

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' REPLY BRIEF

PROOF OF SERVICE

LOGEMAN, IAFRATE & POLLARD, P.C.

By: Robert E. Logeman (P23789)
James A. Iafrate (P42735)

Attorney for Plaintiff

2950 South State Street, Suite 400
Ann Arbor Commerce Bank Building
Ann Arbor, Michigan 48104
(734) 994-0200

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I. THE ONE-YEAR-BACK RULE SET FORTH IN MCL 500.3145(1) DOES NOT APPLY TO A COMMON LAW FRAUD ACTION.

The Defendant/Appellee in its response argues that the purpose of the one-year-back provision of MCL 500.3145(1) can not be effectuated if an action based on fraud is not subject to the rule. The Defendant/Appellee cites Shavers v Attorney General, 402 Mich 554, 596, 600, 267 NW2d 72 (1978) for the proposition that a fiscally viable no-fault system can not be maintained if this type of action is allowed to proceed. While a goal of the No-Fault Act included reducing costs of auto insurance, the primary purpose of the Act “was to provide victims of motor vehicle accidents assured, adequate and prompt reparation for certain economic losses.” Ibid, p. 579. The legislature did not intend to give insurers immunity from making fraudulent statements or actions and has recognized that fraudulent acts should be prohibited.

MCL 500.2001, the “Uniform Trade Practices Act” (UTPA) prohibits an insurer and its employees from making fraudulent statements.

MCL 500.2003. Prohibited trade practices; definitions:

“Sec. 2003 (1) A person shall not engage in a trade practice which is defined in this uniform trade practices act or is determined pursuant to this act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

(2) ‘Person’ means a person defined in section 114 and includes an agent, solicitor, counselor, or adjuster, but excludes the property and casualty guaranty association.

(3) ‘Insurance policy’ or ‘insurance contract’ means a contract of insurance, indemnity, suretyship, or annuity issued or proposed or intended for issuance by a person engaged in the business of insurance.”

* * *

MCL 500.2005. Misrepresentations:

“Sec. 2005. An unfair method of competition and an unfair or deceptive act or practice in the business of insurance means the making, issuing, circulating, or causing to be made, issued, or circulated, an estimate, illustration, circular, statement, sales presentation, or comparison which by omission of a material fact or incorrect statement of a material fact does any of the following:

(a) Misrepresents the terms, benefits, advantages, or conditions of an insurance policy.” (Emphasis supplied).

* * *

MCL 500.2064. Misrepresentations:

“Sec. 2064. (1) No insurer, or any officer, director, agent or solicitor thereof shall issue, circulate or use or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such insurer, or misrepresenting the benefits or privileges promised under any such policy, or estimating the future dividends payable under any such policy.” (Emphasis supplied).

* * *

The legislature has recognized the importance of protecting the public from fraudulent insurance acts.¹ The Defendant/Appellee’s application of the one-year-back rule to a common law fraud claim will leave insureds without a legal remedy and provide civil immunity for fraudulent acts committed by insurance companies in the State of Michigan. The Defendant/Appellee demands protection from having to pay claims administered under the No-Fault Act. The Defendant/Appellee makes it sound as if it is more important to protect the profits of insurance companies as compared to protecting their insureds from unlawful

¹ The Michigan Court of Appeals has held that the UTPA does not grant a private cause of action. See Isagholian v Transamerica Ins. Corp., 208 Mich App 9, 527 NW2d 13, 17 (1994); Bell v League Life Ins. Co., 149 Mich App 481, 387 NW2d 154 (1986), lv app den, 425 Mich 870 (1986); Safie Enterprises v Nationwide Mutual Fire Ins. Co., 146 Mich App 483, 381 NW2d 747 (1985).

conduct. The cost of automobile insurance is mainly driven by collision costs. The potential savings derived by limiting no-fault claims where fraud is alleged certainly does not warrant the elimination of this cause of action in the no-fault arena. There are special protections involving fraud claims including stricter pleading requirements and requiring the insured to prove the fraud by clear and convincing evidence. If this Court adopts the Defendant/Appellee's position, Michigan Courts will provide no legal remedy for fraudulent acts committed by insurers where the fraud is committed more than one year from the filing of a lawsuit. The legislature certainly did not intend this result by enactment of MCL 500.3145(1).

The Defendant/Appellee's analysis of the long line of cases that recognize a fraud exception to the one-year-back rule all are explained by the argument that these cases involved statute of limitation issues and therefore are irrelevant. The Defendant/Appellee ignores the substance of these decisions which recognized the Court's equitable power to provide a remedy under appropriate circumstances where an injustice would otherwise occur. Despite the Defendant/Appellee's argument, this Court in Devillers v Auto Club Ins. Assn., 473 Mich 562; 702 NW2d 539 (2005) did review whether the one year back rule should be tolled by the parties negotiation. The Devillers Plaintiff sought nine months of benefits excluded by the one-year-back rule. This Court cited the relevant one-year-back language as follows:

"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 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. Judge Cavanagh errs, as did the Lewis Court, in assuming that equity may trump an unambiguous and constitutionally valid statutory enactment." (Emphasis supplied). (Ibid, 591)

* * *

The Devillers decision involved the one-year-back rule and not the statute of limitations section of MCL 500.3145(1). This Court referenced fraud as a relevant exception to the one-year-back rule of Sec. 3145(1). The Defendant's argument does not provide a relevant distinction as to why fraud would be a valid exception to a statute of limitations defense as opposed to the one year back rule. Apparently, a fraud allegation is sufficient to toll the one-year-back rule if the time delay involves a statute of limitations issue, however fraud is not an adequate exception if the one year back rule is the applicable rule. This position is not consistent with the legislature's enactment of MCL 600.5855 and the recognition that fraud should never be protected conduct.

II. A COMMON LAW CAUSE OF ACTION ALLEGING FRAUD IS A SEPARATE AND DISTINCT CLAIM SUBJECT TO THE TOLLING PROVISIONS OF MCL 600.5851(1) AND MCL 600.5855.

A common law fraud cause of action is normally subject to a six year statute of limitations unless the cause of action is tolled. See MCL 600.5813. The Plaintiffs' Complaint alleges a common law fraud claim that is distinct from a no-fault claim. The fraud action is subject to the tolling provisions of MCL 600.5851(1) and MCL 600.5855 which state as follows:

"MCL 600.5851(1) provides in the relevant part:

[I]f 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 600.5855 provides:

"If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim

from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovery, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations." (Emphasis supplied).

* * *

This statute was intended to enlarge the time for bringing an action involving fraudulent concealment. See Ramsey v Child, Hulsuit & Co., 198 Mich 658, 666; 165 NW2d 936 (1917). Courts have consistently held that this statute applies to cases where a cause of action has been fraudulently concealed and where fraud is the basis for the action. Ibid, Ramsey citing "Tompkins v Hollister, 60 Mich 470; 27 NW 651 (1886); Stebbing v Patterson, 108 Mich 537; 66 NW 484 (1896); and Allen v Conklin, 112 Mich 74, 70 NW 339 (1897) ; also Purdon v Seligman, 78 Mich 132, 43 NW 1045 (1889)." The fraud tolling statutes at issue in the Ramsey decision were 1915 CL 12323 and 12330 which predated MCL 600.5855.

The Defendant/Appellee assumes in its argument that the basis for the Defendant/Appellee's liability is limited to a damages recoverable under the No-Fault Act and subject to one-year-back rule. However, the Plaintiff/Appellant's cause of action is based on the misrepresentations of the Defendant/Appellee and not the No-Fault Act. The fraud claim arises from the material misstatements which independently establish a distinct cause of action under the common law. A common law claim would be tolled by either MCL 600.5851(1) or MCL 600.5855. This Court recently stated that legislature intended that MCL 600.5855 would provide "essentially unlimited tolling based on discovery when a claim is fraudulently concealed." See Trentadue v Buckler Lawn Sprinkler, 479 Mich 378, 738 NW2d 664 (2007). There is no indication that the legislature did not intend for MCL 600.5855 not to apply

to common law actions or claims arising from a statutory duty to provide no-fault coverage. The legislature is presumed to be aware of other statutes. If the legislature intended that MCL 500.3145(1) be immune from the application of MCL 600.5855, the legislature would have included such language. If this Court does not allow tolling of a fraud claim, this Court will have defeated the legislature purpose of MCL 600.5855 which was to provide a remedy for fraudulent conduct. See Schram v Burt, 111 F2d 557 (1940).

III. THE NO-FAULT ACT DOES NOT CONTAIN AN EXCLUSIVE REMEDY PROVISION

The question of whether or not a statutory scheme preempts the common law is a matter of legislative intent. Jones v Rath Packing Co., 430 US 519; 97 SCT 1305 (1977). The No-Fault Act does not contain an exclusive remedy provision. If the legislature intended to limit damages in all causes of action arising from car accidents, the legislature should have included such a provision. Courts should not assume that the legislature inadvertently omitted from one statute, language that it pled in another statute. See People v Jahner, 433 Mich 490, 504; 446 NW2d 151 (1989). The legislature has previously chosen to include an exclusive remedy provision in other remedial statutes. The Worker Disability Compensation Act, MCL 418.101 effective December 31, 1969 contains an exclusive remedy provision. MCL 418.131 states:

“418.131. Exclusive remedy; exception for intentional tort; employee and employer, definition:

Sec. 131. (1) The right to recovery of benefits as provided in this act shall be the employee’s exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and

willfully disregarded that knowledge. The issue of whether an act was intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.” (Emphasis added).

* * *

Likewise, the Dramshop Act, MCL 436.1801 et seq., was amended in 1986 P.A. 176, and provides:

“This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor.” MCL § 436.22(1), currently §436.1801(10). (Emphasis supplied).

* * *

The Defendant/Appellee wishes to have this Court rewrite the No-Fault Act to include an exclusive remedy provision. This is improper under the rules of statutory construction.

The Defendant/Appellee cites multiple dram shop cases in support of its argument. Despite the exclusive remedy provision of the dram shop act, Michigan Courts have consistently held that liquor licenses remain liable for breach of independent common law duties. In Manuel v Weitzman, 386 Mich 157, 164-165, 191 NW2d 474 (1970), quoting De Villez v Schifano, 23 Mich App 72, 77; 178 NW2d 147 (1970), this Court stated:

“We hold that the dramshop act affords the exclusive remedy for injuries arising out of an Unlawful sale, giving away, or furnishing of intoxicants. King v Partridge, (1968), 9 Mich App 540, 543 157 N.W.2.d 417. However, the act does not control and it does not abrogate actions arising out of unlawful or negligent conduct of a tavern owner other than Selling, giving away, or Furnishing of intoxicants, provided the unlawful or negligent conduct is recognized as a lawful basis for a cause of action in the common law.” (Emphasis supplied).

* * *

This Court affirmed this analysis in Millross v Plum Hollow Golf Club, 429 Mich 178, 413 NW2d 17 (1987). As explained in Millross, the relevant inquiry is whether the Plaintiff has pled

an independent cause action. This Court stated:

“There is no question that the dramshop act provides the exclusive remedy against liquor licensees for conduct arising out of the furnishing of intoxicating beverages. This has long been established by case law and has been reaffirmed by a recent amendment of the dramshop act. However, the exclusive remedy provision does not exclude the bringing of independent common-law claims. To determine whether a common-law claim has been validly pled, reference must be made to the common-law obligation which would expose the defendant to liability.” (Emphasis supplied).

* * *

In this case, the Plaintiff/Appellant’s fraud action is based upon fraudulent representations which subjects the Defendant/Appellee to liability and not the denial of benefits. The Defendant has consistently argued that they did not deny any benefits throughout the litigation. The Defendant/Appellee’s liability for damages arises from the fraud and therefore even if the No-fault Act provided the exclusive remedy for damages, the one-year-back rule would not bar the damages arising from the fraudulent conduct of the insurer.

IV. THIS COURT SHOULD NOT CONSIDER ANY NEW LEGAL ISSUES WHICH WERE NOT RAISED IN THE TRIAL COURT AND COURT OF APPEALS.

The Defendant/Appellee in its brief raises new issues that were not presented at the trial court level and Court of Appeals. The Appellee argues that an underpayment of benefits cannot constitute a basis for a common law fraud cause of action. The trial court and Court of Appeals reviewed this claim based on MCR 2.116(C)(8). The Defendant/Appellee has waived any challenge concerning the issue of whether the Defendant should have been entitled to summary disposition based on this issue. This argument was not raised in the trial court and therefore is not properly before this Court. See Fast Air, Inc. v Knight, 235 Mich App 541, 549; 599 NW2d 489 (1999). Although it is true that this Court may address an argument

first raised on appeal if the issue concerns a question of law and where the facts necessary for its resolution have been presented, the Defendant in this case is attempting to argue an issue that was previously waived and the record was not fully developed. Therefore, this Honorable Court should decline to consider Defendant's new argument which was not addressed by the trial court or Michigan Court of Appeals.

RELIEF REQUESTED

It is respectfully requested that this Honorable Court reverse the Court of Appeals decision for the above reasons and for the reasons fully set forth in Plaintiff/Appellant's Brief on Appeal.

Respectfully submitted:

LOGEMAN, IAFRATE & POLLARD, P.C.

By
James A. Iafrate (P42735)
Attorneys for Plaintiff
2950 S. State Street, Suite 400
Ann Arbor Commerce Bank Building
Ann Arbor, Michigan 48104
(734) 994-0200

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