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STATE OF MICHIGAN
IN THE SUPREME COURT

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

Defendants.

Supreme Court No._____

Court of Appeals No.: 352411

Wayne County Circuit Court
Civil Action No.: 18-002518-NI

# DEFENDANT-APPELLANT MOHAMMED ZAKIR'S APPLICATION FOR LEAVE TO APPEAL

*** ORAL ARGUMENT REQUESTED ***

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## STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND RELIEF SOUGHT

Pursuant to MCR 7.305(A)(1)(a) and 7.303(B)(1), Defendant/Appellant Mohammed Zakir applies for leave to appeal from the decision of the Michigan Court of Appeals dated May 6, 2021. This Court of Appeals opinion simultaneously did two inconsistent things: First, it affirmed a judgment entered by the Wayne County Circuit Court on December 5, 2018, that rescinded no-fault coverage of Plaintiff/Appellee Adora Wilmore-Moody on the basis of misrepresentations in her application for no-fault coverage; it accordingly dismissed Plaintiff/Appellee's first party no-fault case as a consequence of those misrepresentations. This appeal does not ask the Court to reverse that decision. Second, it *reversed* an Order of Dismissal that had been entered by the Wayne County Circuit Court on January 16, 2019, dismissing Plaintiff/Appellee's third-party no-fault claim due to her lack of essential no-fault insurance coverage, thereby reinstating a no-fault claim despite the party's lack of no-fault coverage.

Mr. Zakir requests that this Court grant leave to appeal, reverse the Court of Appeals decision as it relates to reinstatement of Plaintiff/Appellee's third-party no-fault claim, and affirm the Circuit Court's Order of Dismissal with prejudice of Plaintiff/Appellee's third-party no-fault claim.

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## GROUNDS FOR GRANTING LEAVE TO APPEAL UNDER MCR 7.305(B)

Defendant/Appellant Mohammed Zakir asks this Court to address legal principles of major significance to the state's jurisprudence as contemplated by MCR 7.305(B)(3) and to reverse a clearly erroneous decision of the Michigan Court of Appeals that will cause material injustice as contemplated by MCR 7.305(B)(5)(a). In addition, the Court of Appeals decision appealed from conflicts with other decisions of the Court of Appeals as well as long-standing Michigan jurisprudence.

The Court of Appeals decision wrongly violated the "compulsory" mandate of the Michigan No-Fault Insurance Act, MCL§ 500.3101, *et seq*., by permitting Plaintiff/Appellee, whose no-fault insurance coverage was rescinded due to her own misrepresentation in the application, to nevertheless pursue a third-party no-fault claim against Defendant/Appellant. Under Michigan law, only motorists who have no-fault insurance in place are legally permitted to pursue first party and/or or third-party no-fault claims; yet, the Court of Appeals eliminated this requirement for Plaintiff/Appellee and opened a floodgate of opportunities for other motorists who lack, or lose, this mandatory coverage. The tremendous volume of no-fault litigation statewide makes this issue timely and far-reaching, and necessitates Supreme Court review of this issue to reaffirm not only the "compulsory" mandate of Michigan's No-Fault Act but also to reaffirm the legal consequences motorists face where, as here, they lose their no-fault insurance coverage through misrepresentation in the application or other reasons.

In addition, the Court of Appeals decision appealed from is clearly erroneous and will cause material injustice to the citizens of the State of Michigan. Long-standing Michigan law of rescission holds that a rescinded contract is void *ab initio*, as if it never existed; contrary to this,

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the Court of Appeals ruling wrongly resurrected the rescinded Plaintiff/Appellee's no-fault coverage purely to allow her to pursue her third-party claim.

Further, the Court of Appeals ruling has caused and will continue cause material injustice. The Court of Appeals has allowed individuals to benefit from their misrepresentation, it overrode the No-Fault Act's "compulsory" insurance mandate, and it contradicted decades of established Michigan law that rescinded contracts are abrogated and have no continuing effects or use thereafter. The Court of Appeals decision incentivizes fraud and misrepresentation. It threatens widespread, costly implications by failing to halt unlawful third-party no-fault claims and litigation since the Court of Appeals ruling invites people to benefit from their misrepresentations and pursue third-party no-fault claims. None of this was permitted under the letter and spirit of the Michigan No-Fault Act. Further, none of this should be permitted under well- established law involving rescission of contracts. Resources of the courts are at stake as lawsuits are encouraged that should otherwise not be pursued, as a matter of law and equity.

Finally, in addition to conflicting with the Michigan No-Fault Act and prior precedent, the decision of the Court of Appeals conflicts with other decisions of the Court of Appeals, as explained in this Brief.

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# QUESTIONS PRESENTED FOR REVIEW

1. Was it proper for the Court of Appeals to effectively resurrect a rescinded policy of no-fault insurance, after rescinding the policy due to misrepresentation, to enable Plaintiff/Appellee to bring a third-party no-fault claim against Defendant/Appellant Mr. Zakir?

   Plaintiff says "Yes."
   Defendant Zakir says "No."
   The Court of Appeals said "Yes."

2. By allowing an uninsured motorist, whose coverage was rescinded due to misrepresentations in the application, to nevertheless maintain a third-party no-fault claim, did the Court of Appeals violate the Michigan No-Fault Acts's mandate that motorists be insured as a predicate to recovering no-fault benefits?

   Plaintiff says "No."
   Defendant Zakir says, "Yes."
   The Court of Appeals said "Yes."

3. Was it proper for the Michigan Court of Appeals to create an incongruity by rescinding the Plaintiff-Appellee's policy of no-fault insurance for one purpose, but, at the same time, resurrecting the policy for another purpose?

   Plaintiff says "Yes."
   Defendant Zakir says "No."
   The Court of Appeals said "Yes."

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# CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

## A. The Motor Vehicle Accident and Lawsuit

On April 6, 2017, a motor vehicle accident occurred between Plaintiff/Appellee Ms. Wilmore-Moody and Defendant/Appellant Mr. Zakir. **Exhibit 1**, Complaint, ¶8. While Ms. Wilmore-Moody operated her motor vehicle, Mr. Zakir, driving a rideshare vehicle, rear-ended her vehicle. Plaintiff/Appellant alleges that she was injured as a result. *Id.* ¶9.

Plaintiff/Appellee filed a third-party no-fault lawsuit against Mr. Zakir in the Wayne County Circuit Court. **Exhibit 1**, Complaint. She also sued, *inter alia*, her insurance company, Everest National Insurance Company, ("Everest") for first party no-fault benefits. *Id*.

## B. Plaintiff/Appellee's Jeopardized Insured Status Due to Misrepresentation

At the time of this accident, Plaintiff/Appellee Wilmore-Moody had a policy of no-fault insurance through Everest. **Exhibit 1,** Complaint. Because of misrepresentations in the application on part of Ms. Wilmore-Moody, however, Everest sought to rescind the coverage. *See, eg,* **Exhibit 9**, Court of Appeals ruling May 6, 2021, at *4.

During the proceedings at the trial court level, Everest brought a Motion for Summary Disposition, seeking dismissal of Ms. Wilmore-Moody's PIP claims as well as rescission of the no-fault policy it previously issued to her on the basis of material misrepresentations she made in her application. The misrepresentations were that she failed to disclose the presence of family members and others within her household, despite the application requesting this information, which had an impact on her policy premium. *See, e.g.,* **Exhibit 9** at * 8, Ruling of the Court of Appeals; **Exhibit 2**, Defendant Zakir's Motion for Summary Disposition.

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C. **Defendant/Appellant Zakir's Motion for Summary Disposition**

Everest later filed a motion for summary disposition seeking dismissal of plaintiff's Complaint based on material misrepresentations in the application. The trial court granted the motion, and rescinded the policy, which later formed the basis for a Motion for Summary Disposition filed by Defendant/Appellant Mr. Zakir. **Exhibit 2**, Defendant Zakir's Motion for Summary Disposition. Defendant/Appellee Zakir sought summary disposition as to Plaintiff/Appellee Wilmore-Moody's third-party no-fault claim in response to her loss of no-fault insurance from the trial court's ruling as to Everest. At a hearing on January 16, 2019, the trial court granted Defendant/Appellant Mr. Zakir's motion. **Exhibit 4**. Thereafter, the trial court entered an Order dismissing claims against Mr. Zakir. **Exhibit 5.**

D. **Appeal to and Decision from Michigan Court of Appeals**

Plaintiff/Appellee Ms. Wilmore Moody filed a timely appeal to the Michigan Court of Appeals, challenging the trial court's grant of the motions for summary disposition filed by Everest and Mr. Zakir and the dismissal of her first and third party no-fault claims. In a ruling, dated May 6, 2021, the Michigan Court of Appeals *affirmed* the trial court as to dismissal of Ms. Wilmore-Moody's first party no-fault claims, yet it *reversed* the trial court's dismissal of the third-party no-fault claims. **Exhibit 9**. Mr. Zakir now applies to the Michigan Supreme Court for leave to appeal that Court of Appeals ruling as to him.

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# ARGUMENT

## I. THE COURT OF APPEALS WRONGLY VIOLATED THE MICHIGAN NO-FAULT ACT'S "COMPULSORY" MANDATE AND NULLIFIED CONSEQUENCES PROVIDED IN THE ACT FOR THOSE UNINSURED.

### A. Michigan Law Mandates That All Drivers Must Have No-Fault Coverage

The Michigan No-Fault Insurance Act, MCL§ 500.3101, *et seq*., mandates that all Michigan drivers must have no-fault insurance coverage in place. *See*, MCL §500.3101(1).[1]

For decades, this Court has recognized and reaffirmed the "compulsory" nature of this coverage for motorists. In *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517, 523 (2010), this Court stated: "In 1973, the Michigan Legislature adopted the no-fault insurance act, MCL 500.3101 et seq. The act created a **compulsory** motor vehicle insurance . . .." 487 Mich at 189 (emphasis added). *See also, Clevenger v Allstate Ins Co*, 443 Mich 646, 651; 505 NW2d 553 (1993) ("The decision by the Legislature to make residual liability coverage compulsory under the no-fault act is critical.")

More recently, the "compulsory" nature of no-fault coverage was noted in *Meemic Ins Co v Fortson*, 506 Mich 287; 954 NW2d 115 (2020), where this Court stated:

> The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of **compulsory** insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort.

*Meemic,* 506 Mich at 297 (emphasis added), citing *Shavers v Attorney General*, 402 Mich 554, 578-579, 267 NW2d 72 (1978).

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[1] The newest statutory version is inapplicable to this case as the accident in this case occurred on April 6, 2017, and the case was filed before the 2019 amendments to the No-Fault Act.

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The Michigan No-Fault Act, at MCL §500.3135(2)(c), imposes consequences on drivers who do not have this required insurance in effect at the time of an accident. This statute states that "damages shall 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 [MCL §500.3101(1)] at the time the injury occurred." *Id.* [2] Consistently, MCL § 500.3113(b) states that the owner of a vehicle that is not insured is not entitled to recover personal protection insurance benefits.

### B. Provisions of Michigan's No-Fault Statute are to be Respected and Enforced, Not Violated

Provisions of Michigan's No-Fault Act, including its "compulsory" insurance mandate and the consequences it imposes for uninsured motorists, are to be respected. This, the Court recognized in *Titan Ins Co v Hyten*, 491 Mich 547, 565; 817 NW2d 562, 573 (2012), is the policy in Michigan:

> The policy of the no-fault act is better understood in terms of its actual provisions than in terms of a judicial effort to identify some overarching public policy and effectively subordinate the specific details, procedures, and requirements of the act to that public policy. In other words, it is the policy of this state that all the provisions of the no-fault act be respected.

491 Mich at 565. Further, as a matter of basic statutory interpretation, this Court has also recognized that "[i]f the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute. Judicial construction of an unambiguous statute is neither required nor permitted." *McCormick v Carrier*, 487 Mich 180, 191-92; 795 NW2d 517, 524–25 (2010), *citing In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999)

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[2] It should be noted that this section of the No-Fault Act was later amended in 2019. Currently, this statute reads: "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(1) at the time the injury occurred." MCL§ 500.3135(2)(c).

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(footnote omitted). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini,* 490 Mich 239, 246-247; 802 NW2d 311 (2011).

### C. The Court of Appeals Violated Basic Rules of Statutory Construction and Failed to Give Deference to Legislative Intent

In violation of the "compulsory" no-fault insurance mandate as well as the consequences for uninsured drivers in MCL §500.3135(2)(c), the Court of Appeals held that although Plaintiff/Appellee's no-fault coverage was properly rescinded due to her misrepresentation, she could nevertheless pursue a third-party no-fault claim against Defendant/Appellant. The Court of Appeals wrongly eviscerated the Act's "compulsory" mandate and nullified the Act's consequences for those uninsured. Its ruling in this case should be forthrightly reversed.

## II. IT WAS ERROR FOR THE COURT OF APPEALS TO ESSENTIALLY RESURRECT THE SAME NO-FAULT POLICY THAT IT JUST RESCINDED, DUE TO PLAINTIFF/APPELLEE'S MISREPRESENTATION, TO ENABLE HER TO PURSUE A THIRD-PARTY NO-FAULT CLAIM.

Although the Court of Appeals affirmed the trial court's rescission of Plaintiff/Appellee's PIP coverage based on her misrepresentations in the application, and a majority of the panel even found her misrepresentations were "intentional" (**Exhibit 9**, p. 9), [3] the Court essentially, and wrongly, resurrected this rescinded policy to enable her to maintain her third-party no-fault claim against Mr. Zakir. In so ruling, the Court of Appeals violated the letter and spirit of the No-Fault Act, and misapplied the law of rescission. The Court of Appeals also created an impermissible incongruity that could have wide-spread implications in Michigan, by allowing first-party no-

[3] The majority opinion of the Court of Appeals, at p. 9, stated: "[T]he undisputed evidence in this case supports the conclusion that Wilmore-Moody … commit[ed] an intentional misrepresentation." (**Exhibit 9**; emphasis added.)

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fault claims to be barred by a rescinded or non-existent policy while the same motorist's third-party claim was not barred. Defendant/Appellant asks this Court to halt this incongruity and rule that first-party and third-party no-fault claims are *both* barred as a matter of law.

### A. The Court of Appeals Erred Because a Rescinded Policy of Insurance Cannot Be Resurrected, Even for Limited Purposes

For several decades, this Court has recognized that rescission is the final and complete abrogation and "un-doing" of a contract, Rescission restores the contracting parties to the position they had as if no contract ever existed between them. In *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938), for example, this Court explained:

> To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the status quo.

283 Mich at 264 (emphasis added), *citing* 1 Black on Rescission and Cancellation, § 1.

More recently, in *Bazzi v Sentinel Ins Co*, 502 Mich 390, 408-09; 919 NW2d 20 (2018), this Court discussed the effect of a rescinded insurance policy, rendering it *void ab initio*:

> In effect, the insurance policy is considered never to have existed. *United Security Ins. Co.,* 133 Mich. App. at 42, 348 N.W.2d 34 ("'When a policy is cancelled, it is terminated as of the cancellation date and is effective up to such date; however, when a policy is rescinded, it is considered void ab initio and is considered never to have existed.'"), quoting 8B *Appleman, Insurance Law and Practice,* § 5011, p. 403.

502 Mich at 408-409 (emphasis added). *See also, Cunningham v Citizens Ins Co*, 133 Mich App 471, 478; 350 NW2d 283 (1984) ("We do not agree that any provision in the no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq.; precludes Citizens from rescinding plaintiff's policy so that it is *void ab initio*.")

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Courts have recognized that after a contract has been rescinded, no rights that would potentially have been available under the contract before rescission can be claimed because the contract has ceased to exist. *See, eg, Cushman v Avis*, 28 Mich App 370, 372-73; 184 NW2d 294 (1970) ("Rescission abrogates the contract completely. After a binding election to rescind, a party cannot insist on former contract rights. It is as if no such contract had been made.") Also, this Court has recognized that it is not the role of courts to create a contract for the parties where no contract existed. The Court noted in *Hammel v Foor*, 359 Mich 392, 399; 102 NW2d 196, 199 (1960) that "care must also be taken lest the court, out of considerations of equity or sympathy, make a contract for the parties where none existed."

By allowing Plaintiff/Appellee's third-party no-fault claim to stand after rescinding her no-fault insurance coverage due to misrepresentations and dismissing her first-party no-fault case, the Court of Appeals erred. Clear and enforceable statutory language of the Michigan No-Fault Act provides that third-party no-fault claims are reserved only for those who <u>have</u> no-fault insurance. *See,* MCL §500.3135(2)(c). In so ruling, the Court of Appeals improperly "resurrected" a no-fault policy that, as a consequence of rescission, ceased to exist to enable Plaintiff/Appellee to meet the statutory requirement for no-fault coverage.

**B. The Court of Appeals Wrongly Characterized Rescission as a "Legal Fiction" That Could be Disregarded to Essentially Resurrect the Policy and Circumvent the No-Fault Statute's "Compulsory" Insurance Requirement**

The Court of Appeals characterized rescission as a "legal fiction" in justifying its view that rescission need not be complete and need not be retroactive, to enable Plaintiff/Appellee to continue her third-party no-fault suit against Mr. Zakir. This "legal fiction" analysis employed by the Court of Appeals (**Exhibit 9**, Majority Opinion, p. 9) was never raised by counsel for Plaintiff/Appellant at either the trial court or appellate court level. It contradicts nearly a century

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of Michigan Supreme Court case law, some of which is cited in this brief. The Court of Appeals cited no precedent for this "legal fiction" analysis either in this case (**Exhibit 9**) or in its prior *Avers* case (**Exhibit 12**). This Court should soundly reject such analysis.

## III. THE COURT OF APPEALS RULING IMPROPERLY INCENTIVIZES MICHIGAN DRIVERS TO LIE IN THEIR APPLICATIONS FOR INSURANCE, AS THE COURT ELIMINATED ANY CONSEQUENCES

The decision of the Court of Appeals is clearly erroneous and will cause material injustice for a few reasons. MCR 7.305(B)(5)(a).

First, the ruling of the Court of Appeals incentivizes people to defraud their insurers on no-fault applications, as the ruling removes adverse consequences of being uninsured. The Court of Appeals' ruling would enable those who violate the "compulsory" insurance mandate to pursue, and potentially collects substantial amounts through third-party claims. This improperly, and unlawfully, circumvents the "compulsory" mandate in the No-Fault Act.

Second, nobody should be legally permitted to derive the benefits of no-fault coverage without bearing the burdens. The Court of Appeals affirmed the trial court's decision dismissing Ms. Wilmore-Moody's no-fault claims due to her misrepresentation and noted that she was refunded her policy premium of $7,413.57 (**Exhibit 9**, Opinion, at *3), which would thereby eliminate consideration for any contract. Despite this, the Court granted her the same benefit under the no-fault statute as other citizens who annually bear their statutory burden of paying for no-fault insurance coverage. This cannot remain as precedent.

## IV. CONFLICTING COURT OF APPEALS OPINIONS EXIST ON SIMILAR ISSUES, WHICH PROVIDES COMPELLING GROUNDS FOR THE MICHIGAN SUPREME COURT TO ADDRESS AND RESOLVE THE CONFLICT

Past Court of Appeals rulings regarding the effects of a rescinded policy, even recent ones, have not been consistent, which provides a compelling basis for the Michigan Supreme Court to address the issues here. *See,* MCR 7.305(B)(5)(b). Even if this Court addresses the

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issues in a limited context of disqualification of plaintiffs from filing third-party no-fault claims when their no-fault coverage was rescinded, or non-existent, this Court would resolve sharp conflicts in Court of Appeals cases and provide necessary guidance to counsel and the courts.

### A. Court of Appeals Rulings Inconsistent With the Ruling in This Case, Supporting Denial of Third-Party No-Fault Benefits to Those Lacking Mandatory No-Fault Insurance Coverage

Contrary to the ruling in this case, where the Court of Appeals affirmed rescission of no-fault coverage yet essentially resurrected coverage to enable Plaintiff/Appellant to pursue a third-party no-fault case, the Court in *Nelson v Owusu*, unpublished opinion per curiam of the Court of Appeals, decided December 22, 2020 (Docket No. 347963) (**Exhibit 10**), did not engage in a "legal fiction" analysis to enable a party whose coverage was rescinded to bring a third-party claim. Quite the opposite. In *Nelson*, an injured motorist sued for first-party and third-party no-fault benefits. Like this case, the insurer sought rescission of no-fault coverage for misrepresentations in the application. Like this case, the trial court dismissed plaintiff's first and third-party claims due to the misrepresentation. Unlike this case, issues remained in *Nelson* as to who gave the insurer false information, prompting the Court to remand the case to resolve them. Of relevance to the present case was the Court's acknowledged MCL §500.3135(2)(c) and MCL § 500.3101 would bar plaintiff's third-party claim; and upon the trial court's settling of the issues, a rescinded no-fault policy would bar the third-party claim. To this end, the Court in *Nelson* stated:

> The trial court granted summary disposition in favor of defendants Owusu and Hizmo Trucking [defendants in the third-party claim] because it determined that Progressive was entitled to rescind the no-fault policy with respect to plaintiff, which effectively meant that plaintiff was uninsured at the time of the accident.
>
> See *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan,* [330 Mich App 584; __ NW2d __ (2019)], slip op at 4-5 (when a policy of no-fault insurance is

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> rescinded, the policy is considered to have not existed). [4] Accordingly, the trial court determined that plaintiff was not entitled to recover damages from Owusu and Hizmo Trucking under MCL 500.3135(2)(c) ("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 [MCL 500.3101] at the time the injury occurred.). On remand, the trial court shall determine what, if any, effect its determination on remand has on its decision to grant summary disposition in favor of Owusu and Hizmo Trucking.

*Nelson*, slip. op. at * 11 (emphasis added). (**Exhibit 10**)

Similarly, in *Dewey v Auto Club Group Insurance Company*, unpublished opinion per curiam of the Court of Appeals, decided February 20, 2020 (Docket No. 346556)(**Exhibit 11**), the trial court dismissed plaintiff's first party PIP case and her third-party no-fault case because she lacked no-fault insurance at the time of an accident. Plaintiff's coverage apparently lapsed, rather than rescission being the reason for loss of coverage. Plaintiff argued on appeal that the circumstances of her incident did not require having no-fault coverage, but the trial court disagreed, as did the Court of Appeals. In its ruling, the Court of Appeals reaffirmed that the No-Fault Act, MCL §500.3101(1), required plaintiff to have insurance, slip op at *3, and her failure to comply with this requirement disqualified her from recovering both PIP benefits and third-party no-fault benefits. *Id.*, at *4. It concluded: "Under Michigan's no-fault act, owners-drivers are disqualified from receiving PIP benefits and prohibited from recovering third-party damages when they failed to maintain no-fault insurance during the 'period' of time during which the

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[4] The case of *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan,* 330 Mich App 584; __ NW2d __ (2019), involved issues of rescission of coverage due to misrepresentation in the application, but it more centrally involved Esurance's claim of equitable subrogation against MACP after Esurance paid substantial sums on a PIP claim before the policy was rescinded due to misrepresentation in the application. While the same principles of rescission rendering the policy *void ab initio* were considered and were actually the foundation of Esurance's case, the Court's ruling was based on elements of equitable subrogation.

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owner, registrant, or driver of the vehicle expects and intends the vehicle to be driven or moved on a highway on demand." *Id.* (Emphasis added.)

**B. Court of Appeals Rulings Consistent With the Ruling in This Case Supporting Granting of Third-Party No-Fault Benefits to Those Lacking Mandatory No-Fault Insurance Coverage**

In its decision in this case, the Court of Appeals relied on and cited with approval a Court of Appeals ruling issued one month prior, *Bernard Estate v Avers*, unpublished opinion per curiam of the Court of Appeals, decided April 8, 2021 (Docket No. 348048) (**Exhibit 12**). In *Avers*, the Court of Appeals addressed the "legal fiction" analysis of rescission. In its ruling in this case, the Court of Appeals stated the following, referencing and citing from *Avers*:

> Finally, Wilmore-Moody argues that the trial court erred by granting summary disposition in favor of Zakir on the ground that the rescission of her insurance policy barred Wilmore-Moody's third-party claim pursuant to MCL 500.3135(2)(c). MCL 500.3135(2)(c) precludes a party from recovering noneconomic damages in tort if that party did not have the required no-fault insurance in effect for the party's vehicle. *Gray v Chrostowski,* 298 Mich App 769, 776; 828 NW2d 435 (2012). However, this court has recently held the rescission of an insurance policy as a contractual remedy between the insured and insurer does not by itself operate to 'alter the past' and render the insured as actually having been without no-fault insurance at the time of the accident for purposes of the prohibition contained in MCL 500.3135(2)(c) with respect to a third-party negligence claim. *Bernard Estate v Avers*, unpublished per curiam opinion of the Court of Appeals, issued April 8, 2021 (Docket No. 348048), pp 12-13. This Court reasoned as follows:
>
> It is true that rescission, as a contractual remedy, works to 'undo [a contract] from the beginning,' so 'it is as if no contract had been made.' But this contractual remedy is a 'legal fiction,' the fiction being that courts pretend the contract never existed between the relevant parties. The legal fiction is intended as a contractual remedy, and it does not actually alter the past.
>
> > The issue here is whether Bernard, in fact, had proper security in effect at the time of his injury. The uncontested reality is that he did in the form of his insurance policy with Grange. The subsequent rescission of that policy as a contractual remedy for Bernard's fraud does not alter the reality that, at the time of Bernard's injury, he indeed had an insurance policy with Grange. Accordingly, because Bernard had the policy with Grange at the time of the accident and that policy constituted proper security for purposes of MCL

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> 500.3101(1), we conclude that the bar to recovery in MCL 500.3135(2)(c) does not apply in this case. [Id. (citations omitted).]
>
> We find the above reasoning persuasive and adopt it as our own for purposes of this case as well. In this case, it was undisputed that Wilmore-Moody had an insurance policy with Everest at the time of the accident and that Everest subsequently rescinded the policy on the basis of fraud. Hence, the bar to recovery in MCL 500.3135(2)(c) does not apply with respect to Wilmore Moody's third-party negligence claim against Zakir. *Bernard Estate,* unpub op at 12-13. We reverse the trial court's grant of summary disposition in favor of Zakir and remand for further proceedings not inconsistent with this opinion.

**Exhibit 12,** at * 12-13 (footnotes omitted).

Consequently, the Court of Appeals opinions in this case and in the *Avers* case (**Exhibit 12**) both conflict with other decisions of the Court of Appeals in regard to eligibility to pursue a third-party no-fault claim, not to mention conflicting with other law (as explained in this brief, further above) and the letter and spirit of the Michigan No-Fault Act.

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## CONCLUSION AND RELIEF SOUGHT

Defendant/Appellant Mohammad Zakir respectfully requests that this Court grant leave to appeal and/or reverse the Court of Appeals decision and reinstate the Circuit Court order of dismissal, and enter judgment dismissing plaintiff/appellee's third-party no-fault claims against Mr. Zakir with prejudice.

Respectfully submitted,

By: /s/Julie I. Fershtman

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Dated: June 10, 2021

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## CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2021, I caused the foregoing paper(s) to be electronically filed with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

/s/Deborah Kales
Deborah Kales