

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Court of Appeals  
[Leave granted on bypass application]

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Doreen Joseph,

Supreme Court No. 142615

Plaintiff-Appellee,

v

Court of Appeals No. 302508  
Macomb Circuit Court No. 09-5726-CK

A.C.I.A.,

Defendant-Appellant.

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**AMICUS CURIAE BRIEF OF THE COALITION PROTECTING AUTO NO-FAULT  
("CPAN") IN SUPPORT OF PLAINTIFF-APPELLEE**

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Coalition Protecting Auto No-Fault (“CPAN”) is a broad-based, bipartisan coalition of 16 medical provider associations and 8 consumer organizations who have united for the sole purpose of preserving the unique, model status of the Michigan automobile no-fault insurance system – an injury reparations systems that has consistently garnered national accolades since its inception in 1973. Central to the mission of CPAN is to oppose the legislative and judicial erosion of the No-Fault Law. CPAN’s membership associations are identified below:

<b>CPAN: Coalition Protecting Auto No-Fault</b>	
<b>Medical Provider Groups</b>	<b>Consumer Organizations</b>
1. <i>Michigan State Medical Society</i>	1. <i>Brain Injury Association of Michigan</i>
2. <i>Michigan Osteopathic Association</i>	2. <i>Michigan Association for Justice</i>
3. <i>Michigan Health &amp; Hospital Association</i>	3. <i>Michigan Citizens Action</i>
4. <i>Michigan Orthopaedic Society</i>	4. <i>UAW MI CAP</i>
5. <i>Michigan Association of Chiropractors</i>	5. <i>Michigan Protection and Advocacy Services</i>
6. <i>Americare Medical</i>	6. <i>Michigan Paralyzed Veterans of America</i>
7. <i>Michigan Association of Centers for Independent Living</i>	7. <i>Michigan State AFL-CIO</i>
8. <i>Eisenhower Center</i>	8. <i>Michigan Tribal Advocates</i>
9. <i>Michigan Academy of Physician Assistants</i>	
10. <i>Michigan Brain Injury Providers Council</i>	
11. <i>Michigan Dental Association</i>	
12. <i>Michigan Nurses Association</i>	
13. <i>Michigan Orthotics &amp; Prosthetics Association</i>	

14. <i>Michigan Rehabilitation Association</i>	
15. <i>Michigan Rehabilitation Services</i>	
16. <i>Spectrum Health</i>	

This case touches the core of CPAN's interests because the issues presented affect whether injured children and incompetent persons (such as brain injury victims) will be able to recover no-fault PIP benefits for their injuries. In this case, the Supreme Court will address whether it correctly decided *Regents of the Univ of Michigan v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010), which held that the minority/insanity tolling provision of the Revised Judicature Act, MCL 600.5851(1) applies to toll the "one-year back rule" in MCL 500.3145(1) of the No-Fault Act. This Court's decision in *UM Regents* reversed the earlier decision of *Cameron v Auto Club Insurance Association*, 476 Mich 55; 718 NW2d 784 (2006), which had held that minors and incompetent persons could not avail themselves of the Revised Judicature Act's tolling provision to toll the one-year-back rule of Section 3145(1) of the No-Fault Act. This Court's decision in *Cameron* gravely impacted the ability of children and mentally incompetent accident victims to enforce their rights to no-fault PIP benefits.

Irrespective of this Court's holding in *UM Regents*, the Revised Judicature Act's tolling provision applies to the one-year time limitation of Section 3145(1). That section contains three different limitation periods: (1) the one-year notice provision, which bars claims for no-fault benefits unless the insurer receives written notice of the injury within one year of the accident or has paid PIP benefits for the injury, (2) the one-year period to bring a suit for benefits after the most recent incurred expense, and (3) the one-year-back rule,

which bars any claim for no-fault benefits accrued more than one year before the claim was filed. The *Cameron* Court held that the minority/insanity tolling provision of the Revised Judicature Act did not apply to Section 3145(1) because, technically, the one-year-back rule was not a statute of limitations. As a result, children and mentally incompetent persons who have incurred substantial expenses for medical treatment have not been able to enforce payment of those medical claims if they filed suit more than 365 days after the expense was incurred. This Court in *UM Regents* reversed *Cameron*, and held that, regardless of whether Section 3145 is a statute of limitations period, the tolling provision of Section 5851 applies.

The *UM Regents* Court's interpretation of Section 5851 as it applies to Section 3145 is consistent with 30 years of Michigan no-fault appellate law, it is consistent with the language and purpose of Section 5851 which broadly applies to persons who can "make an entry" or "bring an action," and it is consistent with the common law doctrine of *contra non valentem*.

#### **STATEMENT OF BASIS OF JURISDICTION**

Appellant A.C.I.A. filed an application bypassing the Court of Appeals. This Court granted leave to appeal on May 20, 2011.

As described above in its Statement of Interests of Amicus Curiae, CPAN is interested in the determination of the issues presented by this appeal. CPAN will limit its amicus brief to addressing why Section 5851 of the Revised Judicature Act tolls the one-year back rule in Section 3145 of the No-Fault Act. This Court correctly decided *University*

of *Michigan Regents v Titan Insurance Company*, 487 Mich 289; 791 NW2d 897 (2010).

CPAN accompanies this amicus brief with its motion for leave to file an amicus curiae brief.

### **STATEMENT OF RELIEF SOUGHT**

CPAN submits this amicus curiae brief to request this Court affirm the decision of the of this Court in *UM Regents* and to reaffirm that the one-year-back rule is saved by MCL 600.5851 for minors and incompetent persons who are unable to bring suit due to their minority or incompetency. This Court should interpret the No-Fault Act and the Revised Judicature Act as intended by the Legislature – to protect the most vulnerable members of our society: children and the brain injured.

In the alternative, this Court should deny leave as improvidently granted.

### **STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

1. Is the one-year-back rule of Section 3145(1) of the No-Fault Act a statute of limitations?

CPAN answers: Yes.

2. Do the minority and incompetency tolling provisions of the Revised Judicature Act, MCL600.5851(1), apply to the one-year-back rule contained in Section 3145(1) of the No-Fault Act?

CPAN answers: Yes.

### **STANDARD OF REVIEW**

Resolution of the issues in this case involve the interpretation of provisions of the

No-Fault Act and the Revised Judicature Act. Statutory interpretation is a question of law that this Court reviews de novo. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005); *Paige v City of Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (2006).

## STATEMENT OF FACTS

This appeal arises from the catastrophic injuries sustained by Doreen Joseph in an auto accident on June 14, 1977. (Appendix 36a). As a result of the severe traumatic brain injury and quadriplegia, Joseph has received attendant care and case management from her family members. (Appendix 36a).

Plaintiff filed suit to recover allowable expenses for the case management services provided to her. ACIA filed a motion for summary disposition, which included an argument that Joseph's claim for allowable expense benefits was barred by the one-year back rule of Section 3145(1) of the No-Fault Act. (Appendix 12a). The Trial Court denied summary disposition on the one-year back rule issue and found that there was an issue of fact for a jury as to whether Joseph was insane for purposes of tolling under Section 5851 of the Revised Judicature Act. (Appendix 94a-97a).

ACIA filed an application to the Court of Appeals and then filed a bypass application to this Court. This Court granted leave to appeal on May 20, 2011, and directed the parties to address "(1) whether the minority/insanity tolling provision of the Revised Judicature Act, MCL 600.5851(1), applies to toll the "one-year back rule" in MCL 500.3145(1) of the No-Fault Automobile Insurance Act; and (2) whether *Regents of the Univ of Michigan v Titan Ins Co*, 487 Mich 289 (2010), was correctly decided."

## ARGUMENT

This Court held in *Cameron v Auto Club Insurance Association*, 476 Mich 55; 718 NW2d 784 (2006), that Section 5851(1) of the Revised Judicature Act does not apply to toll the one-year back rule of Section 3145(1) of the No-Fault Act. The Court arrived at that holding by interpreting the one-year back rule to be a “limitation on recovery of damages” rather than a limitation on filing an action (i.e., the statute of limitations) and by concluding that Section 5851(1)’s tolling provision only serves to toll statute of limitations. This Court in *UM Regents* held that, regardless whether Section 3145(1) is a statute of limitations, the tolling provision of Section 5851(1) applies to toll the time limitation contained in the one-year back rule. Focusing on the plain language of these two provisions, and applying accepted rules of statutory construction, CPAN presents its arguments below explaining why Section 5851(1) applies to toll the one-year back rule in Section 3145(1).

- I. **Tolling under MCL 600.5851, by its terms, is not limited to statutes of limitations but also applies to persons entitled to “make an entry” which is a term broad enough to encompass person entitled to make claims, such as PIP benefit claimants.**

Michigan law has long allowed tolling for minors and incompetent persons. The Revised Judicature Act’s tolling provision provides that

(1) Except as otherwise provided in subsections (7) and (8), if 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 600.5851(1) (emphasis added).

Thus it is clear that the specific language of the Revised Judicature Act's Section 5851(1) gives minor and incompetent persons the referenced extension of the time in two separate scenarios: (1) to bring an action or (2) to make an entry. The cases interpreting Section 5851 focus on that portion of the statute that refers to the time to "bring an action." There are no cases that interpret the statutory language referring to the time to "make an entry." Reviewing how that term is used in Section 5851 and giving consideration to its common meaning, it is clear that the term "make an entry" is broad enough to encompass the one-year back rule applied to claims for no-fault benefits.

The dictionary does not define the unitary term "make an entry" or "make the entry." Black's Law Dictionary, however, individually defines the terms "make" and "entry." The word "make" is defined as:

1. To cause (something) to exist <to make a record>.
2. To enact (something) <to make law>.
3. To acquire (something) <to make money on execution>.
4. To legally perform, as by executing, signing, or delivering (a document) <to make contracts>.

Black's Law Dictionary, p. 1041 (9th ed 2009). Black's Law Dictionary defines "entry" to include the following:

1. The act, right, or privilege of entering real property <they were given entry into the stadium>.
2. An item written in a record; a notation <Forney made a false entry in the books of March 3>.
3. The placement of something before the court or on the record.

Black's Law Dictionary, p. 613 (9th ed 2009).

Consistent with the Legislature's use of the term "make an entry" in Section 5851(1), the definitions of "make" and "entry" are broad enough to encompass making a claim for no-fault PIP benefits. For instance, making a claim for benefits fits under the fourth

definition of “make” – to legally perform. Likewise, making a claim for benefits fits under the second and third definitions of “entry” – an item written in a record, a notation, or to place something before the court or on the record. By making a claim for PIP benefits, the claimant is legally performing by delivering an item (the claim) which constitutes placement of something on the records of the insurance company. Thus, the insurance company makes a notation in its records to indicate that the insured is seeking benefits. Accordingly making a claim for PIP benefits fits within Section 5851(1)’s term “make an entry.”

The Legislature’s broad use of the term “make an entry” in Section 5851 is also supported by the wide number of contexts in which the courts have used that term. This Court has variously employed that term in the following contexts:

- Criminal law (make an entry into a dwelling). *In re Forfeiture of \$17,598* 443 Mich 261; 505 NW2d 201 (1993).
- Real property (make an entry on land for adverse possession). *Taggart v Tiska*, 465 Mich 665; 641 NW2d 240 (2002).
- Accounting (make an entry in record book). *Toy ex el Ketcham v Lapeer Farmers’ Mut Fire Ins Ass’n*, 295 Mich 218; 294 NW 160 (1940).
- Legal (make an entry in register of actions or nunc pro tunc). *Brownell v Widdis*, 291 Mich 167; 188 NW 544 (1922); *Harbour v Eldred*, 107 Mich 95; 64 NW2d 1054 (1895).
- Medical (make an entry in medical records). *Gile v Hundutt*, 279 Mich 358; 272 NW 706 (1937).
- Immigration (make an entry into the country). *People v Goss*, 446 Mich 587; 521 NW2d 312 (1994).

Likewise, various sections of the Michigan Compiled Laws utilize the term “make an

entry” or “make the entry.” See MCL 168.932 (election law); MCL 257.1353, 333.9206, 427.204, 445.487, 446.29, 487.1807 (make an entry on books); real property (MCL 600.5711, 600.6071, 600.5801, 600.5829, 600.5841, 600.5843). Aside from Section 5851, the term appears six times in the Revised Judicature Act. But unlike the Legislature’s broad and unqualified use of the term “make an entry” in Section 5851(1), the Legislature specifically limited that term to real property actions in other sections of the Revised Judicature Act. See 600.5711 (make an entry on premises); MCL 600.6071 (make an entry in the register of deeds); MCL 600.5801 (providing limitation period for making an entry on lands for purpose of adverse possession); MCL 600.5829 (establishing the right to make an entry on lands; MCL 600.5841 (computing the accrual of a claim to an ancestor for a person who makes an entry, referred to as the tacking provision); MCL 600.5843 (creating new accrual period when the person who has a right to make an entry on land regains possession before the limitations period has expired). Thus, it is clear from these other legislative provisions in the Revised Judicature Act employing the term “make an entry” that the Legislature was drawing a distinction between the broad unqualified term “make an entry” and the narrower variation of that term which it qualified and limited to only certain specific types of “entry.” By not qualifying the term “make an entry” in Section 5851, the Legislature clearly indicated its intent that the term should be broadly construed so that it applies to many situations, including the act of making a claim for insurance benefits. Therefore, the tolling provisions of Section 5851 are broad enough to apply to the one-year back rule applicable to enforcing claims for no-fault PIP benefits.

This interpretation of the phrase “make an entry” in Section 5851 is consistent with earlier case law that held the Revised Judicature Act applies to all actions. This Court

noted in *Lambert v Calhoun*, 394 Mich 179, 191; 229 NW2d 332 (1975), that there is “scant reason” to say that the Legislature intended to distinguish between common law and statutory causes of action when it enacted the tolling provision of the Revised Judicature Act. Minors and mentally incompetent persons are under the same disability regardless of whether their actions arise from the common law or statute, while the defendant in a statutory-based suit is generally in no greater need of protection from delay in the commencement of the action than a defendant in a common law action. *Id* at 191. This Court, thus, applied the Revised Judicature Act’s tolling provision to causes of action created by Michigan statute. *Lambert, supra* at 192; *see also Prof’l Rehab Assocs v State Farm Mut Auto Ins Co*, 228 Mich App 167, 175; 577 NW2d 909 (1998).

**II. The one year back rule in MCL 500.3145 is in the nature of a limitation on bringing an action because it extinguishes the right to enforce any claim accruing more than one year before filing. Thus Section 3145 renders a claim unenforceable because of the expiration of time, and is therefore subject to the tolling provisions of the Revised Judicature Act.**

This Court in *UM Regents* correctly held that the minority/insanity tolling provision of MCL 600.5851(1) applies to the one-year-back rule contained in MCL 500.3145(1) regardless of whether that rule is a “statute of limitations.” It is the position of CPAN that, regardless of what label is applied to it, the one-year back rule operates as a time limitations period that bars certain claims, and therefore, Section 5851(1) of the Revised Judicature Act applies to toll that limitations period. To that end, CPAN also agrees with *UM Regents* that, no matter how Section 3145 is titled (whether it is called limitation on the action or a limitation on the recovery of benefits), the Revised Judicature Act’s tolling provision applies to the one-year back rule of Section 3145(1).

Section 3145(1) of the No-Fault Act contains three separate statutes of limitation. The first statute of limitation provides that an auto accident victim cannot file a lawsuit for PIP benefits more than one year after the accident unless the no-fault insurer has been provided with written notice of the injury or unless the insurer has paid PIP benefits for the injury. The second statute of limitation provides that, even if notice has been given within one year, any suit must be brought within one year of the most recent incurred expense. The third statute of limitations is the "one-year-back rule," which provides that an auto accident victim cannot recover no-fault PIP benefits for expenses incurred more than one year before the insured files suit against the no-fault insurer. Section 3145 of the No-Fault Act sets forth these three separate statutes of limitations as follows:

**[First limitation period]** (1) 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. **[Second limitation period]** 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. **[Third limitation period]** 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.

MCL 500.3145(1) (emphasis added).

The one-year-back rule is a statute of limitations for the simple reason that failure

to file suit within 365 days of an incurred expense bars recovery for that expense. It is a classic time bar that operates in exactly the same manner as any other statute of limitations. Black's Law Dictionary defines the term "statute of limitations" in pertinent part as follows:

Statutes of limitation are . . . **such legislative enactments as prescribe the periods** within which actions may be brought upon certain claims or **within which certain rights may be enforced**. . .

Black's Law Dictionary (7th ed) (emphasis added). This Court in *Cameron* ignored the second part of the definition of "statute of limitations" which included limits upon "certain rights that may be enforced." In so doing, the *Cameron* Court failed to recognize that the right to recover damages (i.e., PIP benefits) is a specific right to be enforced, which is limited by the legislative time period placed in Section 3145(1)'s one-year-back rule. Stated differently, the one-year-back rule is a statute of limitations because, if an injured person cannot recover benefits under Section 3107(1)(a) for allowable expenses that are older than one year, then having the ability to initiate a cause of action for those allowable expense benefits is meaningless. Indeed, if there are no damages, then the injured person cannot state a claim upon which relief can be granted because one of the essential elements of the cause of action for PIP benefits (i.e., damages) is missing.

Even if the one-year-back rule is not a statute of limitations, the minority/insanity tolling provision should still apply to the one-year-back rule based on the Legislature's purpose in enacting the tolling provision of the Revised Judicature Act. As described by the Court of Appeals in *Klida v Braman*, 278 Mich App 60, 71; 748 NW2d 244 (2008), the

Legislature created tolling for minors and insane persons to protect those people who were otherwise unable to protect themselves. The Court in *Klida* stated that “[t]he purpose of a savings or tolling statute for persons under a disability is to protect the legal rights of those who are unable to assert their own rights and to mitigate the difficulties of preparing and maintaining a civil suit while the plaintiff is under a disability.” *Klida, supra* at 71.

The holdings of these cases comport with trial practice. When a suit is filed beyond the one-year period for the recovery of benefits, the defendant files a motion for summary disposition asking for the dismissal of the case. If the party has failed to comply with the one-year-back rule, **the cause of action is deemed to have expired**. Thus, the auto accident victim is denied recovery because the cause of action for the recovery of PIP benefits has been time-barred by Section 3145(1).

Because the one-year-back rule is substantively a statute of limitations, the Revised Judicature Act correctly applies to all time limitation periods applicable to no-fault PIP claims. This is consistent with 30 years of case law which has treated the one-year-back rule as a statute of limitations. *Rawlins v Aetna Casualty & Surety Co*, 92 Mich App 268, 274-277; 284 NW2d 782 (1979); *Hartman v Ins Co of Am*, 106 Mich App 731, 743-744; 308 NW2d 625 (1981); *Geiger v Detroit Automobile Ins Exch*, 114 Mich App 283, 289-290; 318 NW2d 833 (1982); see *Cameron, supra* at 64. This long-standing precedent (prior to *Cameron*), clearly recognized that the one-year-back rule bars a plaintiff's claim the same as any statute of limitations.

In *Geiger, supra*, the Court of Appeals correctly noted that the Revised Judicature Act tolling provisions serve a similar purpose with respect to both the No-Fault Act's one-

year-notice rule and the one-year-back rule – “a person should not lose his claim during his minority, when he has no legal capacity to act on his own behalf.” *Geiger, supra* at 291, citing *Rawlins, supra*. The *Geiger* Court concluded that the tolling provision of Section 5851 did apply to the No-Fault Act’s one-year-back rule, reasoning that

A contrary rule would severely limit the utility of the minority saving provision and could deprive a person of benefits to which he would otherwise be rightfully entitled. In the present case, James Geiger, injured at the age of 16, incurred substantial medical expenses over the 2 years following the accident. He commenced this action approximately two weeks before his nineteenth birthday. Although his right to commence the action is preserved under *Rawlins, supra*, **if we do not apply the minority saving provision to the "one year back" rule of § 3145, plaintiff would be effectively precluded from recovering PIP benefits for the medical expenses incurred during the two years immediately following the accident.** In order to advance the policy of RJA § 5851 and *Rawlins, supra*, we conclude that an insured who is injured during his minority and commences an action before his nineteenth birthday is entitled to collect PIP benefits for expenses and losses incurred from the date of the accident.

*Geiger, supra* at 291 (emphasis added). Thus, the *Geiger* Court held that the time limitations contained in Section 3145(1) – the one-year written notice rule and the one-year-back rule – are substantively the same. The label does not matter, only the effect of the provision.

The legislative purpose behind Section 3145(1) is to provide timely notice of claims and to prevent against stale claims. Once that notice has been provided, insureds with life-long injuries can bring suit anytime, but they can only recover benefits for the year prior to bringing suit. This provides incentive for seriously injured persons to provide written notice to the insurance company shortly after the accident and to timely process all claim-related

expenses. The one-year-back rule, however, should not apply to minors and incompetent persons because they simply cannot comply with these requirements given their legal disabilities. Therefore, the one-year-notice rule and the one-year-back rule contained in Section 3145(1) of the No-Fault Act are exactly the type of time limitations the Legislature intended to toll when it adopted Section 5851(1) of the Revised Judicature Act, as discussed in *Geiger, supra*.

Clearly, the Legislature intended Section 5851(1) of the Revised Judicature Act to protect children and mentally incompetent persons. Minors and incompetent persons cannot protect themselves. They cannot hire an attorney, and they cannot even appreciate that they need an attorney. As recognized by the Michigan court rules, a minor or insane person does not have the personal capacity to file suit. MCR 2.201(E). They must rely on parents, guardians, and other fiduciaries to protect their rights. This is precisely why the Legislature enacted the minority savings provision of MCL 600.5851 and drafted it the way it is written. Even though a minor or insane person's guardian could bring suit on that person's behalf, the Legislature did not want to preclude the minor or insane person's action if the guardian sat on their hands and did nothing to protect the rights of the person suffering under such a disability. Instead of leaving a minor's or insane person's fate to their fiduciaries, the Legislature gave them one-year to file suit after the disability was removed. MCL 600.5851(1).

In enacting the Revised Judicature Act, the Legislature has provided the directive that the Act "is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof." MCL 600.102. The Court of Appeals in *Klida, supra* further

noted that point when it held:

[I]n considering the underlying purposes of the [Revised Judicature Act]'s remedial character, the protective purpose of the minority tolling provision, as well as the harm it was designed to remedy—the deprivation of legal rights—we conclude that whether the cause of action arises by statute, common law, or contract, the minority tolling provision is applicable. To deny minors whose cause of action accrues during their disability the opportunity to pursue their otherwise unasserted legal rights would be the antithesis of the firmly-rooted public policy that such minors are to be protected until one year after they reach the age of majority. Such persons would be denied their legal rights simply because they labored under a legal disability.

*Klida, supra* at 73-74. Failure to apply tolling to the one-year-back rule for minors and incompetent persons frustrates the legislative purposes in creating tolling.

**III. Regardless of the interpretation and application of Section 5851 of the Revised Judicature Act to Section 3145 of the No-Fault Act, the common law doctrine of *Contra Non Valentem*, which bars application of any time prescription against minors and incompetent persons, applies to toll the one year back rule of Section 3145(1).**

Reaffirming *UM Regents* would not only serve the Legislature's intent in enacting the No-Fault Act and the Revised Judicature Act, but it also would comport with the venerable common law doctrine of *Contra Non Valentem*. According to Black's Law Dictionary, Revised Fourth Edition, the doctrine of *contra non valentem agere nulla currit praescriptio* mandates that: "No prescription runs against a person unable to bring an action." Black's Law Dictionary (Revised 4th Ed). Similarly, Black's Law Dictionary, Eighth Edition characterizes the doctrine of *contra non valentem* in the following way: "The rule that a limitations or prescriptive period does not begin to run against a plaintiff who is

*unable to act . . .*” Black’s Law Dictionary (8th Ed).

The doctrine of *contra non valentem* has been specifically recognized in Michigan appellate case law for at least 25 years — a recognition that extends even to no-fault cases. One such case is *Kalakay v Farmers Insurance Co*, 120 Mich App 623; 327 NW3d 537 (1982). In that case, plaintiff sued the wrong insurance company for no-fault benefits as a result of injuries he sustained when his motorcycle collided with an automobile. At the time plaintiff filed his lawsuit, plaintiff claimed the law was unsettled. Plaintiff was aware that the law was unsettled but nevertheless, chose to sue one insurance company rather than the other or both in the same action. The plaintiff alleged that plaintiff’s claim was not time barred by the No-Fault Act because, during the period of unsettled law, he was entitled to the protections of the doctrine of *contra non valentem*. In rejecting this claim, the Court of Appeals held that the doctrine of *contra non valentem* did not apply to that case because plaintiff’s failure to sue the right no-fault insurance company was “due to the plaintiff’s own neglect.” *Kalakay, supra* at 627.

Reaching this decision, however, the Court of Appeals did not in any way intimate that the doctrine of *contra non valentem* did not apply to actions for no-fault benefits under the Michigan No-Fault Act. In this regard, the Court in *Kalakay, supra* at 627-628 states:

Plaintiff is arguing that this Court should, through its equitable powers, hold that the statute of limitations should not apply in this case to bar his suit against DAIE. He claims that at the time he brought suit the law required him to sue Farmers – the car owner’s insurance company – and that he then sued DAIE within a reasonable time after discovering that the law might change. In effect, plaintiff is arguing that the equitable doctrine of *contra non valentem agere nulla currit praescriptio* (a prescription does not run against the party who could not bring

a suit) should apply to this case. *See Sincox v Blackwell*, 525 F Supp 96 (WD La, 1981). . . .

We would most likely hold for plaintiff if in fact he could not have sued DAIE when he sued Farmers because the law then required him to sue Farmers. However, even if we assume that plaintiff exercised due diligence in discovering that DAIE insures his sister's car, even if we assume that the statute did not already bar the suit at that time, and even if we assume that the six-month delay between the reversal of *Davidson* on rehearing and plaintiff's suit against DAIE was not unreasonable, we find that plaintiff did not exercise due diligence in suing DAIE. The doctrine of *contra non valentem agere nulla currit praescriptio* does not apply where the delay is due to the plaintiff's own neglect. *Sincox, supra*. At the time plaintiff sued Farmers and found out about DAIE, the law was not clear but unsettled. The law did not become settled until July 6, 1977, ten months after plaintiff knew about DAIE. As such, he should have sued DAIE at that time in the alternative as one plaintiff in *Davidson* had.

The *Kalakay, supra* decision specifically referenced, with approval, the federal case of *Sincox v Blackwell*, 525 F. Supp 96 (WD La, 1981). The *Sincox* case recognized the doctrine of *contra non valentem* and, with respect to that doctrine, stated:

The Fifth Circuit's actions, however, prove somewhat more probative in light of the doctrine of *contra non valentem nulla currit praescriptio*, (prescription does not run against a person who could not bring his suit). *Nathan v. Carter*, 372 So.2d 560 (La. 1979); *Cartwright v. Chrysler Corp.*, 255 La. 597, 232 So.2d 285 (1970); *Hyman v. Hibernia Bank & Trust Co.*, 139 La. 411, 71 So. 598 (1916).

The concept of *contra non valentem* is one of equity. It does not, however, pertain simply because the plaintiff was ignorant of his rights. *Martin v. Mud Supply Co.*, 239 La. 616, 119 So.2d 484 (1959), rehearing denied (La. 1960); *Jackson v. Zito*, 314 So.2d 401 (La.App.1975), *writ refused*, 320 So. 2d 551 (La.1975). Nor does it protect the plaintiff whose cause has prescribed due to his own neglect. *Henson v. St. Paul Fire & Marine Ins. Co.*, 363 So.2d 711 (La.1978), *rehearing denied*

(La.1978).

*Contra non valentem* cannot apply merely where as a practical matter, filing suit is difficult or the prospects of success on the merits are slight due to a given plaintiff's situation. However, where the tort-feasor's actions serve to confine or mislead the injured party, no prescription may then run.

Justice Cavanagh has also recognized the viability of the doctrine of *contra non valentem* in the context of the Michigan No-Fault Act in his dissenting opinion in *Devillers v Auto Club Ins Association*, 473 Mich 562, 594-599; 702 NW2d 539 (2005). In his dissent, Justice Cavanagh acknowledged the existence of the doctrine of *contra non valentem* and characterized it as a subspecies of equitable tolling. In this regard, Justice Cavanagh stated:

"Equitable tolling" is also referred to as "judicial tolling," "the doctrine of *contra non valentem*," and, in shareholder suits, "the doctrine of adverse domination." Equitable tolling is usually discussed in the context of statutes of limitations. MCL 500.3145(1), in that it precludes recovering no-fault benefits incurred during a certain time period, is, for tolling purposes, no different than a statute of limitations.

*Devillers, supra* at 594 n 1 (Cavanagh, J, dissenting). Justice Cavanagh remarked further on the doctrine of *contra non valentem* and its long-recognized application in the law when he stated:

The long-recognized equitable remedy of judicial tolling has been applied in a variety of circumstances. . . [E]quitable tolling operates to relieve the "strict command" of a legislatively prescribed limitation because of "considerations 'deeply rooted in our jurisprudence.'" *Id* at 559, quoting *Glus v Brooklyn Eastern Terminal*, 359 US 231, 232; 79 S Ct 760; 3 L Ed 2d 770 (1959). . . *In re MGS*, 756 NE2d 990, 997 (Ind App, 2001) (recognizing that equitable tolling was an available remedy to

a statute of limitations); *Harsh v Calogero*, 615 So 2d 420, 422 (La App, 1993) (acknowledging the doctrine of *contra non valentem*); *Regents of the Univ of Minnesota v Raygor*, 620 NW2d 680, 687 (Minn, 2001), (holding that equitable tolling is an available equitable remedy under the proper circumstances), *aff'd* 534 US 533; 122 S Ct 999; 152 L Ed 2d 27 (2002).

*Cameron, supra* at 595 (Cavanagh, J, dissenting).

Michigan's recognition of the doctrine of *contra non valentem* also appears in *Desano v Repitor*, unpublished opinion of Court of Appeals, issued July 10, 1998 (Docket No 200258). In that case, the Court of Appeals specifically referenced the doctrine of *contra non valentem* and the *Kalakay, supra* decision, but held it did not apply in a medical malpractice action where a plaintiff failed to file her action in a timely manner under the applicable statutes of limitations for medical malpractice claims because plaintiff had misconstrued the two year statute of limitations and the operation of the six month waiting period set forth in that statute. Again, there was no indication in the *Desano* decision that the doctrine of *contra non valentem* was not recognized in the State of Michigan.

Similarly, *McCaul v Modern Tile & Carpet, Inc*, unpublished opinion of Court of Appeals, issued July 20, 2004 (Docket No 245758), the Court of Appeals again specifically referenced the existence of the doctrine of *contra non valentem* in Michigan, but held the doctrine did not apply to a case where plaintiff filed an action for personal injuries after the expiration of three statute of limitations and, in defense of the late filing, argued the law was unclear prior to the expiration of the statute of limitations. The Court specifically disagreed with plaintiff that the applicable law was unclear prior to the expiration of the 3 year statute of limitations and stated that, in fact, plaintiff's "remedy was unequivocally

available to plaintiff since 1985, and thus throughout these proceedings.” Therefore, there was no basis to invoke the doctrine. Again, there was no intimation or suggestion in the *McCaul* opinion that the doctrine of *contra non valentem* did not have viability and applicability in the State of Michigan.

There is nothing inherent about the doctrine of *contra non valentem* that limits its protections to only “statutes of limitations.” ***On the contrary, the doctrine applies to any time limitation or prescription that could run against any person who is unable to act to protect his or her legal interests.*** In this regard, the term “prescription” is defined in Black’s Law Dictionary, Eighth Edition, quite succinctly as, “. . . the effect of the lapse of time in creating and destroying rights.” Therefore, the no-fault one-year-back rule is clearly a “prescription” because it limits recovery of expenses incurred more than one year before the date a lawsuit is filed, thereby destroying the right to recover benefits for these expenses. While a typical statute of limitations is, by its nature, a form of prescription because it requires a lawsuit to be filed within a certain period, so is a statutory provision that limits damages if no lawsuit is filed within a certain time period. Therefore, the one-year-back rule set forth in §3145(1) of the statute is most assuredly a “time limitation” or “prescription” that has the effect of barring any claim for unpaid benefits that accrued more than one year prior to the filing of a lawsuit. Accordingly, the no-fault one-year-back rule is the type of time limitation or prescription that is subject to the doctrine of *contra non valentem*.

Even if this Court does not agree with CPAN’s argument that the one-year-back rule is a statute of limitations, applying the doctrine of *contra non valentem* to claims otherwise

barred by Section 3145(1) of the No-Fault Act protects those people who cannot protect themselves from losing critically important benefits for medical care. This Court's formal recognition of the application of *contra non valentem* to no-fault PIP claims allows this Court to address the serious concerns raised by Justice Markman in his concurring opinion in *Cameron* wherein he noted the harshness of the one-year back rule as applied to children and mental incompetents. In his concurring opinion, Justice Markman stated:

I am concerned that as a consequence of this decision, the protections afforded by the tolling provision may become increasingly illusory. This provision allows minors and insane persons to bring civil actions within one year after their legal disabilities have been removed. However, the one-year-back rule of the no-fault automobile insurance act allows such persons to recover only those losses incurred during the one year before the commencement of the action. In other words, although the tolling provision instructs minors and insane persons that they are entitled to wait until one year after their legal disabilities have been removed to bring their civil actions, if they do wait, they will only be allowed to recover what may be a portion of the total damages incurred.

. . . I am concerned that as a consequence of this decision, what is arguably the larger purpose of the tolling provision will be undermined. The tolling provision temporarily places the statute of limitations on hold for minors and insane persons. **The purpose of tolling generally is to allow protected classes of persons an opportunity to be made whole once their disabilities have been removed. However, if the tolling provision in MCL 600.5851(1) does not also toll the one-year-back rule of MCL 500.3145(1), minors and insane persons will not necessarily be made whole.** Rather than being allowed to recover all of the expenses incurred during their periods of tolling, these classes of individuals will be limited to only one year's worth of compensation. This is a result inconsistent with most other statutory tolling provisions.

*Cameron, supra* at 73-74 (Markman, J., concurring) (emphasis added).

Therefore, regardless of what label this Court attaches to the one-year-back rule set forth in Section 3145(1), the doctrine of *contra non valentem* provides this Court with the tool it needs to hold that *UM Regents* was correctly decided, while serving to effectuate the Legislature's intent when it enacted both the Revised Judicature Act provision for tolling and the No-Fault Act. CPAN argues that the doctrine of *contra non valentem* is consistent with the Legislature's intent to protect minors and incompetent persons who are injured in auto accidents.

### CONCLUSION

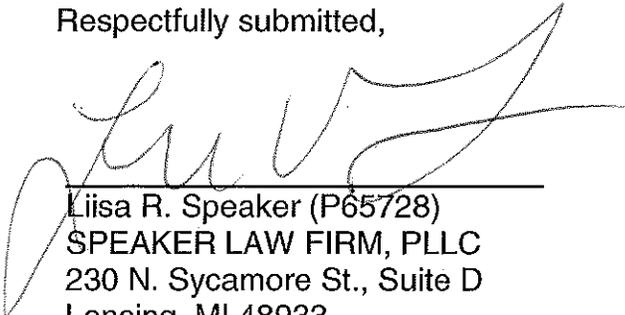
The Legislature clearly evinced its intent by the specific language it used in Section 5851 of the Revised Judicature Act to protect the legal rights of minors and incompetent persons in a broad spectrum of situations. This Court's decision in *UM Regents* honors that legislative intent by allowing minors and incompetent persons to legally enforce payment of vitally important no-fault PIP benefits when they were prevented by minority or disability from pursuing their rights. Therefore, this Court should reaffirm the result in *UM Regents* and hold that the tolling provisions of MCL 600.5851 apply to the one-year back rule set forth in MCL 500.3145(1), thus protecting the claims of minors and incompetent persons seeking recovery of unpaid no-fault PIP benefits. In addition, this Court should hold that the common law doctrine of *contra non valentem* applies to the no-fault PIP claims of minors and incompetent persons so as to prevent those disabled persons from losing their ability to recover medical expenses when they were not able to protect their rights.

**RELIEF REQUESTED**

Amicus Curiae Coalition Protecting Auto No-Fault requests that this Honorable Court affirm the decision of the trial court and reaffirm its prior decision in *UM Regents v Titan Insurance Co*, 487 Mich 289; 791 NW2d 897 (2010). In the alternative, CPAN requests this Court vacate its order granting leave to appeal as improvidently granted and enter an order denying ACIA's application for leave to appeal.

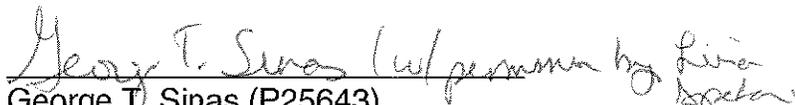
Respectfully submitted,

Dated: October 31, 2011



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**PROOF OF SERVICE**

I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail.

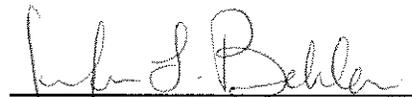
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I declare that the statements above are true to the best of my information, knowledge, and belief.

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Dated: October 31, 2011

  
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