of the contract. Id., p. 41. This Court stated:

> "Plaintiff Hearn has alleged the breach of duties existing independent of and apart from the contractual undertaking. Although mere allegations of failure to discharge obligations under the insurance contract would not be actionable in tort, *Kewin, supra*, p. 423, 295 N.W.2d 50, where as here, the breach of separate and independent duties are alleged, plaintiff should be allowed an opportunity to prove his causes of action.[FN4]
>
> We cannot agree with courts that find all suits evolving from a contract of insurance to be action[s] on the policy' for purposes of applying the limitations provision. See *Modern Carpet Industries, Inc. v. Factory Ins. Ass'n.* 125 Ga.App. 150, 151, 186 S.E.2d 586 (1971); *Skrupky v. Hartford Fire Ins. Co.*, 55 Wis.2d 636, 642, 201 N.W.2d 49 (1972) ('If a party chooses to call his cause of action misrepresentation, fraud, breach of warranty, negligence or mistake, the terms of the policy as they are or should have been still control the obligation of the insurer to pay for the loss').
>
> The fact that a lawsuit seeks to recover a loss that was covered by an insurance policy, alone, should not dictate the nature of a plaintiff's claims and the applicable limitations period. But cf. *Martin v. Liberty Mutual Fire Ins. Co.*, 97 Wis.2d 127, 132, 293 N.W.2d 168 (1980) ('An action to collect for a loss is, by it's very nature, an action on the policy...'). Although the contract of insurance may be one source of the insurer's obligation to pay the loss, the insurer may also be held liable for tortious conduct that is wholly separable from its purely contractual duties.
>
> We agree with the Wisconsin Court of Appeals that '[t]o conclude ... that because the dispute ... would not have arisen in the absence of the policy, the action must be 'on the policy' within the meaning of the statute, would render the phrase, and the statute, meaningless.' *Picus v. Copus*, 127 Wis.2d 359, 379 N.W.2d 341 (1985) (plaintiffs were not the insureds).
>
> If the limitations provision in question were intended to cover all suits 'for the recovery of any claim,' then the preceding words, 'on this policy,' would have been superfluous.
>
> Thus, we hold that, on the facts of this case and as pleaded in plaintiff's complaint, the counts for fraud and negligence are not 'actions on this policy'

for purposes of applying the limitations provision contained in the policy of insurance."

* * *

As in Hearn, Michigan courts have recognized a plaintiff's right to bring a tort cause of action in a no-fault case where the plaintiff alleged a separate cause of action related to the tortious conduct. Harris v Citizens Ins. Co., 141 Mich App 110; 366 NW2d 11 (1983). Although the Harris court found that the claims adjuster's conduct did not rise to the level of "extreme and outrageous conduct" necessary to establish a claim of intentional infliction of emotional distress, the court did not limit the plaintiff's right to bring a tort action simply because the underlying claim involved a no-fault case. This Court has held that in a contractual setting, an action in tort for intentional infliction of emotional distress must be based on a breach of duty that is distinct from the contract. Roberts v Auto-Owners Ins. Co., 422 Mich 594; 374 NW2d 905 (1985).

This Court has also stated that where an insurer misrepresented the availability of no-fault benefits, that the one year back rule of MCL 500.3145(1) would not bar the cause of action. Robinson v Associated Truck Lines, Inc., 422 Mich 946; 374 NW2d 678 (1985). This Court recognized that a fact question existed with respect to the question of whether the Defendant's claims administrator misrepresented the availability of no-fault benefits. Therefore, the law in Michigan recognizes that a claim involving fraud is not limited by MCL 500.3145(1).

Fraud has also been recognized as an exception to the two year back rule of the Michigan Worker's Compensation Act. Fuchs v General Motors, 118 Mich App 547; 325 NW2d 489 (1982). In Fuchs, the employer intentionally miscalculated a wage benefit. The Plaintiff

argued that the two year back rule found in the Act did not preclude the retroactive award of differential benefits when the employer intentionally miscalculated the employee's average weekly wage. The Michigan Court of Appeals agreed and held that the two year back rule found in MCL 418.381(2) was not insulated from the overriding legal principles of waiver and estoppel which are applied to statutory law.

The two year back rule of MCL 418.381(2) states as follows:

> "(2) Except as provided in subsection (3), if any compensation is sought under this act, payment shall not be made for any period of time earlier than 2 years immediately preceding the date on which the employee filed an application for a hearing with the bureau.
>
> (3) Payment for nursing or attendant care shall not be made for any period which is more than 1 year before the date an application for a hearing is filed with the bureau."
>
> * * *

The pertinent language of the two year back rule is very similar to the one year back rule of MCL 500.3145(1) which reads:

> "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..."
>
> * * *

There is not a meaningful difference between the limitation of damage language used in the statutes. In Howard v General Motors Corp., 427 Mich 358; 399 NW2d 10 (1986), Justice Brickley with one Justice concurring and three Justices concurring in the result, stated that the one year back rule of MCL 418.833(1) and two year back rule of MCL 418.381(2) are not statutes of limitation, but rather are rules which concern the time period for which compensation may be awarded.

When analyzing the similar limitation language of the Worker's Disability Compensation Act, the Fuchs court held that the two year back rule was not exempt from the principles of equity. The Court stated:

> "[2] We are satisfied that the WCAB has adopted reasonable construction of the statute, however, the two-year-back rule is not insulated from the overriding legal principles of waiver and estoppel which are applied to a whole body of statutory law. Although the equitable principle of estoppel has not been applied to the two-year-back rule, estoppel has been used in related workers' compensation cases. See *Miller v. Dunn Paper Co.*, 47 Mich.App. 471, 209 N.W.2d 519 (1973), *Chisholm v. Chisholm Construction Co.*, 298 Mich. 25, 298 N.W. 390 (1941)."
>
> (Id., p. 553)
>
> * * *
>
> "We find that all of the elements necessary for estoppel are present in this case. The representation was of a fact within the defendant's knowledge, and it can hardly be supposed that GMC did not intend that it should be relied upon. The misrepresentation relied upon by Fuchs was made with the purpose of inducing the claimant to follow a certain course of conduct, namely, to accept the amount offered without the approbation of the Bureau of Workmen's Compensation. We conclude, therefore, that the finding of the WCAB, implicit in its order, that the defendant was not estopped by its conduct to assert the defense of the two-year-back rule was error as a matter of law."
>
> (Id., p. 554)
>
> * * *

The Fuchs court recognized that the two year limitation provision was not immune from the Court's equitable power.

The Court of Appeals reviewed this matter under MCR 2.119(C)(9). Therefore, the allegations of fraud should be accepted as true when reviewing this case. Unfortunately, the Court of Appeals ignored the allegations of fraud and held that the allegations were simply

a claim for no-fault benefits. The Court treated Plaintiffs' fraud claim as a restatement of the Plaintiffs' no-fault claim and improperly applied MCL 500.3145(1) to the fraud claim. However, it is clear that where a Complaint alleges multiple actions including the necessary elements of fraud, the procedural limitations governed in the fraud action will apply to the fraud count and if such count is not barred, the Plaintiffs may proceed on that count to collect damages proximately caused by the alleged fraud. Brownell v Garber, 199 Mich App 519, 532; 503 NW2d 81 (1993). The Plaintiffs' Complaint did allege the necessary elements of a claim for fraud as stated by the trial court. MCR 2.112(B)(1) requires that the circumstances constituting fraud be stated with particularity. Malice, intent and knowledge may be alleged generally. Id. (B)(2). A Complaint of fraud must be specific enough to reasonably inform the adverse party of the nature of the claims. Weymers v Khera, 454 Mich 639; 563 NW2d 647 (1997). In Kassab v Michigan Basic Property Ins. Assn., 441 Mich 433; 491 NW2d 545 (1992), rev for other reasons in Haynes v Neshewat, 477 Mich 29; 729 NW2d, 488 (2007), this Court held that a Complaint that alleged false representations that were made to a Plaintiff before entering an insurance contract and when the Defendant entered into the contract knew the representations were false, that the Plaintiff's Complaint satisfied the particularity requirement. With respect to this issue, this Court stated:

> "Read as a whole, the complaint alleges that false representations were made to Kassab *before* he entered into the contract of insurance with Michigan Basic, and thus that when Michigan Basic entered into the contract of insurance with Kassab and represented that it intended to pay and would pay for fire damage, the representation was false and Michigan Basic knew when it made the representation that it was false. The allegation that Michigan Basic knew when it made the representation that it was false is within the so-called "bad faith' exception to fraudulent misrepresentation' referred to in our colleague's opinion.[FN13] While Kassab may have difficulty in establishing the allegations, they

do state a cause of action."

(Kassab at p. 443)

* * *

Just as in Hearn, the Plaintiff has alleged misrepresentations which are independent of the No-Fault Act and insurance policy. Ms. Strozewski was advised by the Defendant that she had to quit her job and accept $2.08 per hour to provide nursing care to her injured daughter or she would have to personally pay for agency care. The Defendant profited from this arrangement. A commercial agency would have charged the Defendant four to five times more to provide the attendant care to Loralee. Ms. Strozewski quit a well paying job because of this fraud. Her family lost its health insurance even though the Defendant had promised to pay for such insurance. The Defendant's agreement to pay health insurance reveals that the payment arrangement between the Defendant and the Strozewski family was outside the normal scope of the No-Fault Act since there is no legal obligation to pay family members health insurance. Ms. Strozewski was advised that family members have parental responsibility to care for children and therefore, the Defendant justified the low payment rate of $50.00 per day or $2.08 per hour. The Strozewski family and children's quality of life and finances suffered greatly from this financial arrangement.

It was not until Ms. Strozewski consulted with her current attorneys that she was advised that such misrepresentations were untrue and the instant action was filed. The legal duty of parents to support their children has no effect on whether services performed by a parent for a child are recoverable no-fault expenses. Manley v DAIIE, 127 Mich App 444; 339 NW2d 206 (1983) rev. in part on other grounds in 425 Mich 140; 388 NW2d 216 (1986). The

Strozewski family was not required to pay for the commercial care so long as the care was reasonable and necessary for Loralee's care, recovery or rehabilitation. MCL 500.3107.

The Court of Appeals in it's decision, failed to accept the allegations of fraud found in Plaintiffs' Amended Complaint and decided that the instant case was simply a no-fault claim labeled as fraud. The Court of Appeals exceeded the scope of it's power and improperly extended the opinion in Grant v AAA Michigan/Wisconsin, Inc., (On remand), 272 Mich App 142; 724 NW2d 498 (2006), lv. den. 477 Mich 1043 (2007). The Grant decision did not involve an independent cause of action for fraud. The Court of Appeals' decision should be reversed by this Honorable Court. If the Court finds that a cause of action for fraud is subject to the one year back rule of MCL 500.3145(1), the Court will have eliminated a fraud cause of action where the underlying claim arises from a no-fault insurance policy. A common law fraud claim is subject to the tolling provisions of MCL 600.5851(1). Michigan insureds will have no legal remedy for fraudulent conduct when the damage was incurred more than a year before the lawsuit is filed.

The No-Fault Act does not contain an exclusive remedy provision. If the legislature intended to limit damages in all causes of action that arise from car accidents, it should have contained such a provision and this omission should be considered intentional on the part of the legislature. Farrington v Total Petroleum, Inc., 442 Mich 201; 501 NW2d 76 (1993). The Plaintiff's claim for fraud seeks damages for separate tortious conduct and misrepresented facts that are unrelated to the no-fault policy. Therefore, this Court should reverse the decision of the Court of Appeals and reinstate the Judgment dated March 7, 2005.

RELIEF REQUESTED

This Honorable Court should reverse the decision of the Court of Appeals dated November 21, 2006 and find that a common law cause of action for fraud is not subject to the one year back rule of MCL 500.3145(1).

Respectfully submitted:

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Dated: July 17, 2007

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WASHTENAW)

Anne M. Gallagher, being duly sworn, deposes and says that she is not a party to the above described litigation, and that she enclosed in an envelope two (2) copies of:

PLAINTIFFS/APPELLANTS' BRIEF ON APPEAL
"ORAL ARGUMENT REQUESTED"

sealed the envelope to:

Gregory D. Vantongeren
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Thomas A. Biscup
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and that she deposited the envelope in a governmental mail receptacle located in Ann Arbor, Michigan on July 17, 2007.

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Anne M. Gallagher

Subscribed and sworn to before me on July 17, 2007.

Christa M. Rodriguez, Notary Public
Washtenaw County, State of Michigan
My commission exp: July 13, 2011
Acting in the County of Washtenaw

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