BRIEF IN OPPOSITION

I. Introduction

This action involves claims for personal protection insurance ("PIP") benefits payable to and for the benefit of Plaintiffs subsequent to a February 28, 2015 motor vehicle accident. Intervening Plaintiff provided physical therapy, chiropractic treatment, and transportation to Plaintiffs for their accident sustained injuries. Intervening Plaintiff submitted its claim to Defendant, which has refused to issue any payment on the claim.

The instant Motion is Defendant's request that this Court dismiss the entire action on the factual finding that Plaintiff Wells made a material misrepresentation in his application for the applicable policy such that rescission is appropriate. While Defendant also points to a fraud exclusion similar to that at issue in *Bahri, infra*, that discussion is moot, as Defendant simply points back to the alleged misrepresentation in the application as opposed to articulating some separate fraud perpetrated in the submission of the claim. Regardless of whether the defense is premised on the common law rescission defense or the purported fraud exclusion in the policy, the elements remain the same.

On those elements, it is impossible for Defendant to succeed. As detailed below, Defendant has not even proffered documentary evidence as to each of the elements of its defense, let alone demonstrated that there is no remaining issue of fact. Specifically, Defendant has failed to provide any evidence that there was any misrepresentation at all, that it was intentional, or that it was material to issuance of the policy.

II. Applicable Facts

Intervening Plaintiff concedes that Plaintiff Wells resided with his brother, Anthony Wells, and his nephew, Anthony Jones, at the time he applied for the insurance policy

through Defendant and at the time of the accident in question. However, there are additional facts of particular note relating to those individuals. First, Plaintiff's brother has his own vehicle and his own PIP insurance. (**Exhibit A, 8:1-10**). Second, Plaintiff's nephew does not have a license and does not drive. (**Exhibit A, 9:3-14**).

III. Standard for Summary Disposition

Rather than regurgitate the same law regarding summary disposition pursuant to MCR 2.116(C)(10) with which this Court is obviously familiar, Intervening Plaintiff will recite only the more specific and instructive case law pertaining to claims or defenses that involve a determination of intent, which is necessarily a determination of credibility.

Fraud "must be affirmatively established by clear and convincing evidence." *Grimshaw v. Aske*, 332 Mich. 146, 157; 50 N.W.2d 866 (1952). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial. Furthermore, where the truth of a material factual assertion of a moving party is contingent upon credibility, summary disposition should not be granted." *Foreman v. Foreman*, 266 Mich.App. 132, 135; 701 N.W.2d 167 (2005).

IV. Law and Argument

A. Rescission, generally.

There is no dispute that no-fault insurers are entitled to equitable remedies available under common law despite those remedies not being specifically incorporated into the No-Fault Act:

> "We granted leave to appeal to address **whether an insurance carrier may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance**, when the fraud was easily ascertainable and the claimant is a third party. In accordance with this Court's precedent in *Keys v. Pace,* 358 Mich. 74, 99 N.W.2d 547 (1959), we answer this question in the affirmative."

> *Titan Ins. Co. v. Hyten*, 491 Mich. 547, 550; 817 N.W.2d 562 (2012) (emphasis added).

Several distinct factual circumstances may give rise to equitable remedies, including fraud perpetrated in the procurement of an insurance policy:

> "Michigan's contract law recognizes several interrelated but distinct common-law doctrines— loosely aggregated under the rubric of 'fraud' — that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation. These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment." *Id*., at 555.

Here, Defendant claims that there was fraudulent misrepresentation in the application for the policy. **However, even where fraudulent misrepresentation is established, it does not necessarily follow that any particular equitable remedy is automatic or even should be ratified by the trial court**. Defendant has entirely ignored the equitable nature of its request such that it presupposes entitlement to rescission as an equitable remedy. To the contrary, establishing fraud entitles Defendant to some remedy, though not necessarily rescission, the most extreme remedy available:

> "***Rescission is not a matter of right, but rests in the sound discretion of the court. Each case of rescission must be decided on its own particular facts***." *Schnitz v. Grand River Ave. Development Co.*, 271 Mich. 253, 257; 259 N.W. 900 (1935) (citations omitted, emphasis added).

> "'An application to a court of equity for the rescission, cancellation, or delivering up of agreements and securities is not founded on an absolute right, as in case of an action at law on a contract or in tort, **but is rather an appeal to the sound discretion of the court, which in granting or refusing the relief prayed acts on its own notions of what is reasonable and just under all the surrounding circumstances**.'" *Kavanau v. Fry*, 273 Mich. 166, 171; 262 N.W. 763 (1935), quoting 9 C.J. p. 1161 (emphasis added).

As with all other equitable requests, this Court must assess the facts and circumstances

in determining an appropriate remedy, whether that remedy is rescission or something less severe, like retroactive payment of the premium difference. This determination must be made by weighing the equities such that the result is fair to all interested parties.

B. Defendant has failed to provide documentary evidence of several elements of the defense on which it relies.

As Defendant notes in its Brief, the elements for fraudulent misrepresentation are:

> "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." *Id.* (citations omitted).

For summary disposition to be appropriate, Defendant must provide **substantively admissible documentary evidence** for each element. See MCR 2.116(G)(6); *People v. Anderson*, 293 Mich.App. 33, 64; 809 N.W.2d 176 (2011).

The first element is the materiality of the alleged misrepresentation. Though Defendant has cited case law defining "material" for this purpose, it has produced **no documentary evidence in this regard whatsoever**. Instead, Defendant summarily concludes that "had Everest known that Ms. [sic] Wells lived with his brother, it would have charged a higher premium." There is no affidavit setting forth the underwriting factors or how much the premium would have increased. On the proffered evidence, this Court cannot possibly grant the Motion.

As an aside, this writer has a very good idea why Defendant has not provided the requisite affidavit. There may not actually be any human being who could testify in this regard. According to Paul Serota, the Vice President of Personal Auto for Arrowhead

General Insurance Agency, the individual identified through other depositions as the person most knowledgeable as to Defendant's underwriting policies, **the policies Defendant issues are almost never reviewed by a human being for the purpose of underwriting at all**. Moreover, he had no idea how premium rates were set other than that it is done by computer software. He could not testify as to what constitutes a "material" representation at all because he has no foundational knowledge as to how Defendant determines its premiums, **despite being the person in charge of underwriting Defendant's Michigan PIP policies**.

Even if Defendant had provided the requisite documentary evidence, it remains a question of fact as to whether Plaintiff Well's brother residing with him is material. Using Defendant's own citation again, the inquiry is whether the underwriter would have regarded the truth as "substantially increasing the chances of loss insured against." *Auto-Owners Ins. Co. v. Mich. Comm'r of Ins*, 141 Mich App 776, 781; 369 NW2d 896 (1985). **Under the undisputed facts, Plaintiff Wells's brother maintained his own PIP insurance, such that it is *impossible* for his residency to change the risk assumed by Defendant**. Even if the brother had been involved in an accident, Defendant would *never* be liable for his benefits because the brother's insurance would cover the loss by itself:

> "When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer." MCL 500.3114(1).

There is no coherent argument that the brother's residence ***significantly*** increased Defendant's risk where the risk literally ***did not change at all***. Because the brother

maintained his own PIP insurance, his residency with Plaintiff Wells could never be considered material to Defendant's assumed risk.

In fact, Defendant has provided no evidence that Plaintiff Wells made ***any*** representation to Defendant at all. **The application attached to Defendant's Motion does not contain signatures**. When asked about the application in his deposition, Mr. Serota testified that Defendant never even bothers to procure signed applications unless they have reason to make a specific request, and he confirmed that they never requested or obtained any executed application for Plaintiff Wells. Consequently, Defendant has no evidence ***whether*** any representation was made at all. Curiously, Defendant did not bother asking Plaintiff Wells any questions about his application, who filled it out, whether it was done through an agency, what the agent asked him, or what he told the agent in his deposition.

Finally, it is important to note that the affirmative defense claimed requires that Defendant prove Plaintiff Wells ***intentionally*** misrepresented his brother's residency on the application. The proofs for that element necessarily require a determination of credibility, an inquiry left to the exclusive province of the jury. See *Foreman, supra*. There is no evidence of what the agent asked Plaintiff Wells or what Plaintiff Wells told the agent. These facts are indispensable to determination of whether the alleged misrepresentation was intentional. Again, Defendant could have simply asked Plaintiff Wells at his deposition, but did not.

C. Even if Defendant had proven each element of fraudulent misrepresentation, rescission would be an unjust result on the facts at bar.

As cited above, equitable defenses apply to equitable remedies and the proper

result for a determination of an equitable claim involves balancing fairness. Even if Defendant had met its burden, it remains that rescission would be patently unfair under the circumstances.

Defendant never actually rescinded the policy at issue in a court of law, which is required for the rescission to be acknowledged. There is no dispute that Plaintiff Dunwoody was not involved in any alleged fraud and even if Defendant had rescinded the policy, he would have been entitled to benefits through the Michigan Assigned Claims Plan ("MACP"). Because Defendant failed to act on its equitable claim for more than a year, either it remains liable for Plaintiff Dunwoody's benefits or he will be personally liable for the tens of thousands of dollars in medical treatment that would have been covered by the MACP had he or his providers been notified that there was no coverage through Defendant within the statutory timeframe during which an application can be submitted to the MACP.

> "The doctrine of laches reflects 'the exercise of the reserved power of equity to withhold relief otherwise regularly given where in the particular case the granting of such relief would be unfair and unjust.' Laches differs from the statutes of limitation in that ordinarily it is not measured by the mere passage of time. Instead, when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay." *Lothian v. City of Detroit*, 414 Mich. 160, 168; 324 N.W.2d 9 (1982), quoting Walsh, Equity, Sec. 102, p. 472 (citations omitted).

Plaintiff Dunwoody was always entitled to PIP benefits from someone. Defendant would have this Court rule that through no fault of his own, Plaintiff Dunwoody is now precluded from obtaining benefits, which includes being personally liable for tens of thousands of dollars in medical treatment. This preclusion comes from Defendant's inaction. Defendant cannot possibly be entitled to "equitable" relief that would severely prejudice an entirely innocent person where it was Defendant's own inaction that caused that

prejudice.

There are also numerous facts showing that Defendant has requested equitable remedy but with unclean hands. First, the application itself is confusing as to what is required, as it does not have any separate field to enter the names of residents who do not drive the insured vehicle, but instead only has a field entitled "Drivers." Second, Mr. Serota has testified that Defendant does provide training and instruction to its independent agents, which one would assume would cover exactly what information is material on the application and how to properly list residents despite the confusing application.

It is also quite curious that in the half-dozen files this writer has with Defendant, **it purports to rescind every single applicable policy for the same reason as argued in this case; that the applicant failed to list a resident relative**. Perhaps Defendant should consider editing its own application before calling all of the applicants liars. The truth is that Defendant prefers to obtain misinformation with the end goal being to either collect premiums for policies on which it never has to issue any payment, or that it will simply rescind the policy if there is a loss.

D. Defendant's argument that Plaintiff Wells is estopped from arguing against the purported rescission due to his acceptance of the refunded premium amount is contrary to well-settled law.

Defendant cites three cases in support of this argument, but only one has any precedential value. The first, *Continental Assur Co. v. Shaffer*, 157 F.Supp. 829 (WD Mich 1957), is a federal court case regarding a life insurance policy that simply requires reimbursement of the policy premium for rescission to be effectuated. The case was a declaratory action brought by the insurer to effectuate rescission. ***After validating the***

***basis for the rescission*, the court determined that the insurer must refund the full premium to obtain the rescission**. Nowhere in the opinion does the court conclude that rescission is automatic once the premium is refunded.

The second case, *Howard v. Farm Bureau Insurance*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Dec 22, 2009 (Docket No. 289407), had to do with a homeowners insurance policy that had several undisputed false and material statements. The plaintiff argued that he merely signed the last page of the application and was not aware of the contents. **It is clear from reading the opinion that the insurance policy itself contained provisions regarding rescission, as it specifically references "terms invoked" upon cashing the check**. This is distinguishable from the instant case, where the policy does not contain any such terms and Defendant seeks a common law remedy; not merely to enforce the terms of its contract. The opinion further expressly relies on the fact that the **check itself contained the statement that it is being provided in consideration for rescinding the applicable policy**. The check at issue here contains no such statement.

Interestingly, **both of these cases specifically relied on the fact that the insured signed the application at issue despite not having personally written responses to the relevant questions**. To reiterate, Defendant does not even possess a signed application from Plaintiff Wells, nor did it bother to ask these questions at his deposition. Defendant cannot even prove that there was *any* representation, let alone a material and intentionally false one.

The only binding authority Defendant proffers, *Bertha v. Regal Motor Co.*, 180 Mich. 51, 146 N.W. 389 (1914), is over 100 years old and otherwise entirely inapposite to

this case. *Bertha* involved a release of liability by an injured person in favor of the applicable insurer in exchange for an undisputedly nominal value as compared to the injuries, but was executed before the extent of the injury was known. One of his arguments to circumvent the execution of the release was that the representative from the insurance company was not authorized to conduct that transaction. Defendant's quotation to the opinion is so misleading that it probably implicates sanctions under MCR 2.114(E). Where Defendant's quote trails off with an ellipsis, the Court went on to specify (as shown in bold):

> "It is a proposition of law too fundamental and too well established to require a citation of authorities that, if a party adopts even unauthorized acts of another, and has received and accepted benefits accruing therefrom, he thereby adopts and ratifies the instrumentalities by which the results were obtained, **and is estapped [*sic*] from denying that the agent was authorized to act**." *Id.*, at 57-58.

In other words, the injured person was not entitled to challenge the agent's authority to enter into the release on the insurer's behalf. **Nowhere does the opinion conclude that the injured person could not otherwise challenge the validity of the release**. Here, the issue is not whether Defendant had the *authority* to rescind the policy, but rather whether the rescission is valid.

Defendant would have this Court conclude that any insurer that sends a non-descript check to an insured after an accident entirely avoids liability under the policy regardless of the circumstances. Defendant's authority does not support this conclusion, which just so happens to be diametrically opposed with the on-point, binding case law cited above, concluding that equities must be weighed before equitable rescission can be granted.

If anything, Defendant's case law leads to more questions that require answers

before rescission could be effectuated; to wit, what amount in premiums did Plaintiff Wells pay and how much was refunded? Defendant has provided no evidence that the check it sent represents the entire premium amount paid, a fact on which Defendant's own authority expressly ruled that the *entire* amount must be refunded, not merely a portion.

E. Defendant's citation to *Bahri* is a red herring that has no bearing on the facts at bar.

Intervening Plaintiff has numerous arguments regarding *Bahri*, but there is no need to develop them because that case is simply irrelevant here. Defendant has alleged no fraud in the submission of the claim. Alleged misrepresentations in the application for the policy are an entirely different animal, and have been discussed at length.

V. Conclusion

WHEREFORE, Intervening Plaintiff respectfully requests that this Court DENY Defendant's Motion in its entirety.

Respectfully submitted,

/s/ Matthew Payne

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