

STATE OF MICHIGAN
IN THE SUPREME COURT

On appeal from the Court of Appeals
Judge Smolenski Presiding, and
Judges Hoekstra and Murray

MARY ELLEN MCDONALD,

Plaintiff-Appellee,

v

FARM BUREAU INSURANCE COMPANY,

A Michigan Corporation,

Defendant-Appellant.

Supreme Court No. 132218

Court of Appeals No. 259168

Lower Ct. No. 03-76398-NF

REPLY BRIEF ON APPEAL – APPELLANT FARM BUREAU INSURANCE COMPANY

Respectfully submitted,

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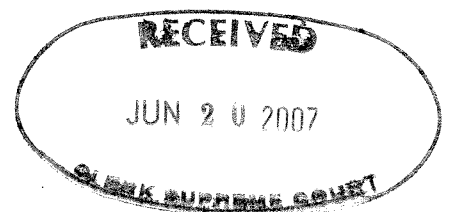


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REPLY ARGUMENT

Plaintiff-appellee Mary Ellen McDonald (“appellee”) can find nothing in Michigan jurisprudence to justify her assertions, and so she resorts to defending against arguments that defendant-appellant Farm Bureau Insurance Company (“Farm Bureau”) has not made, and making new assertions that were not raised below.¹ She insists that the tolling doctrine from *The Tom Thomas Organization v Reliance Ins Co*² does not violate the Contract Clause, which Farm Bureau has never asserted.³ Appellee has also changed her position regarding the facts below and now argues that Farm Bureau – through its adjustor, Jackie Swedorski – “revoked” its permission to settle with the tortfeasor on August 16, 2002, during a telephone conversation. (**Appellee’s Brief, pp 4-6**). But her trial counsel’s representations on the record during Swedorski’s deposition establish that this never

¹ Appellee spends a considerable portion of her brief incorrectly suggesting that Farm Bureau is attempting to mislead this Court by making “convenient” omissions of facts or aspects of the cases it discusses. For example, on page 49 of her brief, appellee asserts “[Farm Bureau] conveniently omits that . . . the insurer had sent a formal letter denying liability” in *Bashans v Metro Mut Ins Co*, 369 Mich 141, 149; 119 NW2d 622 (1963). But in Farm Bureau’s discussion of *Bashans*, it noted that “[t]he plaintiff made a claim under the policy **that the defendant denied** on July 18, 1956.” (**Appellant’s Brief, p 46; emphasis added**). Also, while appellee accurately states that Farm Bureau inadvertently excerpted the 2001 as opposed to the 1999 version of the applicable policy endorsement in its appendix (**Appellant’s Appendix, pp 2a-3a**), the correct endorsement is included in the full policy. (**Appellant’s Appendix, pp 27a-28a**). Farm Bureau quoted and discussed the correct version in its brief, so the error has little relevance to this matter. To correct it, however, Farm Bureau has excerpted the correct version of the endorsement and provided it as part of its **Supplement to Appellant’s Appendix, p 71a-72a**.

Rather than address appellee’s numerous erroneous assertions one by one, however, Farm Bureau will spend its limited space addressing the merits of the case.

² 396 Mich 588, 592; 242 NW2d 396 (1976).

³ On the contrary, Farm Bureau argued that the doctrine violated “the fundamental policy of freedom of contract,” which this Court has recognized in numerous decisions such as *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003), and of which the Contract Clause is a constitutional example.

happened.⁴ Overall, appellee's position bears the marks of a struggle to find a foothold where none exists.

Many of appellee's legal assertions are simply wrong. The *Tom Thomas* tolling doctrine is not an exercise of traditional equitable power because it is a bright-line rule that was to apply to all similar cases regardless of their particular facts. The stare decisis factors from *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), do not suggest this Court should not overrule *Tom Thomas* here. Regarding prospective application, the Court of Appeals had no authority to issue a purely prospective opinion, and that opinion cannot survive this Court's recent jurisprudence regarding such limitations. Regarding estoppel, Michigan jurisprudence has never recognized an estoppel on facts such as these, nor can facts of which appellee was never aware support an estoppel claim.

I. THE TOM THOMAS TOLLING DOCTRINE IS NOT AN EQUITABLE REMEDY AND CANNOT BE JUSTIFIED AS SUCH.

Despite what appellee now argues, the *Tom Thomas* tolling doctrine is not an equitable remedy. The creation of a bright-line rule that applies to all similar cases is not within the traditional scope of equitable powers. In fact, the *Tom Thomas* Court never mentioned equity in explaining the reasoning behind the rule. Likewise, the court in *Peloso v Hartford Fire Ins Co*, 56 NJ 514; 267 A2d 498 (1970) – whose reasoning the *Tom Thomas* Court adopted – did not discuss equity at all. So appellee's attempt to justify the rule after the fact by calling it an exercise of this Court's equitable powers should be rejected.

⁴ Indeed, if appellee had settled the underlying case without permission, it would have been a separate violation of the policy terms precluding her recovery of UM benefits. *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 674, 676; 554 NW2d 610 (1996). Farm Bureau never made this argument below because appellee had Farm Bureau's permission to settle.

It would be a significant departure from the history of equity jurisprudence to create an “equitable” remedy that applies to many cases regardless of their particular facts. As this Court noted in *Devillers v ACIA*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005), equitable remedies must be “based on the particular circumstances” of a specific case. There is no justification for “granting blanket equity to an entire *class* of cases.” *Id.* Equitable relief requires a case-specific analysis, and cannot by nature be granted in the form of a bright-line rule. *Lowry v Collector of Internal Revenue*, 322 Mich 532, 541; 34 NW2d 60 (1948). See also *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999) (“case-by-case analysis [is] characteristic of equity jurisprudence.”); *Schaeffer v Schaeffer*, 106 Mich App 452, 457-458; 308 NW2d 226 (1981) (“a court of equity molds its relief according to the character of the case . . .”).

II. THIS COURT HAS ALREADY OVERRULED TOM THOMAS AT LEAST IN PART, AND STARE DECISIS PROVIDES NO BASIS TO SAVE THE TOLLING DOCTRINE.

Appellee has failed to identify anything in Michigan jurisprudence that could justify the *Tom Thomas* tolling doctrine. She cannot answer this Court’s criticisms of *Tom Thomas* in both *Devillers* and *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). So she instead argues that stare decisis should prevent this Court from overruling *Tom Thomas*. Initially, this is wrong for the simple reason that this Court has *already* overruled the “reasonableness” analysis in *Rory*, and stare decisis did not preclude that decision. But more specifically, the application of stare decisis is inappropriate here.

“Stare decisis is a principle of policy rather than an inexorable command, and this Court is not bound to follow precedent that is unworkable or badly reasoned.” *Karaczewski v Farbman Stein & Co*, ___ Mich ___; ___ NW2d ___ (2007); *Devillers*, 473 Mich at 584. Because it is not a mandate, *Robinson’s* stare decisis factors are not exclusive nor binding;

as this Court recognized in *Devillers*, when considering overruling precedent, “we may examine” those factors. 473 Mich at 584 (italics added). So appellee’s assertion that this Court cannot overrule what remains of *Tom Thomas* is plainly wrong.

Nor are the *Robinson* factors necessary or applicable in all situations. As this Court recognized in *Karaczewski*, stare decisis is not an overriding consideration when the new “decision simply restores the law to that which existed before the aberrational decision” being overruled. *Id.* at _____. For example, in *Rory*, this Court overruled *Tom Thomas*’s “reasonableness” analysis, holding that “Michigan jurisprudence enforced contractually shortened limitations provisions without regard to the ‘reasonableness’ of the provisions” before *Tom Thomas*. 473 Mich at 470 n 24. Accordingly, overruling that analysis did not create a “new rule” but simply restored the law to its pre-*Tom Thomas* state, and so this Court did not even address the *Robinson* factors.

Similarly, overruling the *Tom Thomas* tolling doctrine is not a “declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority.” *Devillers*, 473 Mich at 587. *Tom Thomas* was undisputedly the first Michigan decision to espouse the bright-line tolling concept, and it dismissed contrary precedent by asserting that no earlier case had “considered” such a concept. 396 Mich at 597 n 10. As a result, this Court should treat this case as it did *Rory*, and overrule what remains of *Tom Thomas* without considering the *Robinson* factors.

If this Court does consider the *Robinson* factors, however, the result should be no different. In *Devillers*, 473 Mich at 584-586, this Court applied those factors and held that they did not prevent it from overruling *Lewis v DAIE*, 426 Mich 93; 393 NW2d 167 (1986). Since *Lewis* was nothing more than an extension of the *Tom Thomas* tolling doctrine into

the No-Fault Act, this Court's *Robinson* analysis of that case applies with even greater force here.

This Court has already expressed that it “wholly agree[s] with the views expressed by the dissenting justice[] in *Tom Thomas*,” and so it is beyond doubt that *Tom Thomas* was wrongly decided. *Devillers*, 473 Mich at 582. Like *Lewis*, *Tom Thomas* “defies ‘practical workability’” because it created a new and unsubstantiated concept of blanket entitlement to some form of tolling that quickly took on a life of its own. If not expressly overruled here, it may surface in other contexts, as it did in the No-Fault Act in *Lewis*. This undermines the conclusion that any statutory or contractual limitation provision actually means what it says. And the reliance interests are no greater than in *Devillers*, where this Court noted that “it is highly likely that the average . . . claimant who has profited from [the *Tom Thomas* tolling doctrine] was quite unaware of this decision, and simply received a windfall” So even if applied here, the *Robinson* factors do not preclude overruling *Tom Thomas*.

III. APPELLEE’S RETROACTIVITY ANALYSIS IGNORES BOTH RECENT PRECEDENT AND THE CONSTITUTIONAL LIMITATIONS ON ADVISORY OPINIONS.

Appellee does not acknowledge or address this Court’s recent retroactivity analysis in *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004), *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 431 (2007), *Karaczewski, supra*, or even *Devillers*. These cases directly reject all of appellee’s assertions regarding prospective limitation of any decision overruling the *Tom Thomas* tolling doctrine. Moreover, appellee fails to acknowledge the effect of Const 1963 art 3, § 8 on the Court of Appeals’ attempt to issue a purely prospective opinion, as it did here. Because appellee does not address these points, Farm Bureau will not belabor them further.

IV. OFIS'S ORDER OF PROHIBITION IS IRRELEVANT TO THIS CASE.

Appellee relies heavily on a subsequent notice and order of prohibition issued by the Office of Financial and Insurance Services ("OFIS") on December 16, 2005. A similar notice and order was issued April 4, 2006. (**Appellee's Brief, pp 10-11, 22-29**). But as appellee admits, the order is not retroactive; it does not modify existing policies lawfully in effect, and that an insurer may continue "to use any policy, form or rider that it may have been legally using in Michigan prior to the date of this notice . . ." (**Appellee's Appendix, pp 24b-25b**).

Because the order does not apply retroactively, and the insurance policy involved here was in existence long before the order was issued, appellee's reliance on the order for any reason is misplaced. Our Court of Appeals has previously rejected this argument in *McGraw v Farm Bur Gen Ins Co of Mich*, 274 Mich App 298; 731 NW2d 805 (2007).

V. APPELLEE IS UNABLE TO SHOW THAT ESTOPPEL IS WARRANTED BY MICHIGAN PRECEDENT UNDER THESE FACTS, AND THE RECORD BELIES HER ATTEMPT TO MANUFACTURE NEW FACTS TO BOLSTER HER ESTOPPEL CLAIM.

Finally, appellee concedes waiver is not applicable here, and so focuses on estoppel. (**Appellee's Brief, pp 44-45 n 12**). Notably, she fails to actually discuss or compare these facts to a single Michigan case under which she can assert that estoppel is warranted here. So she resorts to ignoring both the established facts and existing law, and to making arguments as though unfettered by both.

First, appellee has now changed her position regarding the established facts in this case. She claims that Farm Bureau "revoked" its permission to settle with the tortfeasor on August 16, 2002, during a telephone conversation. (**Appellee's Brief, pp 4-6**).

Notably, appellee never alleged this supposed “revocation” when it made its estoppel argument below. (**Appellant’s Appendix, pp 32a-50a**). The reason is simple: the “revocation” did not occur. During Swedorski’s deposition, appellee’s counsel acknowledged both that Farm Bureau had given him permission to settle, and that the permission letter dated August 14, 2002, was actually a response to his August 16 request.

Specifically, Swedorski testified – and appellee’s counsel agreed – that she sent the permission letter in *response* to appellee’s August 16, 2002 request for written permission to settle with the tortfeasor, even though the date of the response was inconsistent with this fact:

A That letter I received from you on August 16, 2002 you stated that you – you wanted me to put into writing the fact that you could accept the 20,000 [settlement offer from the tortfeasor.]

Q (BY MR. BEAN): Did you do that?

A **Yes, I did, and that [the letter dated August 14, 2002] was the letter**, and you also stated I would appreciate receiving this written permission at your earliest convenience so that we can commence the process of negotiating the UIM claim.

Q **Absolutely true. [Supplement to Appellant’s Appendix, p 74a.]**

The parties were unable to identify the correct date of the permission letter, but it was clear that it was written after the August 16 request. Appellee’s counsel stated on the record that Swedorski told him “the August 14th is a typo, and it should have been August 24th.” (**Supplement to Appellant’s Appendix, p 75a**). According to Swedorski’s log notes, she did not receive authority from management to give permission to settle until August 20 or 21, 2002. (**Supplement to Appellant’s Appendix, pp 76a-77a; Appellee’s Appendix, p 96**).

Appellee’s counsel stipulated that “either [the permission letter] is dated incorrectly or the log date is incorrect.” (**Supplement to Appellant’s Appendix, p 78a**). But there was absolutely no dispute that the permission letter was a response to appellee’s request for written permission to settle:

Q . . . Is it correct that [the permission letter dated August 14, 2002] is responding to a letter you received from Mr. Bean dated August 16th, 2002?

A That is correct.

MR BEAN: **That is a good way to do it** [clarify the record.] [**Supplement to Appellant’s Appendix, p 78a.**]

Appellee’s counsel also admitted at oral argument before the trial court that Farm Bureau authorized Ms. McDonald to “accept the underlying \$20,000 . . . ,” and never suggested that Farm Bureau later revoked that permission. (**Supplement to Appellant’s Appendix, p 93a**). So appellee’s current assertion that Farm Bureau retracted permission to settle with the tortfeasor is a new concept that has no support in the record, and this Court should not consider it.

Appellee is left with only one statement that could possibly form the basis for any reliance on her part. That is the statement regarding “getting back in touch” with her attorney in Farm Bureau’s May 14, 2002 letter. (**Appellant’s Appendix, p 31a**). While appellee now combs Farm Bureau’s claims file for what she calls evidence of “dilatatory tactics,” she misses a fundamental point regarding estoppel. As Farm Bureau noted in its primary brief, “the statement or conduct which is alleged to have worked the estoppel **must have been a statement made to or conduct known to the party who was expected to act upon it** or to his agent or someone in privity with him.” *R C Mahon Co v R S Knapp Co*, 268 Mich 67, 71; 255 NW 453 (1934) (emphasis added).

As a result, file memos or log notes by the adjustor are irrelevant to appellee's claim of estoppel. Clearly, appellee cannot have been induced not to file a timely action by conduct of which she was unaware. To hold otherwise would contradict the very nature of fraud and estoppel, which depend on *reliance*. The basic premise bears repeating: estoppel is only available when the claimant "has in good faith **relied upon [the fraudulent] conduct, and has been led thereby to change his position for the worse . . .**" *Porter v Goudzwaard*, 162 Mich 158, 161-162; 127 NW 295 (1910), citing 2 Pomeroy's Equity Jurisprudence (3d Ed), §§ 804, 812 (emphasis added).

Appellee also asserts her counsel's awareness of the one-year provision "does not preclude operation of estoppel." (**Appellee's Brief, p 48**). But she has no authority for this assertion. And this Court has acknowledged that "[o]ne who is cognizant of all the material facts can claim nothing by estoppel." *Cudahy Bros Co v West Michigan Dock & Market Corp*, 285 Mich 18, 26; 28 NW 93 (1938). In *Dahrooge v Rochester German Ins Co*, 177 Mich 442, 454; 143 NW 608 (1913), it also recognized that claimants who "had legal counsel . . . cannot plead ignorance of their rights." Appellee knew about the one-year limitation and knew when it expired. She knew Farm Bureau never agreed to waive it. She knew she had never begun "negotiations" with Farm Bureau regarding the claim. She cannot blame her failure to act at that point on Farm Bureau because she was aware of all the material facts.

Finally, appellee's attempts to distinguish *Dahrooge* and *Bashans v Metro Mut Ins Co*, 369 Mich 141, 149; 119 NW2d 622 (1963), fail as insignificant. She ignores *Dahrooge's* holding that less than three months after the last contact between the parties was sufficient time to conclude the insurer did "not cause delay beyond the period in which action may be brought." *Id.* at 454. She ignores *Bashans's* holding that if a party does

not do what it stated it would do, the “natural conclusion . . . would be that the intention to so act had been abandoned,” and the party previously waiting should be prompted to file a lawsuit at that time. 369 Mich at 146. Moreover, she has no authority distinguishing these cases, nor any alternative authority that she can compare to these facts and show a sustained estoppel.

CONCLUSION AND RELIEF REQUESTED

Appellee fails to establish that the Court of Appeals decision in this case was correct or sustainable, and she fails to justify the *Tom Thomas* tolling doctrine as well. *Tom Thomas* was a radical departure from longstanding Michigan law. The Court of Appeals acknowledged that this Court had effectively overruled *Tom Thomas*, but then ignored this Court’s retroactivity jurisprudence and constitutional limitations on its own decisions, and issued a purely prospective opinion synthesizing *Rory* and *Devillers* without fully effectuating either decision. The Court should reverse the decisions of the courts below and enter judgment in favor of Farm Bureau.

Respectfully submitted,

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Dated: June 20, 2007

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