
State of Michigan
In The
Supreme Court

Appeal from the Michigan Court of Appeals

DOREEN JOSEPH,

Plaintiff-Appellee,

Supreme Court No. 142615

v

A.C.I.A.

Defendant-Appellant.

Court of Appeals No: 302508
Macomb County Circuit Court No: 09-005726-CK

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

PROOF OF SERVICE

SIEMION HUCKABAY, P.C.
BY: JAMES W. BODARY (P24193)
Attorneys for Defendant-Appellant
One Towne Square, Suite 1400
P.O. Box 5068
Southfield, Michigan 48086-5068
(248) 357-1400

GROSS & NEMETH, P.L.C.
BY: JAMES G. GROSS (P28268)
Attorneys of Counsel for Defendant-Appellant
615 Griswold Street, Suite 1305
Detroit, Michigan 48226
(313) 963-8200

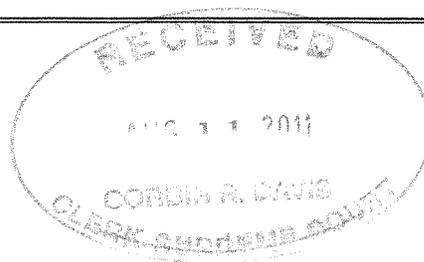


TABLE OF CONTENTS

	<u>PAGE</u>
INDEX OF AUTHORITIES	i
STATEMENT OF JURISDICTIONAL BASIS	iv
STATEMENT OF STANDARD OF REVIEW	v
STATEMENT OF QUESTIONS PRESENTED	vi
STATEMENT OF FACTS	1
ARGUMENTS:	
I. THIS COURT'S RECENT DECISION IN <u>UNIVERSITY OF MICHIGAN REGENTS V TITAN INS CO</u> , 487 MICH 289 (2010), SHOULD BE OVERRULED BECAUSE IT FAILED TO ENFORCE AS WRITTEN THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1). IN DOING SO, THIS COURT FAILED TO IDENTIFY AND ADDRESS THE ISSUES CONFRONTING THE LEGISLATURE WHEN IT ENACTED §3145(1). THIS COURT ALSO PREMISED ITS DECISION ON THE MYTH THAT A CLAIM FOR NO-FAULT BENEFITS ALWAYS BELONGS TO THE INJURED PERSON.	4
A. THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1) LIMITS PLAINTIFF'S RECOVERY TO LOSSES INCURRED WITHIN ONE YEAR PRIOR TO FILING SUIT. TOLLING PROVISIONS WHICH EXTEND THE TIME FOR FILING SUIT DO NOT AFFECT THAT LIMIT ON RECOVERY.	5
B. MCL 500.3145(1) EMBODIES THE LEGISLATURE'S ATTEMPT TO AVOID UNLIMITED OPEN-ENDED LIABILITY FOR BENEFITS ON ONE HAND, AND A DRACONIAN TEMPORAL LIMITATION WHICH WOULD BAR CLAIMS BEFORE THEY EXIST ON THE OTHER.	8
C. THE CLAIM FOR BENEFITS DUE FOR SERVICES RENDERED TO A MINOR OR INCOMPETENT BELONGS TO THE CARE-GIVER, NOT TO THE MINOR OR INCOMPETENT.	21
D. THE PRINCIPLE OF STARE DECISIS SHOULD NOT PREVENT THIS COURT FROM OVERRULING THE WRONGLY DECIDED DECISION WHICH WAS PREMISED ON ABSURD CHARACTERIZATIONS, AND WHICH USURPED THE PREROGATIVE OF THE LEGISLATURE.	27
RELIEF	33

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

INDEX OF AUTHORITIES

CASES

PAGE (S)

<u>Cameron v ACIA</u> , 476 Mich 55; 718 NW2d 784 (2006)	passim
<u>Cruz v State Farm</u> , 466 Mich 588; 648 NW2d 591 (2002)	16
<u>Cruz-Diaz v Hendricks</u> , 409 NJ Super 268; 976 A2d 1092 (App Div 2009)	12,20
<u>Detroit v Ambassador Bridge Co</u> , 481 Mich 29; 748 NW2d 221 (2008)	v
<u>Devillers v ACIA</u> , 473 Mich 562; 702 NW2d 562 (2005)	14,17
<u>Elbert v City of Saginaw</u> , 363 Mich 463; 109 NW2d 879 (1961)	30
<u>Geiger v DAIIE</u> , 114 Mich App 283; 318 NW2d 833 (1982)	passim
<u>Giantonio v Reliance Ins Co</u> , 175 NJ Super 309; 418 A2d 303 (App Div 1980)	12
<u>Helder v Sruba</u> , 462 Mich 92; 611 NW2d 309 (2000)	5
<u>Jackson v State Automotive Mut Ins Co</u> , 837 SW2d 496 (Ky 1992)	12
<u>Jarrad v Integon National Ins Co</u> , 472 Mich 207; 696 NW2d 621 (2005)	16
<u>Lakeland Neurocare Centers v State Farm</u> , 250 Mich App 35; 645 NW2d 59 (2002)	25,27
<u>Lambert v Calhoun</u> , 394 Mich 179; 229 NW2d 332 (1975)	14
<u>LaMothe v ACIA</u> , 214 Mich App 577; 543 NW2d 42 (1995)	24
<u>Lesner v Liquid Disposal, Inc</u> , 466 Mich 95; 643 NW2d 553 (2002)	5
<u>Lomerson v Bujold</u> , unpublished per curiam opinion of the Court of Appeals, rel'd 6/25/02 (No. 231505)	25,26
<u>Mayor of City of Lansing v Michigan Public Service Commission</u> , 470 Mich 154; 680 NW2d 840 (2004)	4,5
<u>McGill v AAA</u> , 207 Mich App 402; 526 NW2d 12 (1994)	24
<u>McLaughlin v Metzner</u> , 201 NJ Super 51; 492 A2d 696 (App Div 1985)	12
<u>Michigan Education Ass'n v Secretary of State</u> , __ Mich __ (2011), rev'd, 488 Mich 18; 793 NW2d 568 (2010)	28,31
<u>O'Donnell v State Farm</u> , 404 Mich 524; 273 NW2d 829 (1979)	16

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 CRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

INDEX OF AUTHORITIES cont'd

CASES

PAGE(S)

Omne Financial, Inc v Shacks, Inc, 460 Mich 305;
596 NW2d 591 (1999) 5

Patterson v Allstate Ins Co, 13 Kan App 2d 919; 75 P3d 763 (2003) 11

Proudfoot v State Farm Mutual Automobile Ins Co,
469 Mich 476; 673 NW2d 739 (2003) 24

Robinson v City of Detroit, 462 Mich 439;
613 NW2d 307 (2000) 5,27,28,30,32

Shavers v Attorney General, 402 Mich 554; 267 NW2d 72 (1978) 16

State Farm Fire & Casualty Co v Old Republic Ins Co,
466 Mich 142; 644 NW2d 715 (2002) 4,16

Tyler v Livonia Public Schools, 459 Mich 382; 590 NW2d 560 (1999) 4

University of Michigan Regents v State Farm,
250 Mich App 719; 650 NW2d 129 (2002) 25,27

University of Michigan Regents v Titan Ins Co,
487 Mich 289; 791 NW2d 897 (2010) passim

Walter v City of Flint, 40 Mich App 613; 199 NW2d 264 (1972) 23

Welton v Carriers Ins Co, 421 Mich 571; 365 NW2d 170 (1985) 13

Wickens v Oakwood Healthcare System, 465 Mich 53;
631 NW2d 686 (2001) 24

STATUTES

75 Pa CSA §1721(b) 12

75 Pa CSA §1791 11

DC St §31-2411 12

HRS §431:10C-315 12

KRS 304.39-230(1) 12,19

KRS 304.39-230(2) 12

KRS 304.39-230(5) 12

MCL 500.3104(2) 15

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

INDEX OF AUTHORITIES cont'd

<u>STATUTES & COURT RULES</u>	<u>PAGE(S)</u>
MCL 500.3107(1) (a)	11
MCL 500.3112	22,23
MCL 500.3145(1)	passim
MCL 500.3174	10
MCL 600.5821(4)	7
MCL 600.5851(1)	passim
MCL 600.5851(2)	29
MCR 7.302(C) (1) (b)	vi
NDCC 26.1-41-19	12
NJSA 39:6A-1.6	11,13
NJSA 39:6A-13.1	12
NJSA 39:6A-13.1.a	19

OTHER AUTHORITIES

<u>Bartlett's Familiar Quotations</u> (Little, Brown and Co) (5 th ed 1980)	21
Sinas & Miller, <u>Motor Vehicle No-Fault Law in Michigan</u> (Simco Publications 2008)	16,25
Uniform Motor Vehicle Accident Reparations Act, §28, Comment (2005 Main Volume)	9
UMVARA, §28 (a)	9,14
UMVARA, §28 (b)	9,14
UMVARA, §28 (c)-(d)	10
UMVARA, §28 (e)	10
UMVARA, §28 (f)	10,14
West's 50 State Surveys: Insurance (Thomson Reuters 2009)	11

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

STATEMENT OF JURISDICTIONAL BASIS

This is an action to recover first-party no-fault benefits. On January 25, 2011, the trial court issued an Opinion and Order denying ACIA's Motion for Partial Summary Disposition, ruling that the one-year-back rule of MCL 500.3145(1) does not limit Plaintiff's recovery, citing University of Michigan Regents v Titan Ins Co, 487 Mich 289 (2010). On February 14, 2011, ACIA filed an Application for Leave To Appeal to the Court of Appeals. However, that Court could not have granted the relief requested because it is bound by the Regents decision. Accordingly, on February 15, 2011, ACIA filed a bypass Application for Leave To Appeal to this Court. This Court granted leave to appeal in an order entered May 20, 2011. 489 Mich 924 (2011). This Court has jurisdiction over this application pursuant to MCR 7.302(C) (1) (b).

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

STATEMENT OF STANDARD OF REVIEW

This case involves the interpretation of a statute, which is a question of law that this Court reviews de novo. Detroit v Ambassador Bridge Co, 481 Mich 29, 35; 748 NW2d 221 (2008).

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

STATEMENT OF QUESTIONS PRESENTED

- I.A. DO TOLLING PROVISIONS WHICH EXTEND THE TIME FOR FILING SUIT AFFECT THE LIMIT ON RECOVERY SET FORTH IN MCL 500.3145(1)?

The trial court answered, "Yes".

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

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

- I.B. DOES MCL 500.3145(1) EMBODY THE LEGISLATURE'S ATTEMPT TO AVOID UNLIMITED OPEN-ENDED LIABILITY FOR BENEFITS ON ONE HAND, AND A DRACONIAN TEMPORAL LIMITATION WHICH WOULD BAR CLAIMS BEFORE THEY EXIST ON THE OTHER?

The trial court did not address this issue.

Plaintiff-Appellee presumably will contend the answer should be, "No".

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

- I.C. DOES THE CLAIM FOR BENEFITS DUE FOR SERVICES RENDERED TO A MINOR OR INCOMPETENT BELONG TO THE CAREGIVER AS OPPOSED TO THE MINOR OR INCOMPETENT?

The trial court did not address this issue.

Plaintiff-Appellee presumably will contend the answer should be, "No".

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

- I.D. SHOULD THE PRINCIPLE OF STARE DECISIS PREVENT THIS COURT FROM OVERRULING THE WRONGLY DECIDED DECISION WHICH WAS PREMISED ON ABSURD CHARACTERIZATIONS, AND WHICH USURPED THE PREROGATIVE OF THE LEGISLATURE?

The trial court did not address this issue.

Plaintiff-Appellee presumably will contend the answer should be, "No".

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

STATEMENT OF FACTS

This is an action to recover first-party no-fault benefits for 33 years of family provided case management services. In order to avoid the one-year-back limitation on recovery set forth in MCL 500.3145(1), Plaintiff claims the benefit of the insanity tolling provision of MCL 600.5851(1). The trial court denied ACIA's Motion for Partial Summary Disposition, which sought to limit Plaintiff's claim to losses incurred on or after February 27, 2008, one year prior to filing suit. ACIA seeks a holding that University of Michigan Regents v Titan Ins Co, 487 Mich 289 (2010), was wrongly decided, and a reversal of the January 25, 2011, Opinion and Order of the trial court denying the Motion for Partial Summary Disposition. The pertinent facts follow.

Historical Facts

On June 14, 1977, Plaintiff, then 17 years old, was involved in a motor vehicle accident which resulted in traumatic brain injury and quadriplegia. (Motion for Partial Summary Disposition, 15a).¹ Her parents had a no-fault insurance policy issued by DAIIE, a predecessor to ACIA. (Id.). To date, ACIA has paid more than \$4 million for Plaintiff's care, recovery, and rehabilitation. (14a).

¹The few facts necessary to decide the issue presented are undisputed. Consequently, so as not to burden the record unnecessarily, this factual account will reference the trial court pleadings on the Motion for Partial Summary Disposition, rather than the exhibits on which they are based. Those exhibits are, of course, referenced in the motions and are contained in the trial court file.

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

Plaintiff filed the instant case on February 27, 2009.
(9a). On August 6, 2010, ACIA filed a Motion for Partial Summary Disposition (7a; 12a), seeking, inter alia, a ruling limiting Plaintiff's recovery to losses incurred on or after February 27, 2008. (19a). Plaintiff filed an Answer to that motion (34a), invoking the insanity tolling provision of MCL 600.5851(1). (41a-42a).

A hearing was held on September 20, 2010, at the conclusion of which the trial court took the matter under advisement. (6a; 124a). On December 17, 2010, ACIA filed a Supplemental Brief in Support of Motion for Partial Summary Disposition. (79a). Therein, ACIA argued that Regents was wrongly decided. (81a-86a).

On January 25, 2011, the trial court issued an Opinion and Order (92a), holding that if Plaintiff could prove that she was insane when her claim accrued, the one-year-back rule would not apply. In doing so, the trial court expressly relied on Regents. (94a, n 1).

On February 14, 2011, ACIA filed an Application for Leave To Appeal to the Michigan Court of Appeals. Because the Court of Appeals was bound by Regents and, therefore, could not grant the relief requested, on February 15, 2011, ACIA filed a bypass Application for Leave To Appeal to this Court. The latter application was granted in an order entered May 20, 2011. The parties were directed to brief the following issues:

- (1) Whether the minority/insanity tolling provision of the Revised Judicature Act, MCL 600.5851(1), applies to toll the one-year-back rule of MCL 500.3145(1); and
- (2) Whether Regents of the University of Michigan v Titan Ins Co, 487 Mich 289 (2010), was correctly decided.

489 Mich 924 (2011).

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

I. THIS COURT'S RECENT DECISION IN UNIVERSITY OF MICHIGAN REGENTS v TITAN INS CO, 487 MICH 289 (2010), SHOULD BE OVERRULED BECAUSE IT FAILED TO ENFORCE AS WRITTEN THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1). IN DOING SO, THIS COURT FAILED TO IDENTIFY AND ADDRESS THE ISSUES CONFRONTING THE LEGISLATURE WHEN IT ENACTED §3145(1). THIS COURT ALSO PREMISED ITS DECISION ON THE MYTH THAT A CLAIM FOR NO-FAULT BENEFITS ALWAYS BELONGS TO THE INJURED PERSON.

In the following discussion, ACIA will first set forth a straightforward analysis of the keystone to a correct decision: the language of the statute at issue. (Issue I.A.). It will then present two ancillary discussions. One will demonstrate why the Legislature chose the language that it did. (Issue I.B.). The other will expose as a myth the proposition that a claim for no-fault benefits always belongs to the injured person. (Issue I.C.). Finally, ACIA will show that the principle of stare decisis should not deter this Court from overruling the Regents decision. (Issue I.D.).

This Court has repeatedly recognized that the judiciary's constitutional obligation is to interpret -- not to rewrite -- the law. State Farm Fire & Casualty Co v Old Republic Ins Co, 466 Mich 142, 149; 644 NW2d 715 (2002). The best measure of the Legislature's intent is the words that it has chosen to enact into law. Mayor of City of Lansing v Michigan Public Service Commission, 470 Mich 154, 164; 680 NW2d 840, 846 (2004). If the language of the statute is clear and unambiguous, further judicial construction through the application of interpretive aids is not permitted. Tyler v Livonia Public Schools, 459 Mich 382,

392; 590 NW2d 560, 564 (1999). A statute is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. Mayor of City of Lansing, supra, 166. Just as importantly, this Court has repeatedly stated that the courts must apply statutory language as enacted, without addition, subtraction, or modification. Lesner v Liquid Disposal, Inc, 466 Mich 95, 101; 643 NW2d 553, 556 (2002); Helder v Sruba, 462 Mich 92, 99; 611 NW2d 309 (2000); Robinson v City of Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000). The courts may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Lesner, supra, 101; Omne Financial, Inc v Shacks, Inc, 460 Mich 305, 311; 596 NW2d 591 (1999).

A. THE UNAMBIGUOUS LANGUAGE OF MCL 500.3145(1) LIMITS PLAINTIFF'S RECOVERY TO LOSSES INCURRED WITHIN ONE YEAR PRIOR TO FILING SUIT. TOLLING PROVISIONS WHICH EXTEND THE TIME FOR FILING SUIT DO NOT AFFECT THAT LIMIT ON RECOVERY.

The issue presented in the instant case is the same one presented in Regents and in Cameron v ACIA, 476 Mich 55; 718 NW2d 784 (2006), i.e., the interplay between the following two statutes:

"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 bene-

fits 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 one year before the date on which the action was commenced."

MCL 500.3145(1) (emphasis added).

"Except as otherwise provided in subsection (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).

In Cameron, this Court held that 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). Central to the Cameron decision was the recognition that §5851(1) solely addresses when a minor or person suffering from insanity may "**make the entry or bring the action**", whereas §3145(1) only pertains to the **damages recoverable** once an action has been brought. This is recognized in the majority opinion, which stated as follows:

"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 be 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.

Justices Young and Corrigan joined in Justice Markman's dissent in Regents, expressing their continued adherence to the interpretation of §3145(1) announced in Cameron, as follows:

"While the RJA, specifically MCL 600.5821(4), states that an action by the state or one of its political subdivisions 'may be **brought** at any time without limitation,' the no-fault act, specifically MCL 500.3145(1), states that 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.' (Emphasis added). Having the right to **bring** a cause of action is not the equivalent of having the right to **recover** an unlimited amount of damages. Therefore, when these two provisions are read together, it is clear that while a political subdivision may **bring** an action at any time, it cannot **recover** benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. In other words, MCL 600.5821(4), which pertains only to **when** an action may be commenced, does not preclude the application of the one-year-back rule, which only limits **how much** can be recovered after the action has been commenced."

Regents, supra, 339 (Markman, J., dissenting) (italics in original) (bold print added).

The analysis adopted by the majority in Cameron and the dissent in Regents is fully consistent with the principle of statutory construction requiring strict adherence to the statutory language. By its very language, the one-year-back rule merely limits the damages which can be recovered after a PIP action is filed. The one-year-back rule does not address when an action may be **commenced**. By contrast, the language of §5851(1) does not even remotely address the damages which can be removed after a PIP action is filed. Rather, that statute solely addresses when a minor or person suffering from insanity may "**make**

the entry or bring the action". In other words, by its very language, §5851(1) has no effect on a damage limiting provision such as §3145(1).

- B. MCL 500.3145(1) EMBODIES THE LEGISLATURE'S ATTEMPT TO AVOID UNLIMITED OPEN-ENDED LIABILITY FOR BENEFITS ON ONE HAND, AND A DRACONIAN TEMPORAL LIMITATION WHICH WOULD BAR CLAIMS BEFORE THEY EXIST ON THE OTHER.

In the following discussion, ACIA will first articulate the conceptual problem posed by no-fault automobile injury reparation statutes with regard to temporal limits on claims. It will then consider how other no-fault jurisdictions have addressed that problem. Finally, ACIA will demonstrate that the express language of MCL 500.3145(1) steers a sensible middle ground in the context of the only system in the country which provides unlimited lifetime medical benefits.

The UMVARA. The Uniform Motor Vehicle Accident Reparations Act (UMVARA) aptly articulated the problems posed in defining the temporal statutory limitations on suits in the context of an insurance system in which loss occurs as expenses are incurred.²

"Rather complex limitations provisions are necessitated by the general principle that loss occurs as expense is incurred or loss is suffered. A simple limitation period, tied to the time when the claim for relief first arose, might result in initial claims filed decades after an accident occurred. On the other hand, a limitation period tied simply to the time of the accident giving rise to the injury would bar many claims before they arose."

²Michigan's No-Fault Act is such a statute. MCL 500.3110(4).

Uniform Motor Vehicle Accident Reparations Act, §28, Comment
(2005 Main Volume) (emphasis added).

The provision in UMVARA addressing loss not involving death reads in pertinent part as follows:

"(a) If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than 2 years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than 4 years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than 2 years after the last payment of benefits."

UMVARA, §28(a) (emphasis added).

In cases involving death, the following provision applies:

"(b) If no basic or added reparation benefits have been paid to the decedent or his survivors, an action for survivor's benefits may be commenced not later than one year after the death or 4 years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any survivor, an action for further survivor's benefits by either the same or another claimant may be commenced not later than 2 years after the last payment of benefits. If basic or added reparation benefits have been paid for loss suffered by an injured person before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or 4 years after the last payment of benefits, whichever is earlier."

UMVARA, §28(b) (emphasis added).

Finally, UMVARA contains two relevant tolling provisions.³

One is for each month that a claimant incurs no loss:

"(e) A calendar month during which a person does not suffer loss for which he is entitled to basic or added reparation benefits is not a part of the time limited for commencing an action, except that the months excluded for this reason may not exceed 120."

UMVARA, §28(e).

That tolling provision addresses the situation in which losses from a long-term injury are entirely covered by a claimant's coordinated medical insurance policy, so that no no-fault claims are submitted for an extended period of time. If that insurance were exhausted after a period of four years, §28(a) would time-bar the claim for expenses in excess of the coordinated medical insurance policy limits even before the loss was incurred.⁴

The second tolling provision is optional:

"[(f) If a person entitled to basic or added reparation benefits is under legal disability when the right to bring an action for the benefits first accrues, the period of his disability is not part of the time limited for commencement of the action.]"

UMVARA, §28(f).

³UMVARA also contains two other provisions addressing circumstances in which benefits are denied on the ground that the insurer to whom the claim was submitted is not responsible for benefits. UMVARA, §28(c)-(d). The Michigan No-Fault Act addresses those situations in MCL 500.3174. Those two UMVARA provisions are not pertinent to this discussion.

⁴The Michigan No-Fault Act elegantly resolves this issue by keeping such claims open indefinitely so long as notice was given within one year of the accident. MCL 500.3145(1).

The commentary to that provision reads as follows:

"[Subsection (f) is optional, its enactment depending on whether the State's general statutes tolling limitation of actions would apply to this specific statute.]"

Sister State Approaches. As this Court is aware, Michigan is the only jurisdiction in the nation which has a no-fault automobile injury reparations scheme with mandatory unlimited lifetime medical benefits. MCL 500.3107(1)(a). By way of contrast, only two no-fault states out of 20 mandate minimum medical coverage in excess of \$50,000.⁵ The median minimum mandatory amount is \$10,000-\$15,000. See West's 50 State Surveys: Insurance (Thomson Reuters 2009), p 212-281.⁶

The states which have enacted no-fault legislation have taken a variety of approaches to temporally limiting an insurer's exposure. Most are silent as to the applicable statute of limitations, leaving it to the courts to determine which of the state's general limitations periods apply. See, e.g., Patterson v Allstate Ins Co, 13 Kan App 2d 919; 75 P3d 763 (2003).

Of those no-fault statutes which do prescribe a period of limitations, most follow the UMVARA model of setting forth a

⁵New Jersey, NJSA 39:6A-1.6 (\$250,000); Pennsylvania, 75 Pa CSA §1791 (\$100,000).

⁶The information as to the approaches taken by sister states is based upon the undersigned attorney of counsel's review of the statutes cited in the West survey. ACIA does not represent that all of the statutes discussed remain in effect. However, the point of the text discussion is to illustrate the variety of approaches that have been taken in addressing temporal limitations on recovery of benefits, not to describe the current actual state of no-fault laws throughout the country.

statute of repose of a certain number of years from the date of the accident or injury if no benefits have been paid, DC St §31-2411 (3 years); HRS §431:10C-315 (2 years); KRS 304.39-230(1) (4 years); NJSA 39:6A-13.1 (4 years); NDCC 26.1-41-19 (4 years), and if benefits have been paid, setting forth a period of limitations running from the last payment of benefits, DC St §31-2411 (3 years); HRS §431:10C-315 (2 years); KRS 304.39-230(1) (2 years); NJSA 39:6A-13.1 (2 years).⁷

Of the seven states whose no-fault statutes address periods of limitations for filing suit, only one expressly provides for disability tolling, and that is only for minority. 75 Pa CSA §1721(b). One state expressly precludes any disability tolling. KRS 304.39-230(5); Jackson v State Automotive Mut Ins Co, 837 SW2d 496, 498 (Ky 1992).

In yet another, the New Jersey appellate court held that none of that state's disability tolling provisions apply to actions to recover no-fault benefits. Cruz-Diaz v Hendricks, 409 NJ Super 268, 976 A2d 1092, 1100 (App Div 2009); McLaughlin v Metzner, 201 NJ Super 51, 492 A2d 696, 697-98 (App Div 1985); Giantonio v Reliance Ins Co, 175 NJ Super 309, 418 A2d 303, 314-15 (App Div 1980). It is probably not coincidental that New

⁷Some of those statutes make separate temporal provisions for accidents resulting in death, although they generally follow the paradigm set forth in the text. KRS 304.39-230(2) (earlier of 1 year after death/4 years after accident or 2 years after last payment of benefits); NJSA 39:6A-13.1 (earlier of 2 years after death/4 years after accident or 4 years after last payment of benefits); NDCC 26.1-41-19 (earlier of 2 years after death/6 years after accident or 6 years after last payment of benefits).

Jersey has the second most generous minimum medical coverage (\$250,000) in the country. NJSA 39:6A-1.6.

The Michigan Approach. The Michigan Legislature adopted a unique approach to defining the temporal limitations for filing suit without (1) allowing open-ended liability, or (2) time-barring claims before they accrue:

"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 one year before the date on which the action was commenced.**"

MCL 500.3145(1) (emphasis added).

As this Court has recognized, that statute creates a conditional one-year statute of repose, a conditional statute of limitations, and a limit on recovery:

"As we noted in *Welton v Carriers Ins Co*, [421 Mich 571; 365 NW2d 170 (1985)], §3145(1) contains two limitations on the time for filing suit and one limitation the period for which benefits may be recovered:

"(1) An action for personal protection insurance [PIP] benefits must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury.

"(2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.

"(3) Recovery is limited to losses incurred during the one year preceding commencement of the action."

Devillers v ACIA, 473 Mich 562, 574; 702 NW2d 562 (2005) (emphasis in original).

The first sentence of §3145(1) allows an injured person the opportunity to indefinitely extend the availability of a suit to recover benefits (subject to the statute of limitations in the second sentence) simply by giving written notice of injury. As noted above, that problem solves in a simple and direct manner the delayed claim problem identified by the authors of UMVARA. (See p 10 & n 4, supra).

The second sentence establishes the period of limitations for filing suit. It is one year shorter than that recommended in UMVARA. (See UMVARA, §28[a]-[b]). Note that neither the second sentence in §3145(1), nor §§28(a)-(b) in UMVARA sets a limit on recovery. Therefore, if the limitations period were tolled (e.g., by minority or insanity), the plaintiff could recover benefits going back many years, or even decades. Indeed, prior to the enactment of the No-Fault Act, the Michigan Legislature had amended the minority/insanity tolling provision to apply to "any action", not just "any of the actions mentioned in [the RJA]",⁸ Lambert v Calhoun, 394 Mich 179, 183; 229 NW2d 332 (1975), so that financial exposure was quite real.

⁸Hence, the Legislature saw no need to include in the Michigan No-Fault Act the optional tolling provision suggested by UMVARA, §28(f). See p 10, supra.

The Legislature addressed that problem in the third sentence, in which it limited recovery to losses incurred within one year prior to filing suit. Thus, if a minor or incompetent had a claim for benefits denied, he or someone on his behalf would have one year from the date of loss to file suit to recover those benefits.

Of course, if the claim was ongoing (as in many, if not most, of those cases involving family-provided attendant care), the suit can result in a recovery of a full year's-worth of benefits. It is only when no losses have been incurred within one year of filing suit that the one-year-back rule would bar any recovery at all.

Thus, in §3145(1), the Michigan Legislature devised a clear and simple resolution of the problem of allowing a reasonable amount of time for pursuing a claim while protecting the fiscal integrity of the no-fault system. Consideration of the current and developing state of the Michigan Catastrophic Claims Association (MCCA), which reimburses individual insurers for benefits paid in excess of certain statutory amounts, MCL 500.3104(2), demonstrates the wisdom of the Legislature's choice.

In 2010, the MCCA paid \$897 million in claims. (MCCA 3/25/11 Press Release, 102a).⁹ The MCCA deficit as of April 2010 was **\$2.0 billion**. (MCCA 4/1/10 Press Release, 101a). That amounts to \$290.71 per insured car. (Id.). This year's MCCA

⁹All of the cited MCCA material is available at its website: www.michigancatastrophic.com.

assessment is \$145.00 per vehicle. (102a). That represents more than a **25-fold increase since 2000**. (MCCA Historic Assessment Data, 103a).

The point of the foregoing exposition is to highlight the immense monetary magnitude of the Michigan no-fault system. Because the insurance is mandatory, maintaining its cost at an affordable level is a matter of constitutional importance.

"We therefore conclude that **Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis**. The availability of no-fault insurance and the no-fault insurance rate regulatory scheme are, accordingly, subject to due process scrutiny."

Shavers v Attorney General, 402 Mich 554, 600; 267 NW2d 72 (1978) (emphasis added).

"Even though the basic concept of no-fault passed constitutional muster, the Michigan Supreme Court held that **unless compulsory insurance is fairly priced and widely accessible, the statutory scheme violates due process protections of the Michigan Constitution**."

Sinas & Miller, Motor Vehicle No-Fault Law in Michigan, (Simco Publications 2008), p 9 (emphasis added). See also Jarrad v Integon National Ins Co, 472 Mich 207, 218, 696 NW2d 621 (2005); Cruz v State Farm, 466 Mich 588, 597 n 13, 648 NW2d 591 (2002); State Farm Fire & Casualty Co v Old Republic Ins Co, 466 Mich 142, 151, 644 NW2d 715 (2002); O'Donnell v State Farm, 404 Mich 524, 547, 273 NW2d 829 (1979).

The one-year-back damage limitation rule is a fail-safe mechanism inserted by the Legislature to safeguard the fiscal integrity of the system while maintaining premiums at affordable

significant component of the MCCA's premium assessment.¹¹ As drafted, §3145(1) would allow suit to be filed¹², but would limit recovery to damages incurred within one year prior to filing suit. Cameron, supra.

¹⁰(...continued)

Circuit Court No. 03-301611-CK; Court of Appeals No. 260562; Supreme Court No. 132631; Love v State Farm, Wayne County Circuit Court No. 03-307417-NF; Maenza v ACIA, Macomb County Circuit Court No. 02 1991 CK; Magness v Frankenmuth Mutual and ACIA, Genesee County Circuit Court No. 03-75462-NF; McKelvie v ACIA, Wayne County Circuit Court No. 05-515392-CK; Mitchell v ACIA, Wayne County Circuit Court No. 05-528912-NF; Moon v ACIA, Macomb County Circuit Court No. 03-2902-NF; Palarchio v ACIA, Wayne County Circuit Court No. 02-238086-NF; Paquette v State Farm, Macomb County Circuit Court; No. 04-2787-NO; Court of Appeals No. 279909; Raco v ACIA, Wayne County Circuit Court No. 05-507192-NF; Regents of U of M v ACIA, Jackson County Circuit Court No. 06-5897-NF; Sako v ACIA, Wayne County Circuit Court No. 07-705602-NO; Schmitz v Citizens & ACIA, Wayne County Circuit Court No. 02-226012-NF; Sharp, et al v Allstate, et al (Amicus), Court of Appeals Nos. 259338; 259848; 259060; Sinishtaj v ACIA, Macomb County Circuit Court No. 04-0092-NF; Smith v ACIA, Macomb County Circuit Court No. 06-2042-NF; Triplet v ACIA, Macomb County Circuit Court No. 06-3693-NF; Valleriani v ACIA, Macomb County Circuit Court No. 03-2523-NI; Villaflor v State Farm, USDC Case No: 04-CV-74140; 6th Circuit No. 07-1663; Wagner v ACIA, Oakland County Circuit Court No. 03-047619-NF; Whitman v ACIA, Gratiot County Circuit Court No. 05-9347-NO; Williams v ACIA, Wayne County Circuit Court No. 04-435505-NF; Willis-Wilson v ACIA, Oakland County Circuit Court No. 01-035417-NF; Woodley v State Farm, Oakland County Circuit Court No. 04-057343-NF; Woods-Murphy v ACIA, Washtenaw County Circuit Court No. 02-1204-NF; Yorkey v ACIA, Washtenaw County Circuit Court No. 03-1109-NF; Zahodnic v ACIA, Oakland County Circuit Court No. 03-053230-NF.

¹¹The MCCA's Expected Future Cost by Reserve Component estimate (104a) indicates that family attendant care constitutes 27.67% of expected future costs. That is the largest single cost component in the system.

¹²The text analysis assumes that the minor/incompetent is the "claimant", so that the minority/insanity tolling provision of MCL 600.5851(1) would toll the statute of limitations contained in §3145(1). However, as is demonstrated in Issue I.C., infra, that is not a correct reading of the No-Fault Act.

That result cuts off the recovery, but still allows a reasonable amount of money to be recovered¹³ and the benefits would be payable going forward. That result is certainly more favorable to the claimant than what might obtain in Kentucky or New Jersey, where there is no disability tolling in no-fault cases. The relevant statutes in those states read in pertinent part as follows:

"(1) If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two (2) years after the last payment of benefits."

KRS 304.39-230(1).

"a. Every action for the payment of benefits . . . except an action by a decedent's estate, shall be commenced not later than two years after the injured person or survivor suffers a loss or incurs an expense and either knows or in the exercise of reasonable diligence should know that the loss or expense was caused by the accident, or not later than four years after the accident whichever is earlier, provided, however, that if benefits have been paid before then an action for further benefits may be commenced not later than two years after the last payment of benefits."

NJSA 39:6A-13.1.a.

If the only services provided in the two years prior to filing suit were unclaimed supervisory home attendant care (a not unusual circumstance), the claim for those services would be completely barred in Kentucky and New Jersey. The insurer would

¹³For example, at \$10/hour, 24/7 home attendant care would yield \$87,600 in compensation. While certainly not the millions most of these claimants want, it is not an inconsiderable sum.

not be required to pay any back benefits and the insurer would be immune from suit for any such services going forward. See, Cruz-Diaz, supra.

Thus, viewed from the perspective of the range of choices available to the Michigan Legislature when it drafted §3145(1), the one-year-back rule represents a reasonable compromise. A claim by a minor/incompetent will never be barred, and benefits will always be available going forward. That is a far less unfavorable result than would obtain under another statutory regimen.

In sum, the Legislature made a considered choice among competing considerations and approaches. As this Court aptly noted in Regents:

"The statute represents the culmination of the Legislature's deliberative process."

Regents, supra at 306. Unfortunately, the Regents majority made that observation solely with reference to the minority/insanity tolling statute. It did not make any attempt whatsoever to consider "the Legislature's deliberative process" in enacting the one-year-back rule of §3145(1), relegating it to a backhand slap in a footnote. 487 Mich at 307 n 35. This Court can and should overrule Regents as nothing less than a judicial usurpation of the plainly expressed legislative prerogative resolving complex competing considerations.

C. THE CLAIM FOR BENEFITS DUE FOR SERVICES RENDERED TO A MINOR OR INCOMPETENT BELONGS TO THE CARE-GIVER, NOT TO THE MINOR OR INCOMPETENT.

"We are handicapped by policies based on old myths rather than current realities." James William Fulbright, *Speech in the Senate* [March 27, 1964]."¹⁴

The Myth. The inability of the Regents majority to focus on the undeniable legislative intent of §3145(1) derives from the baseless assumption that the claim for no-fault benefits always belongs to the minor or incompetent who has received the care or treatment for which recovery is sought. So pervasive is that myth that it was indulged by one of the Cameron majority, 476 Mich at 73-75 (Markman, J., concurring), as well as the dissenters in that case.

One will search in vain in this Court's Cameron and Regents opinions for any critical examination of whether that assumption has any basis in the statutory language or in reason. One will only find variations of "Geiger says so". Yet that assumption was primary motivating factor for overruling Cameron. See, e.g., Cameron, supra at 87 ("Defendant targets infants and the legally incompetent"), 128 ("injured children and the insane may likely be robbed of the benefit of their causes of action"), and 104 (tolling provision "preserves the claims of minors and the insane").

¹⁴Quoted in Bartlett's Familiar Quotations (Little, Brown and Co) (5th ed 1980), p 862.

This Court's decision in Regents demonstrates how corrosive to reason an unexamined but tightly embraced premise can be. It is, therefore, not only appropriate but also necessary to critique the decision in Geiger v DAIIE, 114 Mich App 283; 318 NW2d 833 (1982).¹⁵ In that case, the plaintiff was injured in an auto accident when he was 16 years old. Almost three years later, he first notified the insurer of the accident. The insurer denied the claim on the ground that it was barred by the one-year statute of limitations of MCL 500.3145(1). Id. at 285-86. The plaintiff invoked the minority tolling provision of MCL 600.5851(1).

The insurer sought dismissal of the ensuing lawsuit on the ground that the no-fault claim belonged not to the plaintiff, but to his mother, who was legally responsible for the outstanding medical bills. The Court of Appeals affirmed the judgment in favor of the plaintiff. After quoting only the first sentence of §3112, the Geiger panel wrote:

"The statute expressly confers a cause of action on the injured party to collect PIP benefits for expenses incurred as a result of his injury. We find no indication from the statute that the right to PIP benefits necessarily accrues to the person who is legally responsible for the expenses incurred as a result of the injury."

114 Mich App at 287.

¹⁵For an overview of the pre-Regents development of the case law governing family-provided attendant care claims, see Gross, The Fall, Rise and Uncertain Future of the No-Fault Act's One-Year-Back Limitation on Recovery of Benefits, 87 Univ of Detroit Mercy LR 639 (2010).

The Court of Appeals also articulated an alternative analysis:

"In the present case, even if we view the right to recover PIP benefits for medical expenses incurred during an insured's minority as a separate cause of action belonging to the injured minor's parents, it is clear that the cause of action is derivative from the insured minor's rights under the insurance policy and the no-fault act. It is not an independent cause of action as was the case in *Walter v City of Flint*[, 40 Mich App 613; 199 NW2d 264 (1972)]."

Id. at 288.¹⁶

Geiger is defective at every level of analysis.

First, it is premised on only a partial reading of the relevant statute:

"Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. . . . If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate."

MCL 500.3112 (emphasis added).

The emphasized portion of the statute unambiguously demonstrates that it contemplates that "the proper person to receive

¹⁶As in Regents, Geiger was followed uncritically in subsequent cases. Hatcher v State Farm, 269 Mich App 596, 600, 712 NW2d 744 (2005); Commire v ACIA, 183 Mich App 299, 302, 454 NW2d 248 (1990); In re Hale's Estate, 182 Mich App 55, 58, 451 NW2d 867 (1990); Manley v DAIIE, 127 Mich App 444, 456, 339 NW2d 205 (1983), modified on other grounds, 425 Mich 140, 388 NW2d 216 (1986).

the benefits" can be someone other than the injured person. By failing to give effect to all of the language in the statute, Geiger violated a fundamental tenet of statutory construction. E.g., Wickens v Oakwood Healthcare System, 465 Mich 53, 60; 631 NW2d 686 (2001).

Second, Geiger's assertion that the right to benefits does not "necessarily accrue[]" to the person "legally responsible" for the expenses has been subsequently unanimously rejected by this Court. Such a person is the only person who has "incurred" the expenses by being legally responsible therefor. See Proudfoot v State Farm Mutual Automobile Ins Co, 469 Mich 476, 483-84; 673 NW2d 739 (2003).

Third, Geiger's implicit holding that a healthcare provider does not have a direct cause of action for benefits has likewise been rejected by subsequent case law. A treatise authored by two of the preeminent plaintiffs' no-fault attorneys in the State recognizes that disputes concerning the appropriate charge for a caregiver's services should be resolved in litigation directly between the no-fault insurer and the caregiver:

"The importance of *Bulletin 92-03* and the Court of Appeals decisions in *McGill [v AAA, 207 Mich App 402; 526 NW2d 12 (1994)]* and *LaMothe [v ACIA, 214 Mich App 577; 543 NW2d 42 (1995)]* was the growing acknowledgment by the appellate courts that providers are direct shareholders in no-fault claims involving the payment of an accident victim's medical expenses and, if litigation is necessary to resolve such disputes, it is appropriate for that litigation to be a case of provider versus insurer."

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

Sinas & Miller, Motor Vehicle No-Fault Law in Michigan (Simco Publications 2008), p 354. Accord, University of Michigan Regents v State Farm, 250 Mich App 719, 733, 650 NW2d 129 (2002); Lakeland Neurocare Centers v State Farm, 250 Mich App 35, 41, 645 NW2d 59 (2002).

Finally, Geiger utterly fails to account for the fact that once the services had been rendered, the minor/incompetent has no legally cognizable interest in payment for those services. A Court of Appeals decision illustrates that point.

In Lomerson v Bujold, unpublished per curiam opinion of the Court of Appeals No. 231505, rel'd 6/25/02 (99a), the injured person received home attendant care services from his mother. He alleged that because of negligent advice that his mother received from the defendant attorney, she received inadequate payments from the insurer. The injured person sued the attorney. In an apparent attempt to invoke the minority tolling provision, he asserted that the no-fault claim was his, not his mother's. The trial court granted summary disposition in favor of the defendant.

In an opinion subscribed by Justice Zahra during his tenure on that court, the Court of Appeals affirmed, holding in pertinent part as follows:

"However, for David to establish a legal malpractice claim he must prove that he was actually injured by defendant's alleged negligence. It is well established that a claim of malpractice requires a showing of actual injury caused by the malpractice. . . .

"Here, David received attendant care services, as provided by the no-fault act. David's mother, Mary, received payments for the attendant care services that she provided to David. Although Mary claims that she was under-compensated for her services as a result of defendant's allegedly negligent advice, David has failed to establish that he sustained an actual injury as a result of defendant's allegedly negligent advice to his mother regarding the value of her attendant services. In other words, David has failed to demonstrate an identifiable and appreciable loss suffered as a result of defendant's alleged malpractice."

(Id. at 2) (emphasis added).

The Reality. The Geiger myth fails to account for the reality of claims for medical expenses.

First, by hypothesis, the minor/incompetent has received the products and services giving rise to the claim for benefits. In home attendant care cases -- which by far constitute the largest systemic exposure -- testimony is uniformly given that the injured person has received excellent care. Therefore, concern about the physical well-being of the injured person cannot be the basis for insisting that the no-fault claim belongs to him.

Second, the healthcare provider is the only entity with a legally cognizable right to the benefits. Lomerson, supra. If the money were paid to the injured person, he would, by hypothesis, be obligated to pay it to the healthcare provider. Insisting that the strawman, rather than the ultimate recipient, owns the claim is nothing but linguistic legerdemain.

Third, the healthcare provider -- whether an institution or a family member -- has a direct cause of action against the no-fault carrier to recover money it or he is owed. E.g., UM

Regents v State Farm, supra; Lakeland Neurocare Centers v State Farm, supra. Moreover, neither the competent adult caregiver nor the institution's billing department are under any disability which would toll any limitations period.

In short, the holding that a claim for no-fault benefits always belongs to the injured person is premised on a 30-year-old case which is so poorly reasoned and superseded by subsequent case law that it is unworthy of serious consideration. Moreover, the Geiger myth is utterly without any basis in reality.

One final caveat. The language of §3145(1) is absolutely unambiguous. Therefore, regardless who the no-fault claim belongs to, the statute should be enforced as written. The foregoing exposition is primarily intended to allay the shrill pontificating and uneasy hand wringing that has resulted from unquestioned acceptance of the Geiger myth.

D. THE PRINCIPLE OF STARE DECISIS SHOULD NOT PREVENT THIS COURT FROM OVERRULING THE WRONGLY DECIDED DECISION WHICH WAS PREMISED ON ABSURD CHARACTERIZATIONS, AND WHICH USURPED THE PREROGATIVE OF THE LEGISLATURE.

This Court's observation in Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000), as to the deference due to a prior decision which refuses to apply unambiguous statutory language is appropriate here:

"When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the

bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error."

Id., at 467-68 (emphasis added).

Nothing more actually needs to be said in defense of overruling Regents. Nevertheless, ACIA will discuss the considerations set forth in Robinson and in this Court's recent decision in Michigan Education Ass'n v Secretary of State, ___ Mich ___; ___ NW2d ___ (2011), to underscore the propriety of doing so.

Regents Was Wrongly Decided. As was pointed out above, the dissent in Regents cogently set forth why that case was wrongly decided. ACIA will limit itself here to some additional observations demonstrating that Regents is utterly bereft of any defensible intellectual basis.

First, in its "Stare Decisis" discussion, the Regents majority posited a hypothetical in an attempt to justify its holding:

"Consider, for example, the hypothetical case of a boy injured in a car accident at age 12 and fully recovered by age 15. Upon reaching 18, he retains an attorney to file suit to recover the costs associated with the treatment of his injuries, relying on MCL 600.5851(1). The defendant also retains counsel, who responds by filing a motion to dismiss, arguing that none of the plaintiff's damages are recoverable. The trial court parses the parties' filings and determines that none of the plaintiff's costs were incurred in the year before suit was filed.

GROSS & NEMETH, P.L.C.
ATTORNEYS AT LAW
615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

"Under *Cameron*, the plaintiff in this hypothetical case was indisputably entitled to file suit, because MCL 600.5851(1) preserved his right to do so. Yet *Cameron* gutted his suit of any practical worth because, under its interpretation of MCL 600.5851(1), the plaintiff had no chance to recover any damages."

487 Mich at 304-05 (emphasis added).

Leaving aside the Geiger myth that the no-fault claim even belonged to the minor, of what "damages" was he being deprived? Minors are unlikely to have substantial work loss claims. If the claim is for hospital and doctor bills, the money should go to those providers. If the claim is for home attendant care, the money likewise will go to the providers. The above-quoted passage is nothing more than a sound bite without substance.

Second, the Regents majority had the following to say about reliance interests:

"In doing so, *Cameron* disrupted the reliance interests of the injured minors and the incompetents who relied on its provisions to preserve their claims until removal of their disabilities."

487 Mich at 305 (emphasis added). One would search long and far for a passage so bereft of any sense:

- (1) It posits that incompetents, who, by definition, cannot comprehend "rights he or she is otherwise bound to know", MCL 600.5851(2), relied on rights they could not understand.
- (2) It posits that minors, assuming that they understood their legal rights, deliberately opted not to attempt to claim and recover benefits to which they thought they were entitled, preferring instead to wait years to assert their entitlements.
- (3) It assumes that minors and incompetents were aware that the unambiguous language of §3145(1) does not

mean what it says because of some obscure 30-year-old decision of the Michigan Court of Appeals.

Justice Talbot Smith described a similarly silly legal theory in terms appropriate here:

"All of this is straight from outer space. It is pure fantasy. It is unrelated to life on this earth."

Elbert v City of Saginaw, 363 Mich 463, 480; 109 NW2d 879 (1961).

Regents Adversely Affects the Functioning of the No-Fault System ("Practical Workability"). As the dissent noted in Regents, 487 Mich at 342, n 12, and as demonstrated above, Regents will have the effect of opening the no-fault system to claims of nonpayment or underpayment for home attendant care going back decades. That creates underwriting problems by having to anticipate exposure not only for future services, but for services rendered long in the past. It also has an undeniably inflationary effect on premiums. (See p 15-18, supra). The number of uninsured drivers in this State has doubled since the mid-1990's, and 55% of the drivers in Detroit do not have insurance, largely due to the expense. ("Detroit Free Press Sounds the Alarm-Choice for Drivers to Solve Cities' Insurance Crisis!", Detroit Free Press, 1/10/11, 105a).

Reliance Interests Do Not Weight Against Overruling Regents.

Indeed, this factor weighs heavily in favor of overruling Regents.

First, as this Court noted in Robinson, citizens should be able to rely on courts to give effect to the unambiguous language

of a statute. 462 Mich at 467. Regents confounds that reliance by refusing to do so.

Second, as the Regents majority recognized:

"Cameron is of recent vintage, having been decided a mere four years ago. Hence, reliance on its holding has been of limited duration."

487 Mich at 305. Regents is less than two years old. Reliance on its holding (if any) is vastly more limited than was the case with Cameron.

Third, as pointed out above (p 29, supra), the persons Regents purports to protect -- minors and incompetents -- could have had no realistic reliance on non-enforcement of the one-year-back rule.

In Michigan Education Ass'n v Secretary of State, supra, this Court granted respondent's motion for rehearing and reversed its prior holding, 488 Mich 18, 21; 793 NW2d 568 (2010). There, as here, the issue was one of applying the language of the statute in question. Michigan Education Ass'n, slip op at 6. In response to the dissent, the majority opinion made three points justifying rehearing. Although granting rehearing and overruling a prior decision are technically distinct, those points nevertheless provide a further principled basis for the relief requested in the instant case.

One point was that the issue presented was of considerable importance to the people of this State. Id., slip op at 33. Likewise, as demonstrated above, the decision in the instant case

has serious ramifications for the fiscal integrity of the no-fault system.

A second point was that the prior decision was wrongly decided. Id., slip op at 31. Likewise, as demonstrated above, that is the case here.

Finally, this Court focused on the nature of the error it was correcting. In terms echoing this Court's language in Robinson (quoted at pages 27-28, supra), this Court said:

"[W]hile the dissenting opinions make light of the fact that we supposedly have little justification for this new opinion other than the views expressed in the dissent from the original opinion, we believe that such a justification is actually rather compelling. That is, we believe that the previous dissent was in accordance with the language and intent of MCFA, while the previous majority was not, and as between an analysis of the law that is in accordance with its language and intent and one that is not, we prefer the former."

Id., slip op at 32-33 (emphasis added).

In sum, Regents was wrongly decided. Its premise is a myth. Its holding exacerbates the fiscal difficulties of the no-fault system. And it undermines the reliance citizens should be able to have on enforcement of unambiguous language enacted by its legislative representatives. It should be overruled.

RELIEF

Defendant-Appellant, ACIA, prays this Honorable Court to reverse the January 25, 2011, Opinion and Order and remand with instructions that Plaintiff's recovery is limited by the one-year-back rule of MCL 500.3145(1).

SIEMION HUCKABAY, P.C.
BY: JAMES W. BODARY (P24193)
Attorneys for Defendant-Appellant
One Towne Square, Suite 1400
P.O. Box 5068
Southfield, MI 48086-5068
(248) 357-1400

GROSS & NEMETH, P.L.C.

BY: 

JAMES G. GROSS (P28268)
Attorneys of Counsel for
Defendant-Appellant
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200

Dated: August 9, 2011