

**STATE OF MICHIGAN
IN THE SUPREME COURT**

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

Plaintiffs-Appellants,

v

SC: 132792
COA: 261736
Washtenaw CC: 03-000367-NF

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

**AMICUS CURIAE BRIEF OF THE
MICHIGAN ASSOCIATION FOR JUSTICE**

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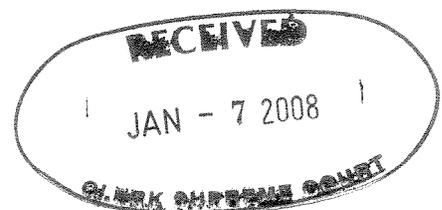


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Interest of Amicus Curiae

The Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work. MAJ consists of more than 2400 member attorneys and recognizes an obligation to assist this Court on important issues of law that would affect substantially the orderly administration of justice in the trial courts of this state. MAJ has filed a motion for permission to participate as amicus curiae in this case. MAJ supports Plaintiff-Appellant and supports reversal of the Court of Appeals' opinion.

Counter-Statement of Question Presented

MAJ agrees with the questions presented by Plaintiffs-Appellants.

Counter-Statement of Facts

Much of ACIA's argument in this case is premised on alleged "facts" not in evidence and not supported in any way. In this case, ACIA refers to a "scheme" by insureds and alternatively claiming "millions," "tens of millions," and even "hundreds of millions" of dollars lost from the No Fault system. The use of the euphemism "No Fault system" is a misnomer, for of course what ACIA means is that the insurance companies do not get to keep the money. ACIA implies that the insurers are losing money and seeks to invoke sympathy and equity from this Court.

This Court should ignore such unsubstantiated "facts." ACIA conveniently refrains from describing the full story. ACIA and other insurers take catastrophic claims into account when conducting their actuarial analyses and in making pricing decisions. If ACIA and other insurers performed these analyses properly, then they took into account the need for attendant care, no matter who provides it. In fact, presumably, the insurers would have used commercial agency rates in their formulas. That ACIA saw the opportunity to deprive insureds of appropriate benefits where family and friends provided the needed attendant care merely demonstrates that this issue is about the amount of insurance company profits and nothing else.

If, on the other hand, ACIA and other insurers did not properly account for catastrophic claims, then that is the price of doing business and this Court should not

act as a bail-out agency for insurers and should not grant them immunity from fraud or other torts.

ACIA also raises the unholy specter of rising premiums, and says that the “upward pressure” on premiums is “evident.” Evident to whom? Where is the evidence? It is not evident if ACIA properly conducted its actuarial analysis (this is especially true for actuarial analysis performed pre-*Devillers* when judicial tolling of the one year back rule was in effect). If ACIA is so confident of its evidence, then ACIA should open its books going all the way back for the world to see. Let independent experts evaluate the truth of ACIA’s assertions. In the meantime, this Court should not be swayed by such gross, unsubstantiated assertions not supported by the evidence.

Argument

I. THE “ONE YEAR BACK RULE” IS NOT ABSOLUTE IN PROPER CASES INVOLVING EQUITABLE CONSIDERATIONS.

In *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562; 702 N.W.2d 539 (2005), ACIA convinced this Court to eliminate judicial tolling’s applicability to the so-called “one year back rule” of MCL 500.3145(1). In *Devillers*, however, while eliminating the applicability of judicial tolling, this Court recognized that the “one year back rule” is not inviolate. Unhappy with this Court’s recognition of equity in *Devillers*, ACIA and other insurers have argued that, based on *Cameron v. Auto Club Ins. Ass’n*, 476 Mich. 55; 718 N.W.2d 784 (2006), the one year back rule provides an absolute limit on recovery of benefits under the No Fault Act. The *Cameron* decision did not overrule *Devillers*, as the insurers’ argument necessarily requires.

In *Devillers*, this Court recognized that equity may prevent the application of the one year back rule in appropriate circumstances, such as fraud and equitable estoppel: “Although courts undoubtedly possess equitable power, such power has traditionally been reserved for ‘unusual circumstances’ such as fraud or mutual mistake.” 473 Mich. at 590. In *Devillers*, this Court rejected a blanket judicial tolling rule and, instead, reserved the application of equity to particular circumstances in specific cases. This Court held that no such specific circumstances were alleged in

Devillers, but recognized that the one year back rule may be inapplicable in the face of fraud or other circumstances:

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.

473 Mich. at 591. Recently, the Court of Appeals recognized – and applied – this Court’s preservation of equitable doctrines applicable to the “one year back” rule. *Douse v. Farm Bureau General Ins. Co.*, 2007 WL 4415494 (Mich.App.,2007). On August 18, 2006, in *Dowadait v. State Farm Mut. Auto. Ins. Co.*, E.D.Mich. case no. 04-71124 (2006 WL 2404505), Judge Zatkoff found that the *Devillers* decision did not alter his prior findings that fraud prevented application of the one year back rule of MCL §500.3145(1) with respect to the attendant care claims presented by the plaintiff, including underpayment of attendant care.

Under traditional judicial powers, as recognized by this Court in *Devillers*, fraud, fraudulent concealment, mistake, equitable estoppel,¹ and similar doctrines all

¹Equitable estoppel is not a “tolling” issue; equitable estoppel prevents a party from raising an issue or defense or denying a fact. *See Hoye v. Westfield Ins. Co.*, 194 Mich. App. 696; 487 N.W.2d 838 (1992). Equitable estoppel can prevent the application of the one year back rule regardless of whether it is a damages cap or a limitations period.

can prevent the application of the one year back rule. In *Cameron*, this Court faced the issue whether the minority/insanity tolling provisions of the Revised Judicature Act, MCL §600.5851, applied to the one year back rule. This Court quoted with approval language in *Devillers* suggesting that the one year back rule was a damages cap under the No Fault Act. 476 Mich. at 61. This Court then explicitly held that the one year back rule is a damages cap for claims under the No Fault Act. This Court did not overrule or reject the language in *Devillers* that equity can prevent the application of the one year back rule and did not address that issue explicitly. *Cameron* does not represent an absolute damages cap under the No Fault Act.

The creation of an absolute rule, as suggested by ACIA, would require an abdication of the judicial role. The judiciary is not merely a rubberstamp authority, but instead must exercise the judicial function. *National Wildlife Federation v. Cleveland Cliffs Iron Co.*, 471 Mich. 608; 684 N.W.2d 800 (2004). This function of the courts includes ensuring equity in appropriate circumstances. ACIA and other insurers recognize this when they raise defenses such as mitigation of damages, unclean hands, and the like in No Fault cases. None of these defenses is mentioned explicitly in the No Fault statute, yet they apply. Why then do equitable considerations not apply when insureds seek to invoke them? Apparently, because the insurers say so. Justice demands otherwise.

II. THE ONE YEAR BACK RULE DOES NOT APPLY TO NON-CONTRACTUAL CLAIMS.

ACIA argues that the one year back rule applies no matter what cause of action is brought by a plaintiff. In so doing, ACIA seeks to expand the language of the statute and have this Court rewrite that language.

Statutory language must be given its plain meaning and courts must not rewrite statutory language. *Cameron, supra*; *Griffith v. State Farm Mut. Auto. Ins. Co.*, 472 Mich. 521, 526; 697 N.W.2d 895 (2005); *Cruz v. State Farm Mut. Auto. Ins. Co.*, 241 Mich. App. 159; 614 N.W.2d 689 (2000). However, ACIA seeks to do exactly that by expanding the one year back rule beyond breach of contract No Fault claims.

The plain language of the No Fault Act makes it clear that the provision only applies to claims under the Act (*i.e.*, breach of contract claims):

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

the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

This section applies only to claims and actions brought under the No Fault Act.² In *Cameron*, this Court noted that separate statutory schemes are to be respected. Yet the application of MCL §500.3145 to independent claims of fraud, silent fraud, negligence, and the like would vitiate the standards set forth in *Cameron* and require a rewriting of the Revised Judicature Act that governs such claims.

ACIA in essence argues that the No Fault Act is an exclusive remedy statute. The No Fault Act, however, is not an exclusive remedy. *See Shavers v. Attorney General*, 402 Mich. 554, 623; 267 N.W.2d 72 (1978)(No-Fault Act “**partially abolish[ed] the common-law remedy in tort for persons injured by negligent motor vehicle tortfeasors....**”)(emphasis added); *Citizens Ins. Co. of America v. Tuttle*, 411 Mich. 536, 542; 309 N.W.2d 174 (1981)(“The tort liability abolished by the no-fault act is only such liability as arises out of the defendant's ownership, maintenance or use of a motor vehicle, not liability which arises out of other conduct, such as the negligent keeping of cattle.”); *Auto Club Ins. Ass'n v. New York Life Ins. Co.*, 440 Mich. 126; 485 N.W.2d 695 (1992)(recognizing common law subrogation

²See, e.g., *West v. Farm Bureau General Ins. Co.*, 272 Mich.App. 58, 723 N.W.2d 589 (2006), finding *Devillers* only applicable to “statutory no fault claims.”

claim involving no fault benefits).³

This Court and the Court of Appeals have recognized that common law (other than the partial abolition of third-party tort liability) survived the adoption of the No-Fault Act. *Bak v Citizens Ins. Co. of America*, 199 Mich App 730, 737; 503 NW2d 94 (1993) (“The enactment of the no-fault act did not extinguish common-law doctrines predating that legislation.”)(citations omitted); *Rusinek v Schultz, Snyder & Steele Lumber Co.*, 411 Mich 502; 309 NW2d 163 (1981)(holding that common law loss of consortium claims survived and applied to No-Fault Act); *Adams v Auto Club Ins Ass’n*, 154 Mich App 186; 397 NW2d 262 (1986)(common claim for reimbursement of overpayment of No-Fault benefits was proper and not subject to MCL §500.3145); *see Hoffman v Auto Club Ins Ass’n*, 211 Mich App 55; 535 NW2d 529 (1995); *see also Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass’n*, 257 Mich. App. 365; 670 N.W.2d 569 (2003), *aff’d* 472 Mich. 91; 693 N.W.2d 358 (2005)(court of appeals dismissed tort claims on lack of evidence, not because such claims were not available). Unlike the Worker's Disability Compensation Act, MCL §418.101, *et seq.*, which contains a specific, enumerated exclusive remedy provision,

³To the extent that ACIA also suggests that the No-Fault Act created first party benefits such as allowable expenses, ACIA is incorrect. The first party benefits under the No-Fault Act were available against third-party tortfeasors prior to the enactment of the Act.

MCL §418.131(1), there is no language in the No-Fault Act – Defendant does not and cannot cite any – that similarly provides that the No-Fault Act is an exclusive remedy statute, especially with respect to dealings between insureds and their insurance carriers. Omissions by the Legislature are considered intentional. *Johnson v Marks*, 224 Mich App 356, 358; 568 NW2d 689 (1997)(citing *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993));⁴ *see also Sam v Balardo*, 411 Mich 405, 430; 308 NW2d 142 (1981). To find an exclusive remedy provision in the No Fault Act, a court would have to judicially re-write the statute to add an exclusive remedy provision, an activity beyond the scope of the authority of the courts.

Under the so-called logic of ACIA's argument, independent tort claims in a No Fault setting also would be subject to the one year statute of limitations in the first sentence of MCL §500.3145. This would require a court to ignore the statutes of limitations for the tort claims as set forth in the RJA. MCL §600.5805 (negligence); MCL §600.5813 (fraud); *see Kuebler v. Equitable Life Assur. Soc. of the U.S.*, 219 Mich. App. 1; 555 N.W.2d 496 (1996). The admonitions of this Court in *Cameron* and *Devillers* regarding the plain language of statutes and enforcing such language

⁴In *Farrington*, the Supreme Court said:

Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.

442 Mich. at 210 (citations omitted).

as written prevent the rewriting of the RJA. In each case, to reach the result that ACIA seeks, a court would have to write exceptions into the RJA for No Fault cases.

ACIA argues that all non contractual claims are subject to the one year back rule. The statutory language simply has no application to independent tort claims of fraud, silent fraud, negligence, or other claims. Damages under tort claims generally are different than damages under a breach of contract claim. *See Phillips v. Butterball Farms Co., Inc.*, 448 Mich. 239, 251; 531 N.W.2d 144 (1995) (“Because this action sounds in tort, the available ‘damages are not limited by contract principles.’”)(footnote omitted). While fraud may prevent application of the one year back rule under *Devillers*, the independent fraud claim allows for recovery of damages other than the No Fault benefits, including exemplary damages, physical damages, etc. *Phinney v. Perlmutter*, 222 Mich. App. 513; 564 N.W.2d 532 (1997); *see also Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594; 374 N.W.2d 905 (1985); *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401; 295 N.W.2d 50 (1980).

However, tort claims may include as damages items that are covered by a contract. In *Hearn v. Rickenbacker*, 428 Mich. 32; 364 N.W.2d 371 (1985), this Court held that the fraud and negligence counts were independent from breach of contract:

It is important to distinguish an action "arising out of the contractual relationship" and one "on the policy." *See Murphy v. Allstate Ins. Co.*, 83 Cal.App.3d 38, 49, 147 Cal.Rptr. 565 (1978). While all three of plaintiff Hearn's counts may be said to have arisen out of his contractual

relationship with the defendants, only the first one is an action on the policy.

Plaintiff Hearn's fraud and negligence counts, like certain claims in *Austin v. Fulton Ins. Co.*, 444 P.2d 536, 538 (Alaska, 1968), are not actions "on this policy."

428 Mich. at 38. Specifically with respect to fraud claims, the Court noted:

As the Court of Appeals has observed in the past, the relationship between insurers and their insureds is "sufficient to permit fraud to be predicated upon a misrepresentation." *Drouillard v. Metropolitan Life Ins. Co.*, 107 Mich.App. 608, 621, 310 N.W.2d 15 (1981) (quoting *Bolden v. John Hancock Mutual Life Ins. Co.*, 422 F.Supp. 28, 31-32 (ED Mich., 1976). An action for fraud is not an action on the policy; it is an action in tort that arose when the fraud was perpetrated. See *Asher v. Reliance Ins. Co.*, 308 F.Supp. 847, 853 (ND Cal, 1970); *Wabash Valley Protective Union v. James*, 8 Ind.App. 449, 450, 35 N.E. 919 (1893).

428 Mich. at 39 (footnote omitted).⁵ This Court also held that it is not dispositive that the damages from the tort claims may include losses covered under the insurance policy:

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 its very nature, an action on the policy ..."). **Although the contract of insurance may be one source of the**

⁵The Court went on:

The same reasoning applies to the plaintiff's negligence claims. If the defendant has breached a legal duty owed to the plaintiff apart from the contract of insurance, then there may be liability in tort.

428 Mich. at 39-40 (footnote omitted).

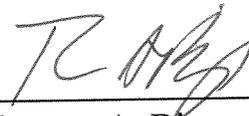
insurer's obligation to pay the loss, the insurer may also be held liable for tortious conduct that is wholly separable from its purely contractual duties.

428 Mich. at 40-41 (emphasis added). Independent tort claims may include as damages items otherwise covered by an insurance contract. The plain language of the No Fault Act does not allow an insurer to defraud its insureds and then apply the No Fault damages cap to the independent tort claims.

Conclusion

For all the aforementioned reasons, MAJ urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,



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Dated: January 7, 2008

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Two copies of the foregoing Amicus Curiae Brief of the Michigan Association for Justice and this Proof were served on January 7, 2008 by first class mail, postage prepaid, on each of the following (and sent via email as well):

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