STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR OAKLAND COUNTY

DDK ACQUISITIONS, LLC,
a Michigan limited liability company,

Plaintiff,

Case No. 2022-197897-CB
Hon. Victoria Valentine

vs.

THE HANOVER INSURANCE COMPANY,
a foreign corporation, and
BROWN & BROWN OF DETROIT, INC.,
a Michigan corporation,

Defendants.

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OPINION AND ORDER REGARDING MOTIONS FOR SUMMARY DISPOSITION FILED BY DEFENDANT BROWN & BROWN OF DETROIT, INC, DEFENDANT THE HANOVER INSURANCE COMPANY AND PLAINTIFF DDK ACQUISITIONS, LLC

At a session of said Court held on the
30th day of January 2024 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Motions for Summary Disposition brought under MCR 2.116(C)(10) by Plaintiff DDK Acquisitions, LLC ("DDK"); by Defendant Brown & Brown of Detroit, Inc. ("Brown & Brown"); and by Defendant The Hanover Insurance Company ("Hanover"), which relate to an insurance dispute. For the reasons set forth below, the Motions are DENIED because the Court finds there are genuine issues of material fact.

INTRODUCTION

Plaintiff owns a two-story masonry building located at 23800 Northwestern Highway in Southfield, Michigan, which it purchased from Presidential West, LLC. At the time of Plaintiff's purchase, the building was under renovation due to having sustained a water loss on or about June 5, 2020 ("first loss").[1] The then owner, Presidential West, LLC, entered into a settlement for this first loss in which Lloyds of London paid $1,615,454.46.[2] Presidential West then sold the settlement proceeds and the building to Plaintiff.[3]

In December 2020, Plaintiff took out a builder's risk policy with Defendant Hanover through an independent insurance agent at Defendant Brown & Brown of Detroit, Inc. in connection with the building's renovation. This builder's risk policy covered the construction process after the first loss.[4] It provided coverage from December 18, 2020,

[1] Brown & Brown's MSD Exhibit A, Schedule of Coverage and Exhibit B, Email dated April 12, 2022.
[2] Brown & Brown's MSD Exhibit D, Release and Settlement Agreement.
[3] Brown & Brown's MSD Exhibit C, Assignment of Accrued Claim and Right of Action.
[4] Brown & Brown's MSD Exhibit E, Commercial Lines Policy Common Declarations.

through December 18, 2021,[5] which was subsequently extended for six months through June 18, 2022.[6]

Brown & Brown was the insurance agent involved in this builder's risk insurance policy. The underlying issue relates to the following question asked in the Application for Builder's Risk Insurance concerning the term "structure itself," which was answered "no" by Brown & Brown, (not Plaintiff):

Has the builder/remodeler and/or structure itself had any single loss or damage over $10,000 in the last 3 years (Include insured/uninsured losses/damages) *	No If "Yes", include the date, description, and amount of each loss below *

This dispute in turn relates to the fact that, prior to the issuance of the policy at issue, the building had sustained the first loss for which insurance proceeds were paid in the amount of approximately $1.6 million dollars, but which were not disclosed in the Hanover application. Based on this answer in the application, Hanover subsequently rescinded the policy after it paid $67,622.23 to Plaintiff DDK. This lawsuit and counterclaim ensued.

FACTUAL TIMELINE:

- 6/5/2020-The building incurred a first loss at which time Plaintiff did not own the building. The damage to the building consisted of ceiling tiles, flooring, drywall.[7] Loss was to the inside of the building.[8]

[5] Brown & Brown's MSD Exhibit E, Commercial Lines Policy Common Declarations.
[6] Brown & Brown's MSD Exhibit F, Endorsement.
[7] Brown & Brown's MSD Exhibit L, Kennedy Dep, pp 13-16.
[8] DDK's MSD Exhibit 5, Pilarski dep, p 24.

- At the time of the first loss, the building was owned by Presidential West LLC and Defendant Brown & Brown was the owner's insurance agent who assisted with the claim to Lloyds of London.[9]

- Settlement regarding first loss resulted in Lloyds of London paying $1,615,454.46.[10]

- Plaintiff purchased the building on 12/15/2020, which included the rights to the accrued insurance claim from the 6/5/2020 water loss.[11]

- Plaintiff then retained Brown & Brown to assist in insuring the building. In December 2020, Brown & Brown, submitted an application for builder's risk insurance to Hanover on behalf of Plaintiff.[12]

- Plaintiff DDK was not provided with a copy of the Application to review, approve, and sign before its submission to Hanover.[13]

- Brown & Brown answered "no" to the pivotal question at issue:[14]

Has the builder/remodeler and/or structure itself had any single loss or damage over $10,000 in the last 3 years (Include insured/uninsured losses/damages) *	No If "Yes", include the date, description, and amount of each loss below *

- Hanover issued the risk policy for a policy period beginning on 12/18/2020 through 12/18/2021.[15]

- This policy covered the construction process after the first loss.

- 11/11/2021 Brown & Brown advised Hanover that construction on property at issue was delayed due to pending insurance **proceeds**.[16]

- Hanover agreed to extend coverage through 6/18/2022.[17]

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[9] DDK's MSD Exhibit 4, 9/9/2020 email from Brian Pilarski.
[10] Brown & Brown's MSD Exhibits B & D; DDK's MSD Exhibit 2.
[11] Brown & Brown's MSD Exhibits C & D.
[12] Brown & Brown's MSD Exhibit G, Application.
[13] DDK's MSD Exhibit 5, Pilarski Dep, pp 23-33; Exhibit 6, Kennedy Dep, p 26.
[14] Brown & Brown's MSD Exhibit G, Application.
[15] Brown & Brown's MSD Exhibit E.
[16] Brown & Brown's MSD Exhibit H, email (emphasis added).
[17] Brown & Brown's MSD Exhibits I, email dated 11/18/2021, Exhibit F, Endorsement of change.

- 11/30/21-2nd water loss.

- Plaintiff DDK notified Hanover and made a claim.[18]

- Initially, Hanover accepted coverage, issued payment of $67,622.23, advised that coverage was not the issue, and stated that the only disputed issue was verifying damage.[19]

- Plaintiff DDK disagreed with the estimate of the amount of loss and demanded an appraisal.[20]

- 6/13/2022 Hanover rejected appraisal demand, claiming now it was investigating coverage.[21]

- 6/30/2022 Hanover sent Plaintiff a letter attempting to unilaterally rescind Policy on grounds of answering "no" in application, claiming this was a material misrepresentation.[22]

- Plaintiff then filed this lawsuit against Defendants Brown & Brown and Hanover.

- Hanover filed a Counterclaim, seeking recission of the policy.

- Each party filed its respective Motion for Summary Disposition under MCR 2.116(C)(10).

STANDARD OF REVIEW

Summary disposition may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "A (C)(10) motion for summary disposition 'tests the factual sufficiency of the complaint.' *Maiden v Rozwood*,

[18] DDK's MSD Exhibit 8, Sworn Statement in Proof of Loss.
[19] DDK's MSD Exhibit 9, email dated 4/8/2022.
[20] DDK's MSD Exhibit 10, 5/20/2022 Appraisal Demand.
[21] DDK's MSD Exhibit 11, email.
[22] DDK's MSD Exhibit 12, letter.

461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating these motions, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties ... in the light most favorable to the party opposing the motion." *Id*. (citation omitted)." *Swoope v Citizens Ins Co of the Midwest,* __Mich App__ (rel'd 1/24/2024).

This motion tests the factual sufficiency of the complaint and "must specifically identify the issues as to which the moving believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)]." MCR 2.116(G)(3)(b). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith*, 460 Mich at 455 (citations omitted; emphasis added).

MOTIONS

Defendant Brown & Brown's Motion for Summary Disposition Under (C)(10) seeks dismissal of Plaintiff's Complaint against it.

Defendant Brown & Brown argues:

- The application used was not a Hanover application.
- Hanover's application did not ask the question at issue.
- Had the Hanover application been used, there would be no basis to rescind the policy.[23]

[23] Brown & Brown's MSD Exhibit M, Deposition of Vargas, p 44.

- It was the claims department, not the underwriting department, that wanted to rescind the policy.[24]
- **"Structure itself"** regarding builder's risk means roof, load-bearing walls, walls, foundation, basement, pillars—structural components of a building are the structure itself.[25]
- In the builder's industry and with the application at issue, structure refers to the structural components of a building and not to the nonstructural components.[26]
- There was no material misrepresentation made in the application.
- There was no material misrepresentation because Hanover underwriting never assessed whether "misrepresentation" was material and because Hanover knew of first loss before it extended policy regarding second loss.
- Plaintiff DDK is the innocent party.
- There was no breach of duty owed to Plaintiff.

Hanover's Motion for Summary Disposition under (C)(10) seeks recission of the policy at issue and reimbursement of the $67,622.23 payment to Plaintiff DDK.

Hanover argues:

- Recission of the policy is warranted because:
  - The Application contained a misrepresentation.
  - The misrepresentation was material.
- DDK must reimburse Hanover for the $67,622.23 paid prior to recission of the Hanover Policy.

Plaintiff's Motion for Summary Disposition under (C)(10), seeks dismissal of Defendant Hanover's counterclaim and affirmative defenses; a declaration that Hanover breached the contract by rescinding the policy and refusing to engage in statutory appraisal; and an order compelling Hanover to participate in statutory appraisal.

Plaintiff argues that:

- Brown & Brown was acting within its express authority as Hanover's Agent when it completed the application.

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[24] Brown & Brown's MSD Exhibit M, Deposition of Vargas, p 48.
[25] Brown & Brown's MSD Exhibit L, Deposition of Kennedy, p 14.
[26] Brown & Brown's MSD Exhibit L, Deposition of Kennedy, pp 16 & 20.

- Brown & Brown's agents assert there is no misrepresentation in the Application regarding whether the "structure itself" had a single loss or damage over $10,000 in the prior 3 years. Brown & Brown's Agents testified that:
    - The previous loss was inside the building.
    - Structure is exterior walls, roof.
    - The first loss had no damage to the structure itself.
- Brown & Brown's knowledge is imputed to Hanover; therefore, the alleged misrepresentation cannot be material as there are no allegations that Brown & Brown acted outside the scope of its agency authority.
- Hanover cannot demonstrate a "misrepresentation" was material.
- Equities do not balance in favor of recission-
    - Plaintiff is the innocent party as it did not provide inaccurate information to Brown & Brown nor was it given the opportunity to review, approve and sign a copy of the Application.
    - Plaintiff discusses the *Bazzi* factors, set forth in Justice Markman's concurrence in *Farm Bureau Gen Ins Co of Michigan v ACE Am Ins Co*, 503 Mich 903, 906-07 (2018):
        - With reasonable effort, Hanover would have discovered the prior loss when the policy was being renewed. See 11/12/21 email from Brown & Brown to Hanover regarding waiting on insurance proceeds.[27]
        - Brown & Brown was Hanover's agent for negotiating and effecting policies issued in Hanover's name.
        - Hanover, not Plaintiff DDK acted negligently.
        - Both Plaintiff DDK and Hanover possess an alternative avenue for recovery—both can pursue recovery against Brown & Brown. However, DDK's alternative avenue for recovery against Brown & Brown does not permit Plaintiff DDK to recover the penalty interest Hanover would owe under MCL 500.2006 for Hanover's failure to timely pay.
        - Enforcement of the policy will not transfer liability to Plaintiff DDK, who is the innocent party.

[27] Brown & Brown's MSD Exhibit H, email (emphasis added).

ANALYSIS

Was Brown & Brown acting as the agent for Plaintiff DDK or Defendant Hanover when it submitted the unsigned application to Hanover? If Brown & Brown was Hanover's agent, Brown & Brown's knowledge—i.e. prior loss- may be imputed to Hanover.

The Court finds there is a question of fact as to whether Brown & Brown was acting as a dual agent.

It has long been the common law of this state that, "[w]hen an insurance policy 'is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer.'" *Genesee Foods Servs., Inc. v Meadowbrook, Inc.*, 279 Mich App 649, 654 (2008). Plaintiff relies on the unpublished Court of Appeals opinion *Pierce & Pitt Trucking, Inc v Secura Ins,* 2022 WL 1196777,[28] *lv den,* 987 NW2d 204 (2023), which cites to *Genesee Foods Services Inc v Meadowbrook, Inc*, 279 Mich App 659, 656-657 (2008) and which nevertheless affirmed the trial court's deviation from this law.

In *Pierce & Pitt Trucking,* the Court of Appeals affirmed the trial court's conclusion that a **dual agency** was established, and found that the facts and circumstances warranted the trial court's deviation from the general rule that an agent acts on behalf of the insured. There, the trial court found the following provisions of the Agency Agreement significant:

[28] While unpublished decisions of this Court are not binding, MCR 7.215(C)(1), they can be "instructive or persuasive," *Paris Meadows, LLC v. City of Kentwood*, 287 Mich App 136 n 3, (2010).

- it allowed MCIA (purported agent) to solicit types of insurance contained in Secura's (the insurer's) commission schedule;
- it authorized MCIA to bind Secura to contracts of insurance;
- it allowed MCIA to collect monies on Secura's behalf and hold the funds as a trustee;
- it authorized the payment of commissions upon certain conditions;
- it prevented MCIA from appointing agents or accepting business from an insurance broker unless Secura gave its written authorization;
- it characterized MCIA as an independent contractor and rejected the creation of an employer/employee relationship; and
- it controlled the payment of the initial premium.

Similar to the facts in *Pierce & Pitt Trucking,* the terms of the Agency Agreement[29] between Hanover and Brown & Brown:

- allowed Brown & Brown to solicit, **bind,** issue and deliver policies of insurance Hanover was licensed to write for product lines designated in the "Schedule of Authority" and for which a commission rate was specifically listed in the "Schedule of Commissions" attached to and made part of the agreement, which was limited by Hanover's underwriting rules and practices.[30]

These provisions provide as follows:

1.2 **Your Authority.** On the effective date of this Agreement, you become an Agent of the Company with authority to solicit, bind, issue and deliver policies of insurance that we are licensed to write for the product line(s) designated in the Schedule of Authority and for which a commission rate is specifically listed in the Schedule of Commissions attached to and made a part of this Agreement.

1.3 **Limitations on Your Authority.** Your authority is limited by:

a. Our underwriting rules and practices which we communicate to you and which may change from time to time. Such changes do not constitute "amendments" and are therefore not subject to Section 13 of this Agreement. We shall keep you informed of any changes by bulletins, documents and other notices as we may transmit to you from time to time. As a result of changes in our business plan, and subject to applicable law, we may choose to suspend, limit or cease writing certain lines, classes or groups of business.

b. The terms, conditions and provisions set forth in this Agreement and in any schedules, addenda and amendments attached to and made part of this Agreement.

[29] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD.
[30] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶¶1.2 & 1.3, bates 005.

- allowed Brown & Brown to collect monies on Hanover's behalf and hold the funds as Hanover's fiduciary:[31]

2.10 **Fiduciary Responsibilities.** All premiums and/or other monies paid to you or collected by you in connection with our policies ("Funds") are our property. Commissions, if any, payable out of such Funds are debts we owe you. You are our fiduciary and you will hold any and all such Funds in your fiduciary capacity. You are responsible for maintaining and providing to us an accurate accounting of all such Funds and to pay on a timely basis all Funds due to us in accordance with this Agreement.

- characterized Brown & Brown as an independent contractor, disavowed any employer/employee relationship, and purported to permit Brown & Brown to exercise its own judgment and discretion in the conduct of its business so long as Brown & Brown's judgment and discretion was consistent with the terms of the Agency Agreement:[32]

2.9 **Independent Contractor Status.** You are an independent contractor, not our employee, and you are expected to exercise your own judgment and discretion in the conduct of your business, subject to the terms of this Agreement and the requirements of law.

- authorized the payment of commissions upon certain conditions:[33]

4.1 **Commissions.** You are entitled to commission on premiums paid to us at the commission rate indicated in our Schedule of Commissions. You do not earn commission on premium adjustments of retrospectively rated policies.

- controlled the payment of the initial premium and, if Brown & Brown failed to collect any premiums, retained the right to collect such premiums in any manner it sought fit:[34]

SECTION 5: PREMIUM COLLECTION.

5.1 **Agency Billed Policies.** Whenever Agency Billing procedures are used:

d. If you fail to collect any premiums in accordance with the terms of this Agreement, we shall have the right to collect such premiums in any manner we see fit. Such action does not relieve you of your liability under this Agreement to pay us all other premiums. No commissions are paid on agency-billed premium we collect.

[31] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶2.1, bates 006.
[32] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶2.9, bates 006.
[33] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶4.1, bates 007.
[34] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶¶ 5.1d & 5.2a, bates 008.

Agreement to pay to us all other premiums. No commissions are paid on agency-billed premium we collect.

5.2 **Company Billed Policies.** Whenever Company Billing procedures are used:

a. Unless we specify otherwise in writing, all applications and policies you submit must be accompanied by the initial premium owed to us without any deduction for commission.

b. We shall pay commissions to you within fifteen (15) days after the last day of the commission month in which we receive and record applicable premiums as paid.

c. We shall identify you as the Agent on all pertinent policies, premium notices, renewal certificates and cancellation notices.

- prohibited Brown & Brown from using branch or affiliated agency locations to sell Hanover's products and services without Hanover's prior written consent.[35]

2.6 **Other Locations.** You are not permitted to make our products available to agents or producers doing business from locations other than your principal office without our prior written consent. Using branch or affiliated agency locations to sell or service our products requires our prior written consent.

In addition, the Agency Agreement:

- controlled the manner in which Brown & Brown was permitted to advertise Hanover's products and services.[36]

SECTION 12: ADVERTISING.

12.1 **With Company Approval.** You may broadcast, publish and distribute materials referring to us and to our products and services; provided, however, that you shall first secure our written authorization with respect to such materials that were not prepared by us.

12.2 **Authorization for Changes.** With respect to materials which were prepared by us and which refer to us and to our products and services, you shall not alter any such materials, and thereafter broadcast, publish or distribute them as altered without first obtaining our written authorization.

- stated that Hanover would identify Brown & Brown as "Agent" on all pertinent policies, premium notices, renewal certificates and cancellation notices.[37]

5.2 **Company Billed Policies.** Whenever Company Billing procedures are used:

a. Unless we specify otherwise in writing, all applications and policies you submit must be accompanied by the initial premium owed to us without any deduction for commission.

b. We shall pay commissions to you within fifteen (15) days after the last day of the commission month in which we receive and record applicable premiums as paid.

c. We shall identify you as the Agent on all pertinent policies, premium notices, renewal certificates and cancellation notices.

d. If this Agreement is terminated and you are in compliance with all its terms and conditions, we shall furnish you,

As Hanover points out, however, *Pierce & Pitt Trucking*, is distinguishable because:

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[35] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶2.6, bates 006.
[36] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶¶12.1-12.3, bates 0011-012.
[37] DDK's MSD exhibit 1 attached to its Response to Hanover's MSD, ¶5.2c, bates 008.

- Brown & Brown's authority was limited by Hanover's underwriting rules and practices.
- Hanover-Brown & Brown's Agency Agreement did not limit Brown & Brown's ability to appoint agents or accept business from other insurance brokers without Hanover's authorization.

The Court, therefore, finds that based on the above provisions set forth in the Brown & Brown and Hanover's Agency Agreement, there is a question of fact as to whether, under the pertinent law, Brown & Brown was acting as a dual agent. If Brown & Brown was acting as a dual agent, then Brown & Brown's knowledge may be imputed to Hanover. *See New Props., Inc. v. George D. Newpower, Jr., Inc.*, 282 Mich App 120, 134 (2009) ("When a person representing a corporation is doing a thing which is in connection with and pertinent to that part of the corporation business which he is employed, or authorized or selected to do, then that which is learned or done by that person pursuant thereto is in the knowledge of the corporation."). Knowledge imputed to Hanover may then defeat Hanover's claim of misrepresentation.

Was there a misrepresentation and if so, was it material?

Michigan law supports rescission of an insurance policy when the insured makes a material misrepresentation on the policy application. *Oade v Jackson Nat'l Life Ins.* Co., 465 Mich 244, 252-253, (2001). A misrepresentation "is material if, given the correct information, the insurer would have rejected the risk or charged an increased premium." *Id.* at 254.

Here, the issue regarding misrepresentation relates to Brown & Brown's answer to the Application's question regarding the undefined term "structure itself." It is undisputed

that Hanover's own application does not inquire about "structure itself" and that Hanover was informed about "insurance *proceeds*" before it granted Plaintiff DDK the extension.

The Court finds that there is a question of fact as to whether there is a misrepresentation in the builder's risk application policy, which uses the undefined term "structure itself."

Contracts must be construed as a whole. *Village of Edmore v Crystal Automation Sys, Inc*, 322 Mich App 244, 262 (2017). Courts must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468 (2003).

"An insurance policy is enforced in accordance with its terms. Where a term is not defined in the policy, it is accorded its commonly understood meaning." *Twichel v MIC General Ins Corp*, 469 Mich 524, 534 (2004).

"A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases used in the contract." *Auto Owners Ins Co v Seils*, 310 Mich App 132, 145 (2015). However, "the dictionary should be seen as a tool to facilitate [the court's interpretative judgments], not conclusively resolve linguistic questions." *Estate of Erwin*, 503 Mich 1, 19-20 (2018).[38]

"[T]he failure to define a contractual term does not render a contract ambiguous." *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 115 (2011),

[38] Although *Erwin* involved the interpretation of statutory language, rules of statutory construction are commonly adopted by courts as rules of contract construction. *See e.g., Klapp*, 468 Mich at 468.

remanded on other grounds, 493 Mich 859 (2012). "To determine the ordinary meaning of a term, [this Court] may refer to a dictionary." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53 (2006). "Terms in a particular trade are given their natural and ordinary meaning in that trade." *Wells Fargo Bank, NA*, 295 Mich App at 115 (quotation marks and citation omitted). Additionally,

> [p]arol evidence is always receivable to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical. Similarly, where a new and unusual word or phrase is used in a written instrument, or where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, it is proper to receive extrinsic evidence to explain or illustrate the meaning of that word or phrase. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally. *Wells Fargo Bank, NA*, 295 Mich App at 115 (quotation marks and internal citations omitted).

Given the facts at issue in this case, the Court concludes that the terms "structure **itself**" used in the application are technical terms. Hanover cites dictionary definitions of the term "*structure*" (not structure itself) and argues that structure means the building itself. Brown & Brown relies on the testimony of Brian Pilarski (current senior VP and client executive for commercial risk and insurance placement at Kapnick Insurance Group and former sales agent at Brown & Brown) and Patrick Kennedy (former marketing leader at Brown & Brown) that the term "*structure itself"* means load-bearing walls, foundation, roof, and structural components of the building—not the interior of the building. Thus, the court finds that the term "structure itself" is subject to more than one interpretation, thereby

rendering the contract ambiguous. See *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220 (2019). Because the parties' intent is not clear from the plain language of the application, there are questions of fact for the trier of fact. See *Farmer's Ins Exch v Kurzmann*, 257 Mich App 412, 418 (2003) ("Ambiguities in a contract generally raise questions of fact for the jury[.]". Therefore, the Court finds that there is a question of fact as to whether there was a misrepresentation.

Based on the above, the issues of whether the purported misrepresentation was material or whether the equities favor recission in light *of Bazzi v Sentinel Ins Co,* 502 Mich 390 (2018) will not be addressed at this time.[39]

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[39] In *Bazzi v Sentinel Ins Co,* 502 Mich 390 (2018) our Michigan Supreme Court clarified its opinion in *Titan Ins CO v Hyten,* 491 Mich 547 (2012), and held that while the innocent-third-party rule did not survive, recission is an equitable remedy and insurers did not have an absolute right to rescind an insurance policy with regard to third parties. Defendant Hanover argues that *Bazzi v Sentinel Ins Co, supra* does not apply here because Plaintiff DDK is the insured and is therefore a first party to the insurance policy.

The Court recognizes that the facts here present an unusual situation. Hanover is correct that Plaintiff DDK is not a third party to the insurance *policy*—it is the insured. The Court, however, also recognizes that Plaintiff DDK neither signed nor was apprised of the contents of the Application submitted to Hanover by Brown & Brown. Recently, in *Howard v LM General Ins,* ___Mich App___, lv den 512 Mich 929; 994 NW2d 514 (2023) our Court of Appeals held that recission of the insurance contract based the misrepresentation of one insured would be inequitable as to the innocent coinsured:

> [W]hile plaintiff is party to the insurance contract, she is an innocent third party to Bartell's misrepresentations. In *Bazzi v Sentinel Ins Co*, 502 Mich. 390, 407-410, 919 N.W.2d 20 (2018), the Supreme Court held that, while an individual's claim as an innocent third party does not preclude an insurer from seeking rescission for fraud, the existence of fraud does not give the insurer an absolute right to rescission. Rather, rescission is equitable in nature and "is granted only in the sound discretion of the court." *Univ of Mich. Regents v Mich. Auto. Ins. Placement Facility*, —— Mich.App. –––, ––––; —— N.W.2d ––––, 2022 WL 188072 (2022) (Docket No. 354808); slip op. at 3. Trial courts are to "balance the equities" when determining whether an insurer may rescind an insurance policy. *Bazzi*, 502 Mich. at 410, 919 N.W.2d 20 (quotation marks and citation omitted). "Rescission should not be granted when the result would be inequitable or unjust." *Id.* "[T]he party seeking rescission has the burden of establishing that the remedy is warranted." *Farm Bureau Gen. Ins. Co. of Mich. v ACE American Ins. Co.*, 337 Mich App 88, 100, 972 N.W.2d 325 (2021).

CONCLUSION

When construing the motions in the light most favorable to the non-moving parties, the Court finds questions of material fact exist as to whether Brown & Brown was acting as a dual agent and whether there was a misrepresentation in the Application. Accordingly,

Defendant Brown & Brown's Motion for Summary Disposition Under (C)(10), which seeks dismissal of Plaintiff's Complaint against it is DENIED.

Hanover's Motion for Summary Disposition under (C)(10), which seeks recission of the policy at issue and reimbursement of the $67,622.23 payment to Plaintiff DDK is DENIED.

Plaintiff's Motion for Summary Disposition under (C)(10), which seeks dismissal of Defendant Hanover's counterclaim and affirmative defenses; a declaration that Hanover breached the contract by rescinding the policy and refusing to engage in statutory appraisal; and an order compelling Hanover to participate in statutory appraisal, is DENIED.

IT IS SO ORDERED.

This is not a final order and does not dispose of the case.

In a concurrence in *Farm Bureau Gen Ins Co of Mich*, 503 Mich. 903, 919 N.W.2d 394, former Justice MARKMAN articulated five nonexclusive factors courts should consider in "innocent-third party cases" to determine whether rescission would be equitable. We adopted these factors in *Pioneer State Mut. Ins. Co. v Wright,* 331 Mich App 396, 411, 952 N.W.2d 586 (2020). Applied to the facts of this case, the factors compel the conclusion that rescission would not be equitable as to plaintiff. (footnotes omitted).

/s/Victoria A. Valentine

Date: 1/30/24