STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WARREN WOODS,

Plaintiff,

-vs-

Case No: 08-107649 CZ
Hon. Cynthia Diane Stephens

ALLSTATE INSURANCE COMPANY,
a foreign corporation,

Defendant.
_____/

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_____/

PLAINTIFF'S RESPONSE TO DEFENDANT MOTION TO COMPEL INDEPENDENT MEDICAL EVALUATION PURSUANT TO MCL 500.3151

NOW COMES Plaintiff, WARREN WOODS, by and through his attorneys, GURSTEN, KOLTONOW, GURSTEN, CHRISTENSEN & RAITT, P.C., and for his response to Defendant's motion to compel independent medical evaluations states

1. Admit

2. Admit

3. Admit in part. Defendant has unreasonablely refused to pay properly payable insurance benefits.

4. Neither admit nor deny as to what Defendant would like.

5. Deny. MCR 2.311 does not require anything. MCR 2.311 provides that a court may order a party to submit to examinations; however, "[t]he order may be entered only on motion for good cause..."

6. Deny MCL 500.3151 states anything “unequivocally”; however, it is important to note that MCL 500.3151 only provides for “physicians” to conduct “mental or physical examinations” and Defendant’s IME is neither a physician nor will they be conducting mental of physical examinations.

7. Deny this current request is governed by MCL 500.3151 as John Baker, Ph.D is a doctor of PHILOSOPHY not a physician (as required by the statute).

8. Neither admit nor deny as the deposition speaks for itself.

9. Neither admit nor deny as the deposition speaks for itself.

10. Deny. Defendant

11. Deny. Defendant has already breached this insurance contract by failing to pay reasonably necessary medical expenses. A fundamental concept in contract law is that a party is not required to continue performing under a contract that was breached by the other party. *Roberts v Farmers* does not apply to the current case as Defendant’s already breached the agreement. 275 Mich App 58 (2007).

WHEREFORE Plaintiff, WARREN WOODS, by and through his attorneys, GURSTEN, KOLTONOW, GURSTEN, CHRISTENSEN & RAITT, P.C., and requests this Court deny Defendant’s motion.

Respectfully Submitted,

_____
Thomas W. James (P68563)
Attorney for Plaintiff

Date: _____

BRIEF IN SUPPORT OF
PLAINTIFF'S RESPONSE TO DEFENDANT MOTION TO COMPEL

INDEPENDENT MEDICAL EVALUATION PURSUANT TO MCL 500.3151

This is the second lawsuit filed against Defendant for this same automobile accident in 2003. The first lawsuit was filed on October 13, 2004 and amicably resolved in May 2006 for $160,000 in first party no-fault benefits. Plaintiff filed this action because Defendant has once again failed to comply with their statutory and good faith duties to perform under the automobile insurance contract.

Defendant's brief is conspicuously missing the fact that John Baker, Ph. D has already tested and evaluated Plaintiff. In that prior case, Dr. John Baker, Ph D was selected by Defendant to conduct a defense psychological testing on July 8, 2005 and reviewed records on December 2, 2005. The results of that testing was as anticipated, Plaintiff is fine and he is a faker. Now, they need another report calling him a faker again? Plaintiff cannot understand if they already have the opinion from their DME to justify terminating benefits, and they relied upon that opinion, where is the good cause to have Plaintiff evaluated again by this same DME? Now since *Muci v State Farm* has been handed down, their rights to have this non-physician test Plaintiff has been extinguished. 478 Mich 178 (2007).

I. DEFENDANT HAS NOT OUTLINED ANY "GOOD CAUSE" AS REQUIRED BY MCR 2.311 TO REPEAT THIS TESTING

Defendant has failed to provide to either Plaintiff or this Court the "good cause" that is required to have this **REPEAT TESTING** done. MCR 2.311 states that "the court in which the action is pending may order the party to submit to a

physical or mental or blood examinations... The order may be **entered only on motion for good cause**..." (Emphasis added).

When Defendant first notified Plaintiff's counsel of this request, Plaintiff's counsel responded that he did not see this "good cause" as required under the Court Rule. Still to this date, no good cause has been given as to why Defendant seeks to subject Plaintiff to 8 hours of testing by this philosopher who has already called him a liar and a faker once. (Exhibit 1- John Baker, Ph D - report 07/08/05)(Exhibit 2- John Baker, Ph D - report 12/02/05).

Repeat testing is not necessary. Defendant has the opinion they paid for from John Baker Ph D and they should be stuck with it. This REPEAT DME is not necessary and "just because I want it" is not good cause as required under the Court Rules.

II. DEFENDANT'S REQUEST DOES NOT COMPLY WITH MCL 500.3151 AS JOHN BAKER, PH.D IS NOT A PHYSICIAN AS REQUIRED BY THE STATUTE.

Defendant's request for neuropsychological testing conducted by John Baker Ph D should be denied as it does not comply with MCL 500.3151. Furthermore, Defendant's reliance upon *Muci v State Farm* is misplaced. *Supra*.

As of late, the Michigan Supreme Court has honed our laws regarding the no-fault system and on numerous occasions remind all of us that lower courts and attorneys must abide by the strict and literal language of our statutes. *Cameron v Auto Club*, 476 Mich 55 (2007). We cannot disregard their direction in this case.

MCL 500.3151 states as follows:

> **500.3151 Submission to mental or physical examination.**
> When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to **mental or physical examination** by **physicians**. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits.
> (Emphasis Added)

The strict and literal language of the statute Defendant relies upon says nothing about allowing a philosopher to conduct 8 hours of testing upon a person.

Statute Requires	**Defendant' Request Fails**
A Physician	John Baker, Ph D is not a physician
Mental or physical examination	8 hours of neuropsychological testing is not an examination

Clearly, Defendant's request for this repeat testing fails to comport with the statute and our new guidance from *Muci. Supra*. Plaintiff requests this Honorable Court deny Defendant's defective request for repeat testing by a philosopher.

III. DEFENDANT'S SHOULD NOT BE ALLOWED TO CONTINUE "FISHING" FOR NEW EXCUSE S FOR THEIR BREACH OF CONTRACT.

Two weeks ago, Defendant attempted to escape responsibility in this case by trying to file a Notice of Non-Party Fault in a PIP case. This is shocking considering just 2 years ago, they paid $160,000 to settle the first PIP case that was filed due to this accident. This case originated in District Court. During that period in District Court numerous discussions were had between Plaintiff's counsel and Defendant. Defendants have always maintained this case was an issue of priority

not of causation. This is evidenced by the fact that while in District Court and during that discovery period, not one single DME was requested. Now that Defendant has lost their motion to file a notice of non-party fault, they seek to come up with a new excuse for not paying... causation. Plaintiff requests this Honorable Court deny their motion and estop Defendant from asserting this "new" defense under the doctrine of "mend the hold".

Once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses. *Kirschner v Process Design*, 459 Mich 587(1999); *South Macomb Disposal authority v. American Ins Co*, (On Remand), 225 Mich App 635 (1997); quoting *Lee v. Evergreen Regency Cooperative*, 151 Mich App 281 (1986). This concept was recently reiterated in Blundy v. Secura Insurance, Unpublished #275462 (July 1, 2008) (Exhibit 3).

In *Blundy*, Secura appealed the denial of its motion for summary disposition based on a lack of insurable interest and for misrepresentations in the procurement of the insurance policy by Ted Blundy, the named insured on the policy. The vehicle in question was actually owned and registered to his son, Jason Blundy, who was claiming PIP benefits as the result of an accident. The Court of Appeals noted that the pricing of the policy was based upon Jason Blundy being the principal driver and nothing in the record supported a conclusion that the Blundys were attempting to take advantage of a multi-vehicle discount. The Court of Appeals stated:

> Moreover, defendant was also precluded from voiding the policy because Jason, an innocent third party, was injured. *Lake States Ins, supra*. As

> observed in *Hammoud v. Metro Pro & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997) . . . .
>
> * * * * *
>
> Defendant finally argues that Jason was barred from obtaining no-fault benefits under MCL 500.3101 and 500.3113(b) because he failed to obtain a separate insurance policy. This issue has been waived because defendant's correspondence attempting to void the policy did not set forth this reason. See Kirschner v Process design Assoc, Inc, 459 Mich 587, 593; 592 NW2d 707 (1999) ('[O]nce an insurance company has denied coverage to an insured and stated its defenses, the insurance company has waived or is estopped form raising new defenses.'). . . "
> (Exhibit 3 - slip opinion)

In the case at bar, Defendant has attempted their notice of non-party fault argument and it failed. Now they seek to come up with new excuses for their denial of benefits. Defendant has failed, waived or is estopped from asserted new defenses.

WHEREFORE Plaintiff, WARREN WOODS, by and through his attorneys, GURSTEN, KOLTONOW, GURSTEN, CHRISTENSEN & RAITT, P.C., requests this Honorable Court deny Defendant's motion.

Respectfully Submitted,

_____
Thomas W. James (P68563)
Attorney for Plaintiff

Date: _____