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STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Court of Appeals,
Elizabeth Gleicher, P.J., Stephen Borrello and Brock Swartzle, JJ.

ADORA WILMORE-MOODY, Individually,

Plaintiff/Counter-Defendant/Appellee,

and ADORA WILMORE-MOODY as Next Friend of DAIMLER AAKU, a Minor,

Plaintiff,

-v-

MOHAMMED ZAKIR,

Defendant-Appellant,

and

EVEREST NATIONAL INSURANCE COMPANY,

Defendant/Counter-Plaintiff,

and

PDB INVESTMENTS & INS. AGENCY, INC. and MICHIGAN ASSIGNED CLAIMS PLAN and/or MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants.

Supreme Court No. 163116
Court of Appeals No. 352411
Lower Court Case No. 18-002518-NI

/

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT OF ISSUE PRESENTED

I. **Whether Rescission of An Automobile Insurance Policy After The Injury Has Occurred, Bars Recovery of Noneconomic Damages Under MCL 500.3135(2)(c), On The Basis That The Claimant Did Not Have In Effect The Security Required by MCL 500.3101(1) At The Time The Injury Occurred.**

Amicus Answers, "No"

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INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. Amicus curiae MAJ recognizes an obligation to assist this Honorable Court on important issues of law that would substantially affect the orderly administration of justice in the State of Michigan. Amicus curiae MAJ believes that the question presented in this case is one of major significance to Michigan's law of motor vehicle reparations, and persons injured in automobile collisions, particularly in light of the increased use of rescission as a defense by insurers seeking to avoid liability, after a motor vehicle collision has already occurred.

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INTRODUCTION

This Court requested supplemental briefs regarding whether the rescission of an insurance policy under the No-Fault Act, MCL 500.3101 *et seq.*, bars recovery of non-economic damages under MCL 500.3135(2)(c) on the basis that the claimant did not have in effect the security required by MCL 500.3101(1) at the time the injury occurred. This is an issue of major significance to Michigan's law of motor vehicle reparations, particularly in light of the increased use of rescission as a defense by insurers seeking to avoid liability, after a motor vehicle collision has already occurred.

For the reasons stated below, Amicus Curiae MAJ[1] respectfully submits that a correct reading of MCL 500.3135(2) necessarily leads to the conclusion that the time it references is the time the motor vehicle collision took place, and not at a later time, when rescission may have been judicially granted as an equitable remedy to the injured person's insurer. The plain unambiguous meaning of MCL 500.3135(2)(c) is that the injured person must have had the required insurance at the time their injury occurred during the collision. The legal fiction of rescission ab initio is an equitable contractual remedy, which does not change the actual fact that the injured person had complied with the law at the time of the collision, by having purchased the required

[1]No counsel for any party authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party or counsel for any party.

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security, which was in effect at the time of the collision. The tortfeasor is not a party to the contract between the injured party and their insurance company. The driver's liability is premised on the tort law of negligence, which has been preserved statutorily in MCL 500.3135(2)(c). There is no equitable defense to a negligence action in Michigan. This Court should not permit the negligent driver to benefit from an equitable remedy that was granted to the injured person's insurer.

LAW AND ARGUMENT

A. Regardless of Later Rescission, The Injured Person Should Not Be Deemed to Have Been Retroactively Uninsured for Purposes of MCL 500.3135(2)(c).

1. MCL 500.3135(2)(c) is Plain and Unambiguous.

MCL 500.3135(2)(c), which prohibits recovery of non-economic damages by a party who was operating their own uninsured vehicle states as follows:

> "Damages must not be assessed in favor of a party who was operating his or her own vehicle **at the time the injury occurred** and did not have in effect for that motor vehicle the security required by section 3101 (l) **at the time the injury occurred**." (Emphasis added).

The critical language of MCL 500.3135(2)(c) is clear on its face. Whether a driver is uninsured, hence ineligible for tort non-economic damages, must be determined "at the time the injury occurred". Amicus Curiae submits that the plain language of the statute does not require judicial construction to be understood. It is

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elementary that the meaning of a statute must, in the first instance, be based upon the actual language in which the statute is written, and if that language is plain, the sole function of the courts is to enforce it according to its terms. *Caminette v United States*, 242 US 470; 37 S Ct 192; 61 L Ed 442 (1917). Michigan law comports with this principle.

This Court has held that the first step in the process of interpreting a statute and divining legislative intent is to examine the language of the statute. *Mount Pleasant v State Tax Commission*, 477 Mich 50, 53; 729 NW2d 833 (2007). The words contained in a statute provide the most reliable evidence of the Legislature's intent. *Shinholster v Annapolis Hospital*, 471 Mich 540, 549; 685 NW2d 275 (2004). In ascertaining legislative intent, the Court gives effect to every word, phrase, and clause in the statute. *Id*. The Court must consider both the plain meaning of the critical words or phrases, as well as their placement and purpose in the statutory scheme. *Id.*

If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible. *Mount Pleasant*, 477 at 53. An unambiguous statute must be enforced as written. *Shinholster*, 471 Mich at 549. If language is clear and unambiguous, the statute must be applied accordingly. *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010) . A necessary corollary of these principles is that a court may read nothing into

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an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Roberts v Mecosta Co. Gen. Hosp.*, 466 Mich 57, 63, 642 NW2d 663 (2002).

The statute at issue is not ambiguous. The Legislature is presumed to mean what it said. It used the past tense when it stated that the operative period is whether at the time the injury occurred, the driver "did not have" in effect the security required. The phrase "at the time the injury occurred" is clear and unambiguous in its focus on both the time of operation ("a party who was operating . . . at the time the injury occurred"), and the time for determining insurance coverage ("did not have. . . . at the time the injury occurred").

When the 2019 amendments to the No-Fault Act were passed, the Legislature had the opportunity to amend MCL 500.3135(2)(c) to address situations of later rescission of a policy that had been in effect at the time of the injury. The Legislature did not do so. In the process of passing the 2019 amendments, the Legislature engaged in vigorous discussion and debate about the entire legislative scheme of No-Fault insurance. The Legislature had the opportunity to hear from, and did have input from interested parties. Rescission is not mentioned anywhere in the No-Fault Act, prior to or after the 2019 amendments. If the Legislature had chosen to amend MCL 500.3135(2)(c), it could have easily added a sentence to the effect that later rescission of an insured's policy would be regarded as having violated the mandate to have the

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required security "at the time the injury occurred". The Legislature made no such amendment.

This Court should not construe the statute as containing such a provision, which is non-existent in the actual unambiguous text. Defendant-Appellant's brief argues that this Court should not "wrongly encourage Michigan residents to engage in fraud" (Appellant's supplemental brief, p. 5). However, this Court has previously held that policy concerns never justify rewriting or avoiding unambiguous statutes. Such concerns must be directed to the Legislature. See *Calovecchi v Michigan*, 461 Mich 616, 624; 611 NW2d 300 (2000) ("[P]olicy questions are properly directed toward the Legislature rather than to [the] Court. [The Court's] duty is to construe the text of the statute before [it], not to reach the policy result we judges think preferable."); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000) (The Supreme Court will not "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature."); See also *Jennings v Southwood*, 446 Mich 125, 142; 521 NW2d 230 (1994), quoting *City of Lansing v Lansing Twp.*, 356 Mich 641, 648; 97 NW2d 804 (1959) ("'The duty of the Court is to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere'").

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2. Principles of Statutory Construction Mandate The Conclusion that Later Rescission Does Not Retroactively Render the Owner-Driver Uninsured At The Time of the Collision.

The Michigan No-Fault Insurance Act is a comprehensive legislative enactment designed to regulate the insurance of motor vehicles in Michigan. *Cruz v State Farm Auto. Ins. Co.,* 466 Mich 588, 595; 648 NW 2d 591 (2002). The Act is complete within itself, and sets forth all provisions necessary for its implementation. The Act includes sufficient incentive for drivers to purchase the mandated coverage, including MCL 500.3113 (b) which prohibits payment of personal protection insurance benefits to an owner or registrant of a vehicle involved in the accident, to which the required security was not in effect. The Act excludes from participation in the automobile reparations system those drivers who fail to participate by buying insurance. *Stevenson v Reese,* 239 Mich App 513, 519; 609 NW2d 195 (2000).

The Act also imposes criminal penalties on those who drive without having the required security. MCL 500.3102(2) provides in relevant part:

> "(2) An owner or registrant of a motor vehicle or motorcycle with respect to which security is required, **who operates** the motor vehicle or motorcycle or permits it to be operated upon a public highway in this state, without having in full force and effect security complying with this section or section 3101 or 3103 is guilty of a misdemeanor." (Emphasis added)

This section again is worded by the Legislature as applying to the time of

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operation of the motor vehicle. This section of the Act is in pari materia with MCL 500.3135(2)(c), and must be read in harmony with it. The object of the in pari materia rule is to effectuate legislative purpose when statutes are harmonious. *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). It is clear that the purpose of MCL 500.3102(2) is harmonious with MCL 500.3135(2)(c). Both sections are punitive in nature, designed to punish those who drive without the required insurance. If this Court were to hold that a later rescinded policy would render the owner driver as having retroactively operated the motor vehicle at the time of the injury without the required security, then this Court would also have to construe MCL 500.3102(2), as permitting criminal prosecution of such a person retroactively.

Such a construction would raise constitutional issues because the operator of the vehicle at the time of operation has no notice that they are committing a crime at that moment. Such a construction would violate the well established cannon of constitutional avoidance when construing statutes. When a fair construction of legislation permits serious constitutional questions to be avoided, that construction is preferred. *Crowell v Benson*, 285 US 22, 52 S Ct 285, 76 L Ed 598 (1932).

The punitive nature of both these sections of the No-Fault Act point to the error of looking at later rescission instead of the insured's status "at the time the injury occurred" or "at the time of operation". These two sections of the statute must be

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construed harmoniously. If the clear temporal requirement of "at the time the injury occurred" of MCL 500.3135(2)(c) is to be disregarded, then there would also be room to hold that one is subject to criminal prosecution even if at the time of the traffic stop, the vehicle was insured, but the insurance policy was later rescinded.

If the time of suit, rather than the time of injury, is used as the point of reference, then a driver who was uninsured at the time of injury would later be able to buy insurance before filing suit to claim tort damages. The present case presents the opposite situation, but the analysis is the same. Although rendered "uninsured" by the legal fiction of rescission granted during litigation, the fact is the vehicle was actually insured "at the time of injury". Premiums had been paid and a policy of insurance was issued. The insured relies on the insurer's issuance of a policy to comply with the insurance requirement. In turn, the Secretary of State relies on the proof of insurance to issue a license. In contrast to pre-collision rescission, rescission after the injury, does not provide opportunity to comply by purchasing other insurance.

By the unvarnished language of MCL 500.3135(2)(c), the Legislature has not abolished the right to sue a negligent driver when the injured person was insured "at the time of the injury". The phrase "at the time the injury occurred" is clear and unambiguous in its focus on the time of operation of the vehicle and the time injury

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occurred, not a later time. The meaning of a statute must in the first instance, be discerned from the clear language of the statute. There is no evidence that at the time MCL 500.3135(2)(c) was drafted, that the Legislature had considered the effect of a later rescission of a no-fault policy. The statute is silent on the effect of such a rescission.

The statute specifically states "at the time of the injury", and these words cannot be eliminated as surplusage pursuant to proper principles of statutory construction. This Court has clearly enunciated rules for statutory construction, stated in *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001):

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. *Tryc v Michigan Veteran's Facility,* 451 Mich 129, 135; 545 NW2d 642 (1996). To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. *People v Stone,* 463 Mich 558, 562, 621 NW2d 702 (2001). In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp,* 439 Mich 623, 635; 487 NW2d 155 (1992)."

Reasonable minds may not differ that the meaning of MCL 500.3135(2)(c) is

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to be determined at the time of the injury. If any ambiguity exists, a court must give the statute a valid and reasonable construction that will reconcile any inconsistencies and give effect to all of its parts. *Girard v Wagenmaker*, 437 Mich 231, 238; 470 NW2d 372 (1991); *Aikens v Dep't of Conservation*, 387 Mich 495, 499; 198 NW 2d 304 (1972). In this case, all relevant parts of the No-Fault Act refer to the time of operation, the time of injury or the time the vehicle was involved in the subject accident. This Court should not effectively add language to the statute by a construction that deems the vehicle uninsured at the time of injury, due to later rescission.

But for a later judicially granted equitable remedy to the insurer, the owner/driver of a vehicle who had purchased and maintained coverage, which was in effect at the time of injury, has complied with the law. But for the later rescission, the driver of the vehicle does not have knowledge that he or she will be deemed as driving without insurance, and has no notice that they should should purchase other coverage prior to the time of the collision. There is also no opportunity to retroactively comply with the law by purchasing a policy from another insurer after rescission is granted to the original insurance company.

Case law construing other sections of the Insurance Code of 1956 demonstrates the Legislature's intent that drivers have sufficient notice and warning that they will be driving without the security mandated by MCL 500.3101. In *Yang v Everest,* 507

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Mich 314; 968 NW2d 390 (2021), this Court held that purported notice of cancellation of insurance under MCL 500.3020(1)(b), sent before any non-payment had occurred, was ineffective to cancel insurance. The Court recognized the importance of the insurer's strict compliance with the cancellation statute in order to give policyholders an opportunity to purchase other insurance.

Unlike cancellation, the equitable remedy of rescission, granted after the collision has already occurred, does not give the driver notice and an opportunity to purchase other insurance. The Legislature, through MCL 500.3020(1)(b), has expressed its intent that drivers have sufficient warning that they are driving without the mandatory insurance. The equitable remedy of rescission has no place in this statutory scheme, and it should not be used to deem drivers retroactively uninsured for purposes of MCL 500.3135(2)(c).

B. Later Recision of an Insurance Policy Is Not Intended to Benefit the Tortfeasor. The Tortfeasor is not Entitled to An Equitable Remedy.

The purpose of the No-Fault Act is "to provide accident victims with assured, adequate and prompt reparations at the lowest cost to both the individuals and to the no-fault system." *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002). "Given the remedial nature of the Act, courts must liberally construe its provisions in favor of persons who are its intended beneficiaries" *Frierson v West American Ins Co.*, 261 Mich App 732, 734, 683 NW2d 695 (2004).

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Rescission has become the defense de jour, similar to the popularity of post claim fraud defenses that were ushered in by *Bahri v IDS Property Cas Ins. Co.*, 308 Mich App 420; 864 NW2d 609 (2014). Everest alone invokes this defense regularly, as demonstrated by the following Michigan appellate decisions in the past few years. *Mendelson Orthopedics, PC v Everest National Ins Co*, 328 Mich App 450; 938 NW2d 739 (2019); *Petite v White*, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2020 (Docket No. 345551), *Enriquez v Rios-Carranza*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2019 (Docket No. 336128), *McCarty v Akins*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2021 (Docket No. 350052). Amicus Curiae recognizes that Michigan law permits rescission as an equitable remedy, which a court may grant in some cases to remedy fraud in the procurement on an insurance policy. *Pioneer State Mut Ins Co. V Wright*, 331 Mich App 396; 952 NW2d 586 (2020); *Bazzi v Sentinel Ins Co.*, 502 Mich 390; 919 NW2d 20 (2018). The No-Fault Act itself does not have a provision addressing rescission of an insurance policy. As a strictly contractual remedy between the insurer and its customer, it should not enure to the benefit of the tortfeasor, who was not a party to the contract, and has no claim that he or she is entitled to any equity.

There is no equitable defense to the tort of negligent driving, either in the common law, or in the No-Fault Act. The ability to sue the tortfeasor for negligence

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has been preserved as a cause of action by MCL 500.3135(1), which provides:

> "(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."

This statutory provision contains the only statutory defenses available to the tortfeasor, in addition to common law defenses available for negligent driving. With the 2019 sweeping amendments to the Act, the Legislature never amended this section to include language of "and only if the injured person's insurance policy was not later rescinded."

The residual tort liability retained by the No-Fault Act, is in exchange for the assurance that the tortfeasor is not liable for economic damages covered by the Act, and is imposed only if the threshold injury is proven, pursuant to the statutory requirement. There is no equitable defense to the imposition of liability based on negligence.

This Court should not construe MCL 500.3135(2)(c)in a manner that would grant such an unjustified equitable remedy to the tortfeasor. The equitable remedy of rescission is uniquely suited to contractual claims only. It is a legal fiction, intended to put the contracting parties in the same position they would have been in had the contract not been entered into. With respect to insurance policies, rescission relieves the insurer of contractual duties under the policy, if it is has been shown that the

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insurer would never have issued the policy, but for misrepresentation.It is a form of remedial or restorative justice, the beneficiary of which is the insurer. Premiums are returned to the customer, and the insurer no longer has a policy of insurance covering that customer, as if the policy never existed.

By contrast, the tortfeasor and the injured party cannot be returned to their pre-accident status. The collision has actually occurred through negligence of the tortfeasor, and the injured party has already sustained physical injuries. There is no remedy that is available other than money damages to the injured party, assuming all elements of the claim can be proven. There is no statutory or common law justification for permitting the tortfeasor to escape responsibility for damages already caused, when the collision cannot be undone by a legal fiction.

The beneficiary of any statutory forfeiture of the negligence cause of action under MCL 500.3135(2)(c) are the tortfeasor and his or her liability insurer, who would escape civil accountability for vehicular negligence, even though they were strangers to the misrepresentation. There is no basis to provide the tortfeasor or its insurer with any restorative justice, because they are entitled to none. The harm caused by the negligence has occurred, and the injured party cannot have their bodily injuries restored. The only remedy is the statutory cause of action retained by the Legislature under MCL 500.3135(2). This Court should not grant the tortfeasor a defense that is not listed in MCL 500.3135(1).

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CONCLUSION

This Court should affirm the Court of Appeals holding that with respect to MCL 500.3135(2)(c), the legal fiction of rescission, in which the courts essentially pretend that the contract never existed between the contracting parties, cannot alter the actual reality of the injured person having had a policy of insurance in existence at the time of the collision at issue. As such, this Court should hold that the bar to recovery of MCL 500.3135(2)(c) does not apply in situations of later rescission of an automobile insurance policy which provided the required coverage.

Respectfully submitted,

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The number of countable words in this brief are 3,668, pursuant to the WordPerfect software used to type this brief.