
State of Michigan
The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

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

Plaintiff-Appellant,

Supreme Court No. 132792

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

Court of Appeals No: 261736
Washtenaw County Circuit Court No: 03-367-NF

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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CONCURRENCE IN JURISDICTIONAL BASIS

Defendant-Appellee ACIA concurs in Plaintiff's Statement of Jurisdictional Basis.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DOES THE ONE-YEAR-BACK RULE SET FORTH IN MCL 500.3145(1) APPLY TO ANY ACTION TO RECOVER NO-FAULT BENEFITS, HOWEVER IT IS LABELED?

The trial court answered, "No".

The Court of Appeals answered, "Yes".

Plaintiff-Appellant contends the answer should be, "No".

Defendant-Appellee contends the answer should be, "Yes".

- II. IN AN ACTION TO RECOVER NO-FAULT BENEFITS, DOES A CAUSE OF ACTION FOR COMMON LAW FRAUD FAIL TO STATE A CLAIM UPON WHICH THE RELIEF SOUGHT CAN BE GRANTED?

The trial court answered, "No".

The Court of Appeals did not address this question.

Plaintiff-Appellant contends the answer should be, "No".

Defendant-Appellee contends the answer should be, "Yes".

- III. EVEN IF COMMON LAW FRAUD WERE AN AVAILABLE CAUSE OF ACTION FOR THE RECOVERY OF NO-FAULT BENEFITS, AS A MATTER OF LAW CAN AN UNDERPAYMENT OF NO-FAULT BENEFITS CONSTITUTE A BASIS FOR SUCH A CAUSE OF ACTION?

The trial court did not address this question.

The Court of Appeals did not address this question.

Plaintiff-Appellant contends the answer should be, "Yes".

Defendant-Appellee contends the answer should be, "No".

INTRODUCTION

The instant case is an outstanding example of the latest popular tactic to avoid the statutorily mandated damage limitation in MCL 500.3145(1), which the Legislature enacted in an effort to maintain the fiscal viability of Michigan's no-fault automobile injury reparations scheme. A brief history of the home attendant care litigation will place this case and the issue presented in proper context.

In the 1990's, an incredibly lucrative scheme was developed to obtain hundreds of millions of dollars on no-fault claims for members of families of injured minors or of persons who allegedly sustained brain injuries in auto accidents. Fully competent adult caregivers would invoke the insanity/minority tolling provision of MCL 600.5851(1) on behalf of the brain injured or minor person in order to circumvent the one-year-back rule of §3145(1) of the No-Fault Act. That enabled them to claim reimbursement for attendant care services going back years or even decades. The legal linchpin for doing so was Geiger v DAIIE, 114 Mich App 283; 318 NW2d 833 (1982), lv den, 417 Mich 865 (1983), which held that even though the injured person may not otherwise have any legal entitlement to payment, a no-fault claim always belongs to the injured person, even though the caregiver may be "the proper person to receive the benefits" within the meaning of MCL 500.3112(1).

In response, no-fault insurers began to argue that the aforementioned tolling provision does not apply to §3145(1).

The reaction of the plaintiffs' bar was to file multiple count complaints alleging fraud, violation of the Michigan Consumer Protection Act, violation of the Uniform Trade Practices Act, and even negligence. Their argument was that §3145(1) does not apply to those additional counts, even though they all sought no-fault benefits as damages.

The fraud claim is, essentially, that the insurer should have paid the amount sought in the lawsuit, and that by paying less it was guilty of misrepresenting the claimant's entitlement under the policy. Even those who had not even requested any payment for home attendant care sought to recover by alleging "silent fraud", based upon the insurer's supposed duty to affirmatively advise a claimant of all benefits available under the policy. The source of that alleged duty is language in Johnson v State Farm Mutual Automobile Ins Co, 183 Mich App 752, 763, 765; 455 NW2d 420 (1990).

In Cameron v ACIA, 476 Mich 55; 718 NW2d 784 (2006), this Court held that the one-year-back rule is not a statute of limitations, but rather a substantive limit on recovery. That being so, it is not tolled by §5851(1).

In Grant v AAA Michigan/Wisconsin, Inc (On Remand), 272 Mich App 142; 724 NW2d 498 (2006), lv den, 477 Mich 1043 (2007), reconsideration pending, the Court of Appeals held that §3145(1) applied to the plaintiff's claim for violation of the Michigan Consumer Protection Act because the damages sought were the no-fault benefits to which plaintiff claimed entitlement.

The plaintiffs' response to that case was that Grant applied only to MCPA claims and not to fraud claims. In the instant case, the Court of Appeals rejected that argument, although it denied publication.

The instant case affords this Court the opportunity to put an end to the systemic circumvention of the legislatively mandated limit on recovery set forth in §3145(1) of the No-Fault Act.

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COUNTER-STATEMENT OF FACTS

This is an action for first-party no-fault benefits.

Defendant, AUTO CLUB INSURANCE ASSOCIATION (ACIA), appealed from an order awarding \$500,000 for home attendant care services rendered between October 1989 and April 2, 2002, one year prior to the filing of the Complaint in the instant case. The Court of Appeals reversed in an unpublished opinion.

Plaintiff's factual account is deliberately scanty, for reasons which will presently become apparent. The following undisputed facts should make clear the nature of the "fraud" alleged by Plaintiff as well as the reason for the allegation. The account will be somewhat over-inclusive, the point being to give this Court a sense of what these types of cases are about.

Historical Facts

On January 12, 1987, AMYRUTH and LORALEE COOPER -- then 21 months and two and one-half years of age, respectively -- were involved in an auto accident while in a vehicle driven by their mother, SHARON STROZEWSKI. (5b¹; 26b²). The vehicle was completely submerged in a cold river. (77b; 85b).³ Both girls suffered severe anoxic encephalopathy. (81b; 88b).

¹The transcript of that deposition was attached as Exhibit B to ACIA's April 6, 2004, Reply Brief.

²The transcript of that hearing was attached as Exhibit A to Plaintiff's May 12, 2004, Supplemental Brief.

³Those reports were attached as Exhibits E-F to ACIA's February 4, 2004, Motion for Summary Disposition.

In October 1987, the girls were discharged home from residential rehabilitation programs. (5b, 7b; 77b; 86b). Both have required 24-hour attendant care ever since. (77b, 83b; 86b, 90b). AMYRUTH has required 24-hour skilled nursing care, which has been provided at home through an agency. (86b). ACIA has paid for that care since her return home. (11b, 18b).

At the time of the accident, MS. STROZEWSKI was working at GTE. (10b-11b; 94b⁴). She was earning approximately \$50 per day. (136b; 74a; 44b).

By the fall of 1989, LORALEE did not need as much nursing care as she was getting, but still required attention beyond what a babysitter could provide. (11b; 134b). That, plus the fact that MS. STROZEWSKI had recently given birth to a premature baby, convinced the ACIA's claims representative, JIM HANKAMP (139b⁵, ¶2), and MS. STROZEWSKI soon-to-be husband⁶ that she should quit her job to care for LORALEE. (11b; 134b, 136b).

ACIA agreed to pay MS. STROZEWSKI \$50 per day -- which was what she was earning at GTE (44b; 136b) -- for 24-hour care "in excess of normal child care".⁷ (99b). MS. STROZEWSKI accepted.

⁴The transcript of that deposition was attached as Exhibit B to Plaintiff's April 16, 2004, Response to ACIA's Reply Brief.

⁵That Affidavit was attached as Exhibit D to ACIA's March 16, 2004, Second Motion for Partial Summary Disposition.

⁶MS. STROZEWSKI married William Strozewski, the father of the prematurely born child, on October 27, 1990. (38b, 43b).

⁷LORALEE was 4½ years old at the time and could not have been left home alone in any event. (77b; 99b, 105b).

(139b, ¶4). She began caring for LORALEE full-time in October 1989. (105b).

The Settlement

At the time of the accident, MS. STROZEWSKI was in the process of divorcing the girls' father, DAVID COOPER. (8b, 9b; 22b, 38b). Although MS. STROZEWSKI had custody of the girls, MR. COOPER had been appointed conservator of their estates to preserve money recovered in a tort action filed on their behalf against MS. STROZEWSKI. (22b, 26b, 64b).

However, by the fall of 1990, that arrangement was becoming impractical: Both ACIA and MS. STROZEWSKI realized that the home in which she and the girls were living was not large enough to accommodate the medical equipment and additional space required for the girls' care. (40b-41b). MR. HANKAMP wanted the girls to be cared for at home because doing so would minimize the costs. (60b-61b). But the negotiations between MR. HANKAMP and MS. STROZEWSKI concerning future care arrangements were hampered by the fact that she did not have the authority of a conservator. (23b-24b, 33b, 39b, 42b, 45b-46b, 59b).

Accordingly, in the fall of 1990, MS. STROZEWSKI filed a petition in the St. Joseph County Probate Court seeking to replace MR. COOPER as Conservator. (19b). At the conclusion of a November 27, 1990, hearing, the court granted the relief (72b), noting, "This really makes her responsible" (74b). On December

4, 1990, the court issued unrestricted Letters of Authority to MS. STROZEWSKI. (143b, 144b).⁸

Ten days later, MS. STROZEWSKI executed an agreement (145b Appendix I)⁹ with ACIA which addressed home modifications, a loan to enable MS. STROZEWSKI to purchase a new home (128b), homeowners insurance, utilities, home attendant care, health insurance, and the purchase of a van (106b; 139b, ¶5). The portion of the agreement concerning home attendant care reads in pertinent part as follows:

"14) IT IS FURTHER agreed between the Insureds and the Insurer that the Insurer agrees to pay the Conservator, SHARON LORAYNE STROZEWSKI agrees to accept the sum of Fifty Dollars (\$50.00) per day for the home care and assistance of LORALEE ASHLEY COOPER."

* * * *

"17) IT IS FURTHER agreed, that if there is a material change in circumstances then the Agreement with respect to Home/Attendant/Nursing care is voidable at the option of either party in the Agreement."

(148b, ¶¶14, 17). MS. STROZEWSKI signed the agreement as Conservator and also in her individual capacity. (106b; 139b, ¶5; 150b).

On September 16, 1991, ACIA increased MS. STROZEWSKI's rate to \$75 per day. (107b; 139b, ¶6). MS. STROZEWSKI accepted that increase. (139b).

⁸Those documents were attached as Exhibit D to ACIA's May 13, 2004, Supplemental Brief.

⁹The agreement was attached, inter alia, as Exhibit G to ACIA's March 16, 2004, Second Motion for Summary Disposition.

On September 1, 1998, ACIA increased MS. STROZEWSKI's rate to \$6.50 per hour. (107b; 140b, ¶7). MS. STROZEWSKI accepted that increase. (107b; 140b, ¶7). MS. STROZEWSKI was paid a total of \$45,376 that year. (108b; 140b, ¶10).

On March 1, 1999, ACIA increased MS. STROZEWSKI's rate to \$7.50 per hour. (107b; 140b, ¶8). MS. STROZEWSKI accepted that increase. (140b). MS. STROZEWSKI was paid a total of \$53,934.34 that year. (108b; 140b, ¶10).

On January 1, 2000, ACIA increased MS. STROZEWSKI's rate to \$8.00 per hour. (107b; 140b, ¶9). MS. STROZEWSKI accepted that increase. (107b; 140b, ¶9).

In October 2000, ACIA increased MS. STROZEWSKI's rate to \$10.00 per hour. (107b; 140b, ¶11). MS. STROZEWSKI accepted that increase. (140b, ¶11).

In December 2000, MR. HANKAMP retired and was replaced by LUCRETIA HOYE. (139b, ¶2; 152b¹⁰, ¶4). In the three years that MS. HOYE has handled the file, ACIA maintained the \$10.00 per hour rate. (152b-153b, ¶6). ACIA paid MS. STROZEWSKI an average of \$70,000 per year over that period. (152b, ¶6). Through December 26, 2003, ACIA had paid more than \$5.6 million in benefits for the girls' care. (153b, ¶7).

Prior to the filing of the instant lawsuit, MS. STROZEWSKI never notified ACIA that she no longer wished to be bound by the

¹⁰That affidavit was attached as Exhibit E to ACIA's March 16, 2004, Second Motion for Partial Summary Disposition.

1990 agreement because of materially changed circumstances.
(106b; 140b-141b, ¶14).

The Litigation -- First Motion for Partial Summary Disposition

The Complaint (154b) in the instant case was filed on April 2, 2003. (13a). ACIA filed its Answer on June 11, 2003. (12a).

On February 4, 2004, ACIA filed a Motion for Partial Summary Disposition. (11a). Therein, ACIA argued, inter alia, that the 1993 amendment to MCL 600.5851(1) rendered its minority/insanity tolling provision inapplicable to the one-year-back provision of MCL 500.3145(1) of the No-Fault Act. ACIA sought an order limiting Plaintiff's claim to services rendered subsequent to April 2, 2002. (2/4/04 Motion for Partial Summary Disposition/Brief in Support).

The trial court, Hon. Donald Shelton, denied that motion in an order entered March 8, 2004. (11a). On March 29, 2004, ACIA filed an Application for Leave To Appeal to the Court of Appeals. (166b). That application was denied in an order entered July 1, 2004, "for failure to persuade the Court of the need for immediate appellate review". (167b).

Two weeks later, the Court of Appeals issued its published opinion in Cameron v ACIA, 263 Mich App 95; 687 NW2d 354 (2004), lv qt'd, 472 Mich 899 (2005), aff'd, 476 Mich 55 (2006), which held that §5851(1) does not apply to causes of action for no-fault benefits arising after October 1, 1993. Thereupon, ACIA filed a Motion for Reconsideration of its leave application, which was denied in an order entered July 29, 2004. (167b).

ACIA then filed an Application for Leave To Appeal to this Court. (168b). On November 4, 2004, that Court entered an order denying leave "because we are not persuaded that the question presented should now be reviewed by this Court". (168b). A motion for reconsideration was denied in an order entered December 29, 2004. (168b).

The Litigation -- Second Motion for Partial Summary Disposition

On March 18, 2004, ACIA filed a Second Motion for Partial Summary Disposition. (11a). Therein, ACIA argued that because it had been paying MS. STROZEWSKI pursuant to the December 1990 agreement, and because she had never opted out of the contract, she could not recover home attendant care benefits for services rendered prior to the filing of the Complaint. (3/18/04 Motion for Partial Summary Disposition/Brief in Support).

In her March 30, 2004, response, Plaintiff argued, inter alia, that MS. STROZEWSKI had no authority to release the minors' claim without court approval, citing MCR 2.420(A) and Geiger v DAIIE, 114 Mich App 283 (1982), lv den, 417 Mich 865 (1983) (holding that first-party no-fault claim always belongs to the injured person). (3/30/04 Response to Motion/Brief in Support).

On April 6, 2004, ACIA filed a reply, arguing, inter alia:

- (1) Because no action was pending at the time of the settlement, the express terms of Rule 2.420(A) rendered the Revised Probate Code controlling, under which court approval for the settlement was not required (4/6/04 Reply, p 2-3); and
- (2) Geiger was wrongly decided, so that the claim for the alleged underpayment for services rendered belongs to MS. STROZEWSKI (id., p 12-14).

On April 16, 2004, Plaintiff filed a response, arguing, inter alia, that pursuant to MCL 700.484(3)(s), the agreement required court approval because settling the first-party no-fault claim was beyond MS. STROZEWSKI's authority. (4/16/04 Response to Reply, p 2-3).

At the conclusion of the April 21, 2004, hearing on the motion, Judge Shelton asked for additional research on the issue of MS. STROZEWSKI's authority to enter into the agreement. (4/21/04 Tr, p 35-37). Following the submission of additional briefs, a second hearing was held on May 26, 2004. At that hearing Judge Shelton repeatedly voiced his incredulity that this Court could have intended Rule 2.420(A) not to apply unless there is a pending action. (5/26/04 Tr, 6, 7, 8, 9, 11).

Judge Shelton said he would issue a written opinion. (5/26/04, p 14). However, he later requested briefs on whether MS. STROZEWSKI had a "substantial conflict of interest" when she entered into the agreement because she received money as a result of it. (11/8/04 ACIA Supplemental Brief, p 2). ACIA pointed out that the amount for home attendant care benefits was settled by MS. STROZEWSKI in her individual capacity. (Id., p 4).

At the conclusion of the November 10, 2004, hearing on ACIA's Third Motion for Partial Summary Disposition (discussed below), Judge Shelton ruled as follows:

"I'm going to deny that motion for summary disposition. I believe in accordance with that statute^[11] there was a substantial conflict of interest in the transaction involved, particularly the release on the settlement was not approved by the probate court and it is therefore pursuant to the statute voidable, and I will do that. And the motion for summary disposition with regard to that release and settlement is denied."

(11/10/04, p 24).

ACIA did not seek interlocutory relief from that decision.

The Litigation -- Third Motion for Partial Summary Disposition

Immediately following the release of the Cameron decision, Plaintiff filed an Emergency Motion To File Amended Complaint. (8a). The trial court granted the motion in an order entered August 2, 2004. (8a). Plaintiff's First Amended Complaint (159b) was filed on August 5, 2004. (8a). It added a count for "Fraud/Misrepresentation/ Deception". (163b).

On October 19, 2004, ACIA filed its Third Motion for Partial Summary Disposition. (7a). Therein, ACIA argued that Plaintiff may not recover for any services rendered prior to April 2, 2002, inter alia, for the following reasons:

- (1) Cameron holds that the RJA insanity/minority tolling provision does not apply to no-fault expenses incurred subsequent to October 1, 1993;
- (2) Plaintiff, not her daughters, is the "claimant" for purposes of the No-Fault Act;
- (3) Plaintiff's cause of action for common law fraud fails to state a claim on which the relief herein sought can be granted;

¹¹MCL 700.482.

(4) Even if the fraud cause of action stated a viable claim, it would be governed by the one-year-back provision of §3145(1) of the No-Fault Act.

(10/19/04 ACIA Motion, p 4, ¶6).

Judge Shelton denied that motion in an order entered November 29, 2004. (6a). On December 17, 2004, ACIA filed an Application for Leave To Appeal to the Court of Appeals. (169b). On January 12, 2005, that Court denied that application "for failure to persuade the Court of the need for immediate appellate review." (170b).

On January 19, 2005, ACIA filed an Application for Leave To Appeal to this Court. (170b). On January 28, 2005, this Court entered an order denying the application "because we are not persuaded that the questions presented should now be reviewed by this Court". (171b).

Final Disposition

On March 7, 2005, the trial court entered a Judgment ordering certain payments and further providing:

"(3) If the appellate courts of this State ultimately determine that plaintiffs' claim for benefits accrued between October 1989 and April 2, 2002 is not time-barred by the no-fault one year back provision of §3145, defendant shall pay plaintiffs an additional FIVE HUNDRED THOUSAND AND 00/100 (\$500,000.00) DOLLARS.

"(4) If the appellate courts of this State ultimately determine that plaintiffs' claim for benefits accrued only from October 1989 to October 1, 1993 is not time-barred by the no-fault one year back provision of §3145, defendant shall pay plaintiffs an additional ONE HUNDRED SIXTY THOUSAND AND 00/100 (\$160,000.00) DOLLARS."

(3/7/05 Judgment, p 2).

On March 28, 2005, ACIA timely filed a Claim of Appeal from that Judgment. Therewith it filed a Motion To Remove Case from Expedited Summary Disposition Track. (14a). On April 17, 2005, this Court entered an order granting that motion. (15a).

On November 21, 2006, the Court of Appeals, per Judges Murphy, Meter and Davis, issued an unpublished opinion (16a-17a) which reversed and remanded for entry of an order of partial summary disposition in favor of ACIA on the fraud claim. Citing Grant, supra, the panel concluded that Plaintiff's Amended Complaint stated a no-fault action couched in fraud terms.

I. THE ONE-YEAR-BACK RULE SET FORTH IN MCL
500.3145(1) APPLIES TO ANY ACTION TO RECOVER
NO-FAULT BENEFITS, HOWEVER IT IS LABELED.

In the following discussion, ACIA will first set forth the correct analysis of this issue. In the context thereby provided, ACIA will critique the various arguments advanced by Plaintiff. The analysis set forth below is the same as the one advanced in ACIA's Answer to Application for Leave To Appeal in Grant, supra (Supreme Court No. 132211).

Standard of Review

Whether a cause of action is barred by the one-year-back rule of §3145(1) of the No-Fault Act is a question of law, which is subject to de novo review by this Court. Cameron, 476 Mich at 60.

Discussion

Section 3145(1) governs this action under either of two alternative analyses: (1) The unambiguous language of the statute says that it applies to any action to recover no-fault benefits; and/or (2) The analogous decisional authority concerning competing statutes of limitations mandates application of §3145(1) because the gravamen of Plaintiff's claim is the invasion of her interest in her entitlement to no-fault benefits.

The statute invoked by Defendant reads in pertinent part 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 after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."

MCL 500.3145(1) (emphasis added).

The principal rule of statutory construction is to enforce the intent of the Legislature, Peters v Gunnell, Inc, 253 Mich App 211, 216, 655 NW2d 582 (2002), which is determined in the first instance from the language of the statute, Robertson v DaimlerChrysler Corp, 465 Mich 732, 748, 641 NW2d 567 (2002). If the language is unambiguous, it is to be enforced as written. Tryc v Michigan Veterans' Facility, 451 Mich 129, 135-36, 545 NW2d 642 (1996); Rinke v Potrzebowski, 254 Mich App 411, 414, 657 NW2d 169 (2002).

The Legislature's choice of language evinces an intent that §3145(1) was not to be avoided by claiming "recovery of [no-fault] benefits" under a theory other than a straightforward claim under the No-Fault Act. The express terms of that provision make clear that it is the nature of the damages sought, rather than the form of the action, which governs. See, e.g., State Mutual Cyclone Ins Co v O & A Electric Cooperative, 381 Mich 318, 324-25, 161 NW2d 573 (1968); Kelleher v Mills, 70 Mich App 360, 368, 245 NW2d 749 (1976); Borman's, Inc v Lake State Development Co, 60 Mich App 175, 187-88, 230 NW2d 363 (1975);

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Rach v Wise, 46 Mich App 729, 731-32, 208 NW2d 570, lv den, 390 Mich 778 (1973).

The one-year-back provision of §3145(1) serves two important purposes, neither of which can be effectuated unless -- pursuant to the unambiguous language of that provision -- it applies to all "action[s] for recovery of personal protection insurance benefits".

First, and most obvious, it requires claimants to pursue their claims in timely fashion. See Pendergast v American Fidelity Fire Ins Co, 118 Mich App 838, 841-42, 325 NW2d 602 (1982); Allen v Farm Bureau Ins Co, 210 Mich App 591, 599, 534 NW2d 177 (1995). The no-fault injury reparations scheme involves the processing of tens of thousands of claims per year for different products, services, and accommodations. That volume and the importance of insurers having a reasonable opportunity to investigate claims while they are still fresh are the bases for the relatively short period of permissible recovery.

However, there is a second and equally important purpose served by §3145(1): The maintenance of a fiscally viable no-fault system while keeping premiums at an affordable level, which is of constitutional dimension. Shavers v Attorney General, 402 Mich 554, 596, 600; 267 NW2d 72 (1978). That purpose is brought into sharp relief by the context in which this issue comes to this Court.

The instant case is one of hundreds involving brain-injured persons or minors in which claimants seek to recover benefits for

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services rendered far beyond the one-year-back limitation the Legislature imposed in §3145(1) of the No-Fault Act. The problem with these cases is that once the one-year-back rule is circumvented, claims can be maintained for alleged nonpayment or underpayment of 24/7 home attendant care going back years or even decades. Multi-million dollar claims are not uncommon, with the "smaller" claims amounting to several hundred thousands of dollars.

The motivating factor behind the insurers' appeals in these cases is that the no-fault system is hemorrhaging tens of millions of dollars per year on long-stale claims. The upward pressure on premiums is self-evident. Not only must the motoring public finance benefits payable now and in the future, they must also subsidize the payment of tens of millions of dollars on claims which should have been asserted years or decades ago.

The legislative purposes of §3145(1) cannot be effected unless the limitation applies to all "actions for recovery of personal protection insurance benefits", regardless how they are framed or characterized. For example, if Plaintiff is correct, simply raising her claim under a count for "breach of contract" would afford her the benefit of a six-year statute of limitations under MCL 600.5807(8). That result cannot be reconciled with the language of §3145(1).

However Plaintiff labels it, her claim arises from her alleged entitlement under the No-Fault Act. The fraud claim is

premised on Defendant's alleged misrepresentations as to that entitlement. (163b). A fortiori, if Defendant is correct and Plaintiff is not entitled to the no-fault benefits she claims, her fraud claim fails.

It is thus beyond question that the instant case is "[a]n action for recovery of personal protection insurance benefits payable under [the No-Fault Act]". Shorn of the histrionics and excess verbiage, Plaintiff's claim is that she was entitled to be paid a certain amount of benefits payable under the No-Fault Act, and that she was not paid the full amount to which she was entitled under the No-Fault Act. That claim fits squarely within the express and unambiguous language of §3145(1).

That same result obtains under an alternative analysis which does not focus on the precise, unambiguous language of §3145(1). Applying by analogy the general rules which have been applied to competing¹² statutes of limitations demonstrates that the one-year-back rule applies.

The gravamen of an action is determined by reading the claim as a whole, looking beyond procedural labels to ascertain a party's exact complaint. Simmons v Apex Drug Stores, Inc, 201 Mich App 250, 253, 506 NW2d 562 (1993), lv den, 445 Mich 861 (1994); Aldred v O'Hara-Brice, 184 Mich App 488, 490, 458 NW2d

¹²By citing the principles set forth in the text, Defendant does not concede that there is any conflict between the fraud statute of limitations and the one-year-back rule. There is not. Defendant merely invokes by analogy the principles used in resolving such conflicts when they do exist.

671 (1990); Belleville v Hanby, 152 Mich App 548, 551, 394 NW2d 412 (1986).

In determining whether an action is of the type subject to a particular statute of limitations, the court looks at the bases of the plaintiff's allegations. Insurance Commissioner v Aageson Thibo Agency, 226 Mich App 336, 342-43; 573 NW2d 637 (1997), ly den, 459 Mich 867 (1998). It is the type of interest harmed which is the focal point of the inquiry. Id. at 343; Aldred, supra at 490.

In the instant case, the interest allegedly harmed was Plaintiff's purported entitlement to additional benefits under the No-Fault Act. That is the gravamen of her action. The Legislature has enacted a statute specifically governing such actions, §3145(1). It is that provision which should be enforced. See Aldred, supra (legal malpractice statute of limitations cannot be avoided by pleading breach of contract); Barnard v Dilley, 134 Mich App 375; 350 NW2d 887 (1984) (same).

In sum, Plaintiff has filed an "action seeking to recover personal protection insurance benefits payable under [the No-Fault Act]". Such an action is expressly governed by §3145(1) of that Act, regardless how many different theories are alleged for recovery of those benefits.

Plaintiff's rather diffuse presentation encompasses two distinct arguments and a discussion of several miscellaneous cases. ACIA will address them under separate headings.

This Court's Decision in Devillers v ACIA, 473 Mich 562; 702 NW2d 539 (2005), Does Not Create a Fraud Exception to the One-Year-Back Rule. (Plaintiff's Brief on Appeal, p 5-7). The passage upon which Plaintiff relies reads as follows:

"Although courts undoubtedly possess equitable power, such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake. A court's equitable power is not a unrestricted license for the court to engage in wholesale policy making, as Justice CAVANAGH implies.

"Section 3145(1) plainly provides that an insured 'may not recover benefits for any portion of the loss incurred more than one 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."

Devillers, supra at 590-91.

Analysis of the context of that quotation and of the subsequent case law demonstrates that the equitable tolling to which the passage refers applies to the statute of limitations aspect of §3145(1), not the damage limitation.

First, understanding the meaning of the above-quoted response to the dissent requires identifying that to which it was responding. Perusal of Justice Cavanagh's dissenting opinion makes clear that equitable tolling applies to periods of limitations:

"The long-recognized equitable remedy of judicial tolling has been applied in a variety of circumstances. In fact, '[t]ime requirements in lawsuits between private litigants are customarily subject to "equitable tolling[.]"'"

* * * *

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"For instance, in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant . . . or because of fraudulent concealment . . . this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant."

* * * *

"Equitable tolling has been applied where 'the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.'"

* * * *

"See, e.g., *Howard v Mendez*, 304 F Supp 2d 632, 638-639 (MD Pa, 2004) (concluding that 'common sense requires tolling of the limitations period when a litigant's right to file suit depends on the timely conduct of the opposing party's agent in assisting in the exhaustion of mandatory administrative remedies'); *Harris v Hegmann*, 198 F3d 153, 158-159 (CA 5, 1999) (recognizing a Louisiana 'judicial rule' that tolls the limitations period during the time in which a plaintiff is legally unable to act)."

* * * *

"For example, in *Erwin, supra* at 95-96, the United States Supreme Court found that statutes of limitations that operate against the government, like those that operate against private parties, should be subject to the already existing rebuttable presumption of equitable tolling."

* * * *

"But despite this important restriction, the Court found that the period of limitations should be equitably tolled when the circumstances of a particular case warranted it."

Id. at 594-95, 595, 596, 597 (emphasis added).

The focus of the analysis in Devillers was on the doctrine of judicial tolling on §3145(1), which includes both a limita-

tions period and a limit on recovery in a timely filed suit. Id. at 574. The conceptual distinction between the two was not an issue in Devillers. It was, however, the central issue in Cameron.

The holding in Cameron was crystal clear on two points: (1) the one-year-back rule is not a statute of limitations; and (2) it therefore could not be tolled:

"By its unambiguous terms, MCL 600.5851(1) concerns **when a minor or person suffering from insanity may 'make the entry or bring the action.'** It does not pertain to the damages recoverable once an action has been brought. MCL 600.5851(1) then, is **irrelevant to the damages-limiting one-year-back provision** of MCL 500.3145(1). Thus, to the clear, the minority/insanity tolling provision in MCL 600.5851(1) does not operate to toll the one-year-back rule of MCL 500.3145(1)."

Cameron, supra at 62 (emphasis added).

In light of the foregoing, one cannot rationally conclude that the current state of the law from this Court would allow equitable tolling of the one-year-back rule. Whatever may be said of the above-quoted language from Devillers, Cameron precludes any type of tolling of the damage limitation contained in §3145(1).

The case law cited by Plaintiff in this portion of her discussion is readily distinguishable and, moreover, consistent with ACIA's analysis.

In Cincinnati Ins Co v Citizens Ins Co, 454 Mich 263; 562 NW2d 648 (1997), this Court held that in the circumstances of that case, the defendant was equitably estopped from invoking the

one-year statute of limitations set forth in MCL 500.3145(2). Id. at 270-72. Contrary to Plaintiff's representation at page 6 of her brief, Cincinnati Ins Co did not apply equitable tolling to a one-year-back rule. As explained above, such a rule is a substantive limitation on recovery which is not subject to statutes or doctrines directed at extending periods of limitations.

Likewise, in Flynn v Korneffel, 451 Mich 186; 547 NW2d 249 (1996), this Court noted that it exercises its equitable powers in unusual circumstances to effectuate a redemption of realty "where one has not been executed within the statutory period". Id. at 199 (emphasis added). Here, again, this Court was addressing a period of limitations, not a substantive damage limitation.

In short, far from aiding Plaintiff, those two cases illustrate the point made by ACIA about the focus of the language in Devillers that Plaintiff invokes. Equitable tolling does not apply to a one-year-back rule.

The Fraudulent Concealment Statute Does Not Apply to the One-Year-Back Rule. (Plaintiff's Brief on Appeal, p 7-8). The statute upon which Plaintiff relies reads as follows:

"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 discovers, 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."

MCL 600.5855 (emphasis added).

On its face, that statute, like §5851(1), expands the time in which an action may be brought. As this Court held in Cameron, such tolling provisions do not operate to toll the one-year-back rule. 476 Mich at 62.

The Miscellaneous Cases Cited by Plaintiff Do Not Constitute a Basis for Holding that a Claimant Can Avoid the One-Year-Back Rule by Couching Her Claim as One for Fraud. (Plaintiff's Brief on Appeal, p 8-12).¹³

Hearn v Rickenbacker, 428 Mich 32; 364 NW2d 371 (1987) (Plaintiff's Brief on Appeal, p 8-10) is decisively distinguishable for two reasons.

First, the issue in Hearn was the meaning of the phrase "action on this policy" in the context of a one-year contractual period of limitations. Hearn did not involve an attempt to circumvent a legislatively enacted damage cap, which, as Cameron, supra at 62 holds, is distinct from a period of limitations.

Second, the tort allegation in Hearn did not relate to the nonpayment of his claim:

"Likewise, Mr. Hearn's allegations regarding his fraud and negligence claims are based on actions falling outside the policy of insurance. He is not alleging negligence associated with nonpayment of his claim,

¹³ACIA will not address every single case cited by Plaintiff, but will limit its discussion to those upon which Plaintiff apparently places major reliance.

but rather with the handling of his premiums and policy purchase generally, at a time prior to the fire loss."

428 Mich at 39 (emphasis added). Rather, the fraud claim in Hearn involved misappropriation of the policy premiums by the agent:

"The plaintiff alleges that the defendant Rickenbacker tendered only one-half of the premium to the Association and that the agent did not notify the plaintiff of the Association's notice, cancellation, or refund."

Id. at 34. Hearn has no rational application to the issue before this Court.

Contrary to Plaintiff's representations, Robinson v Associated Truck Lines, Inc, 422 Mich 946; 374 NW2d 678 (1985) (Plaintiff's Brief on Appeal, p 10), did not involve the one-year-back rule. Rather, it involved estoppel to rely on a statute of limitations. 135 Mich App 574, 575-76; 355 NW2d 282 (1984).

Plaintiff correctly cites Fuchs v GMC, 118 Mich App 547; 325 NW2d 489 (1982) (Plaintiff's Brief on Appeal, p 10-12), as a case in which the Court of Appeals invoked equitable estoppel to circumvent unambiguous statutory language. However, that case is not only not binding on this Court, but also wrongly decided.

The basis for the holding was that the employer deliberately underpaid the plaintiff's workers' compensation benefits. Without explanation or citation to authority, the Court of Appeals characterized that as a "misrepresentation", which induced the plaintiff to a "course of conduct" of accepting the amount offered. Id. at 553.

That reasoning, of course, would render any statute of limitations or recovery cap inapplicable to any claim for underpayment under a contract of any sort. Apparently aware of that problem, the Fuchs panel self-consciously qualified its holding as "limited to the facts in this case". Id. at 555. Moreover, Fuchs involved a liquidated entitlement amount, id. at 553, unlike the instant case, which involves home attendant care, for which there is no set fixed rate.

In sum, the unambiguous language of §3145(1) applies the one-year-back rule to any action brought to recover no-fault benefits, however it is labeled. This Court should so hold.

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II. IN AN ACTION TO RECOVER NO-FAULT BENEFITS, A CAUSE OF ACTION FOR COMMON LAW FRAUD FAILS TO STATE A CLAIM UPON WHICH THE RELIEF SOUGHT CAN BE GRANTED.

As an alternative ground for affirmance, and to afford this Court an opportunity to put an end to this nonsense of turning every no-fault insurance dispute into a fraud claim, ACIA submits that there is no common law cause of action for recovery of no-fault benefits.

Preservation

This argument was presented as Argument III. in ACIA's Third Motion for Partial Summary Disposition.

Standard of Review

This issue involves the interpretation of a statute, which is an issue of law for this Court's de novo review. DiPonio v Construction Co v Rosati Masonry Co, 246 Mich App 43, 631 NW2d 59, lv den, 465 Mich 896 (2001), Insurance Commissioner v Aageson Thibo Agency, 226 Mich App 336, 573 NW2d 637 (1997), lv den, 459 Mich 867 (1998).

Discussion

It is a general rule of law in Michigan that when a statute creates a new right or imposes a new duty having no counterpart in the common law, the remedies provided in the statute for violation are exclusive and not cumulative. Dudewicz v Norris Schmidt, Inc, 443 Mich 68, 78, 503 NW2d 645 (1993); Pompey v General Motors Corp, 385 Mich 537, 552, 189 NW2d 243 (1971); Ohlsen v DST Industries, Inc, 111 Mich App 580, 583, 314 NW2d 699

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(1982). In the instant case, there is no dispute that Plaintiff is seeking statutory no-fault benefits. Those benefits have no counterpart in the common law. Any doubt on that point should be allayed by reference to the opening paragraph in Shavers v Attorney General, 402 Mich 554; 267 NW2d 72 (1978):

"The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or 'fault') liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common law remedy in tort."

Id. at 578-79 (emphasis added).

Later in the opinion, this Court again acknowledged that the no-fault law was a radical departure from the common law:

"This Court deeply appreciates that the No-Fault Act, in radically redefining the nature of Michigan's motor vehicle insurance, profoundly and importantly affects a crucial dimension of our lives."

Id. at 590.

Still later in the opinion, this Court noted:

"The interest of plaintiffs that is affected by compulsory no-fault insurance **is not a previously recognized common-law or constitutional right.**"

Id. at 597 (emphasis added).

In the instant case, Plaintiff brings a common law fraud action to recover statutory no-fault benefits. The transparent reason for doing so is to avoid the comprehensive no-fault scheme which includes a strict limitation provision (§3145[1]) to assure prompt filing of claims and to protect the fiscal integrity of the system. ACIA's position is that the statutory remedy and the means for obtaining that remedy are exclusive. The pertinent case law fully supports that thesis.

In Lamphere Schools v Lamphere Federation of Teachers, 400 Mich 104; 252 NW2d 818 (1977), this Court addressed whether a teachers' union could be held liable in tort by a public school district for money damages incurred as a result of a peaceful strike prohibited by the Public Employment Relations Act (PERA), MCL 423.201 et seq. In seeking these damages, the school district based their complaint on three common law theories:

- (1) It argued that the union had caused their member teachers to strike contrary to "an alleged common law duty".
- (2) It also alleged that the conduct of the union in recommending and subsequently calling the strike constituted a tortious interference with existing individual contractual relationships between the school district and its teachers.
- (3) Finally, it asserted a claim of recovery for civil conspiracy against the union for planning and implementing the strike in violation of the PERA.

Id. at 110.

This Court set forth three reasons for its holding that the school district was barred from suing the union for damages under any of the traditional common law tort theories. First and

foremost, the Court was convinced that the Legislature intended the PERA to occupy the public labor relations field completely. Second, the Court found no applicable precedent for the cause of action pled by plaintiff school district.

Finally, the Court was convinced that public policy considerations prohibited the creation of a new cause of action which would unsettle an already precarious labor-management balance in the public labor relations sector. Id. at 107-08.

The first and second reasons provided by the Court are particularly applicable to this case. First, there can be no doubt, especially in light of Shavers, that the Legislature intended the No-Fault Act to be a comprehensive all inclusive automobile insurance scheme. E.g., Cruz v State Farm Mutual Automobile Ins Co, 466 Mich 588, 595, 648 NW2d 591 (2002); Nalbandian v Progressive Michigan Ins Co, 267 Mich App 7, 18, 703 NW2d 474 (2005); Travelers Ins v U-Haul of Michigan, Inc, 235 Mich App 273, 276, 597 NW2d 235 (1999).

Second, prior to the passage of the No-Fault Act, there was no common law cause of action permitting a plaintiff to recover, without regard to fault, wage loss benefits, medical benefits, and replacement service benefits from an insurance company. In the same way this Court in Lamphere Schools struck down these common law causes of action, this Court should dismiss Plaintiff's common law tort theory of fraud.

Further support for ACIA's position is found in the numerous appellate cases which have addressed attempts by plaintiffs to

avoid the restrictions of the Dramshop Act, MCL 436.1201, et seq., by filing common law causes of action.¹⁴ In Millross v Plum Hollow Golf Club, 429 Mich 178; 413 NW2d 17 (1978), the plaintiff's decedent was fatally injured when he was struck by an automobile operated by an employee of Plum Hollow Golf Club. Just before leaving work, the employee had attended a dinner at Plum Hollow, which was part of his job responsibility. Cocktails had been served by Plum Hollow personnel to the employee and other guests prior to dinner. The accident with Millross occurred when the employee was on his way home. Id. at 181-82.

The dramshop claim against defendant Plum Hollow was resolved and a consent judgment was entered in favor of the plaintiff. However, an additional count alleged that Plum Hollow was liable for the employee's negligent driving, inter alia, because of its failure to properly supervise the employee or provide him with an alternative means of transportation home. The trial court dismissed that claim, ruling, inter alia, that the plaintiff's negligence claim was based upon the dispensing of an alcoholic beverage and was therefore preempted by the exclusive remedy of the Dramshop Act. Id. at 182-83. The Court of Appeals reversed.

This Court held that plaintiff's claim, which arose out of the selling, giving, or furnishing of alcoholic liquor by a

¹⁴The Dramshop Act was amended and the sections renumbered in 1998. PA 1998 No. 58. Up until that amendment, the citation for the Dramshop Act was MCL 436.1, et seq.

liquor licensee (Plum Hollow Golf Club), was preempted by the exclusive remedy of the Dramshop Act. In reaching that result, this Court, in part, had to determine when a statutory scheme preempts the common law on a subject:

"Whether or not a statutory scheme preempts the common law on a subject is a matter of legislative intent. [Citation omitted]. In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter. [Citation omitted]."

Id. at 183. See also Kraft v Detroit Entertainment, LLC, 261 Mich App 534, 543-44; 683 NW2d 200 (2004).

This Court noted that at common law, negligence in the sale or furnishing of intoxicating liquor to an ordinary able-bodied person was not a tort, even though a result of intoxication was injury to the intoxicated person or others. Id. at 183. The Court recognized that by enacting the Dramshop Act, the Legislature created a new remedy for a new and particular right. Id. at 184. The Court concluded:

"Therefore, this Court has found that the Legislature intended the dramshop act to be a complete and self-contained solution to a problem not adequately addressed at common law and the exclusive remedy for any action arising under 'dramshop-related facts.'"

Id. at 185-86.

This Court agreed with the plaintiff's contention that notwithstanding the exclusive remedy and nature of the Dramshop Act, Michigan courts have long recognized that liquor licensees remain liable for breach of independent common law duties. In

agreeing with that proposition, the Court cited favorably to Manuel v Weitzman, 386 Mich 157, 191 NW2d 474 (1971), for the following test to determine whether an independent common law cause of action had been properly brought:

"Manuel sets forth a two-part analysis for determining what claims are proscribed by the exclusive remedy provision.

"(1) Does the claim against the 'tavern owner' arise out of an unlawful sale, giving away, or furnishing of intoxicants? If so, then the dramshop act is the exclusive remedy.

"(2) If the claim arises out of conduct other than selling, giving away or furnishing of intoxicants, does the common law recognize a cause of action for the negligent conduct? If so, then the dramshop act neither abrogates nor controls the common law action. If not, there is no independent common-law claim."

Id. at 187.

If the Manuel test is applied here, as it should be, there can be no dispute that Plaintiff's claim for fraud must be dismissed. This lawsuit arises out of ACIA's alleged failure to pay statutory no-fault benefits. That being so, the No-Fault Act is the exclusive remedy.

Although Plaintiff never gets to the second part of the Manuel test because she fails on the first part, if she did, the result would still be the same. There was no common law cause of action permitting a plaintiff to recover, without regard to fault, wage loss benefits, medical benefits, and replacement service benefits from an insurance company. Since the common law did not recognize such a cause of action, there can be no inde-

pendent common law claim, however labeled, separate and distinct from the plaintiff's statutory no-fault claim.

Several dramshop cases have dealt with the attempt by a plaintiff to avoid the two-year statute of limitations by filing a common law tort or breach of contract action with longer limitation periods. In Jones v Bourrie, 369 Mich 473; 120 NW2d 236 (1963), the plaintiff was injured in an auto accident as the result of his driver's intoxicated condition. The plaintiff alleged that the driver was served liquor in the defendant's bar after he was already intoxicated. The complaint was filed after the two year statute of limitations providing for civil liability under the Dramshop Act had run, but within the three year statute of limitations for general tort actions. The Court held:

"Plaintiff herein, for unknown reasons, permitted the statutory period to run. He cannot now assert an action to exist at common law. Plaintiff's remedy was under the statute (CL 1948, §436.22, as amended) and he failed to timely exercise it. To allow now an action, based on a common-law remedy, would be to permit circumvention of the statute and to assert a nonexistent remedy beyond that provided by the legislature."

Id. at 476-77.

In Browder v International Fidelity Ins Co, 413 Mich 603; 321 NW2d 668 (1982), the issue was whether the plaintiff could bring an action against the defendant tavern owner's surety on a contract theory outside the Dramshop Act. The plaintiff had filed an amended complaint adding the defendant insurer after the expiration of the Dramshop Act's two-year limitations period, and invoked the six-year limitations period for contract actions. In

determining that the Dramshop Act barred the plaintiff's contract claim and provided the exclusive limitation period, the Browder Court stated:

"In summary, we find that the Legislature intended the dramshop act to be a complete and self-contained solution to a social problem not adequately addressed at common law. The plain and unambiguous language, together with the built-in checks and balances adopted by the Legislature to finally hone the rights and obligations of the parties under the act, lead to only one conclusion: The Legislature intended the statutory action of trespass on the case to be the exclusive remedy and 'any action' arising out of dramshop-related facts to be instituted within two years."

Id. at 615-16 (emphasis added). Compare Shavers, supra.

In the instant case, Plaintiff seeks to implement a common law cause of action to recover an exclusively statutory remedy, i.e., no-fault benefits. She does so to avoid the damage limitation imposed by the Legislature in enacting the comprehensive first-party benefit scheme. Based on the general legal principles governing such attempts, this cause of action should be rejected.

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III. EVEN IF COMMON LAW FRAUD WERE AN AVAILABLE CAUSE OF ACTION FOR THE RECOVERY OF NO-FAULT BENEFITS, AS A MATTER OF LAW AN UNDERPAYMENT OF NO-FAULT BENEFITS CANNOT CONSTITUTE A BASIS FOR SUCH A CAUSE OF ACTION.

This issue was not raised below. However, it is presented here for two valid reasons.

First, it constitutes an alternative ground for affirmance. Vandenberg v Vandenberg, 253 Mich App 658, 663, 660 NW2d 341 (2002); Middlebrooks v Wayne Co, 446 Mich 151, 166 n 41, 521 NW2d 774 (1994). If ACIA is entitled to summary disposition pursuant to MCR 2.116(C)(10), then the Court of Appeals should be affirmed.

Second, it places ACIA's conduct in its proper context as a counterpoint to Plaintiff's baseless allegations of fraud.

Standard of Review

This Court reviews decisions on summary disposition de novo. Smith v Globe Life Ins Co, 460 Mich 446; 597 NW2d 28 (1999).

Discussion

The elements of fraud/misrepresentation are as follows:

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. . . ."

Hi-Way Motor Co v International Harvester Co, 398 Mich 330, 336; 247 NW2d 813 (1976). Accord International Brotherhood of Elec-

trical Workers, Local Union No. 58 v McNulty, 214 Mich App 437, 447; 543 NW2d 25 (1995). The reliance must be reasonable. Novak v Nationwide Mutual Ins Co, 235 Mich App 675, 689-90; 599 NW2d 546 (1999). The cause of action must be proved by clear and convincing evidence. Hi-Way Motor Co, supra at 336.

Assuming the truth of Plaintiff's representations as to what MR. HANKAMP said, ACIA is entitled to judgment in its favor as a matter of law on Plaintiff's fraud claim. The only "misrepresentation" which Plaintiff discusses was MR. HANKAMP's assertion that if Plaintiff did not quit her job to care for LORALEE, ACIA would not pay for commercial nursing for her. (Plaintiff's Brief on Appeal, p 2, 14). That assertion is insufficient to support a claim for fraudulent misrepresentation in an insurance context for four independent and alternative reasons.

First, Plaintiff does not allege a breach of a duty which is "distinct from the contract" (Plaintiff's Brief on Appeal, p 10). Plaintiff's claim is that MR. HANKAMP misrepresented her rights under the contract. Nowhere does Plaintiff explain how that claim is independent of the contract on which it is ultimately and explicitly based.

Second, to be actionable, a misrepresentation must be a statement of presently existing fact. Custom Data v Preferred Capital, 274 Mich App 239, 242-43, 733 NW2d 102 (2007); Foreman v Foreman, 266 Mich App 132, 143, 701 NW2d 167 (2005); Eerdmans v Maki, 226 Mich App 360, 366, 573 NW2d 329 (1997). A conditional statement of future conduct is promissory in nature and cannot be

the basis for a cause of action for fraudulent concealment.

Eerdmans, supra at 366.

Third, there is absolutely no evidence that MR. HANKAMP's statement was false. He allegedly said that if Plaintiff did not quit work and care for LORALEE, ACIA would not pay for her own care. Absent a showing that he would not have acted in accord with his stated intent, Plaintiff's cause of action must fail. It is worth noting that her claim is inferentially based upon the truth of that statement, i.e., that she was "forced" to quit work to care for her daughter.

Finally, lest we leave our common sense at the courthouse door, the dispute must be seen for what it is. Plaintiff argues that MR. HANKAMP "represented" that \$50/day was an appropriate rate. (Plaintiff's Brief on Appeal, p 2, 14). MR. HANKAMP testified that he thought that the rate was appropriate. (74a). Bearing in mind that the amount due for home attendant care is not a liquidated amount, what we have here is not fraud, but rather a classic disagreement over how much should have been paid. ACIA thinks that it paid a reasonable amount for what was provided; Plaintiff thinks that it should have paid more.

In that context, if the alleged underpayment constitutes fraud, it follows that if Plaintiff were to lose before a jury, she and her attorneys would be guilty of conspiring to perpetrate insurance fraud, which is a four-year felony, MCL 500.4503(c)-(d), (h). Perhaps the Attorney General should be monitoring these claims.

All of that illustrates the silliness of the game that plaintiffs play to avoid the one-year-back rule. But for Cameron, the parties would not be arguing "fraud". Calling an alleged underpayment a misrepresentation is pounding a square peg into a round hole.

In sum, Plaintiff's cause of action for fraudulent misrepresentation is neither factually nor legally viable.

RELIEF

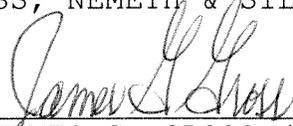
Defendant-Appellee, AUTO CLUB INSURANCE ASSOCIATION, prays
this Honorable Court to issue an opinion holding that:

- (1) An action to recover no-fault benefits, however labeled, is subject to MCL 500.3145(1), including the one-year-back rule; and
- (2) There are no common law causes of action in which no-fault benefits may be recovered as damages; or
- (3) A dispute over the amount of no-fault benefits which should have been paid does not give rise to an action for fraud.

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Dated: October 4, 2007

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