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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

JANICE SHERMAN,

Plaintiff-Appellant,

vs.

JOHN DOE,w

Defendant,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

Docket No. 167826

Court of Appeals Docket No: 364393
Lower Court: Washtenaw Circuit Court
Case No. 22-000075-NI

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Defendant-Appellee Progressive's Brief in Response to Plaintiff-Appellant's Application for Leave to Appeal

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Counter-Statement of Jurisdiction

Plaintiff-Appellant seeks leave to appeal the decision of the Court of Appeals under MCR 7.305(B)(5)(a), arguing that the decision is both "clearly erroneous" and "will cause material injustice." Defendant-Appellee contests this conclusion. The Court of Appeals' opinion recited the applicable law to the issue at hand and did not overstep in its decision. Plaintiff-Appellant instead asks this Court to reformulate the existing framework for recission of a Michigan automobile insurance policy when there is no need to do so.

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Counter-Statement of Questions Presented

1. Under MCR 7.305(B), Plaintiff-Appellant's Application must show that the Court of Appeals decision was "clearly erroneous and will cause material injustice" to justify this Court's review. Neither condition is met here when the Court of Appeals restated clear and existing law on the issue of rescission. Should the Supreme Court grant leave to appeal?

   Sherman answers, "Yes."

   Progressive answers, "No."

   This Court should answer, "No."

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Introduction

This case presents a straightforward issue of contractual interpretation and legal rescission rather than the "parade of horribles" cited by Plaintiff-Appellant. It is undisputed that Janice Sherman applied for a policy of insurance with Progressive with a Clinton Township address. Progressive then issued her a policy based on that address and the listing of vehicles she provided. However, Sherman misrepresented her domicile, the garaging locations of the vehicles on her policy, and who was driving those vehicles. Specifically, Sherman only listed a Clinton Township address because she was temporarily staying there due to a flooding issue at her Detroit address, but she considered the Detroit address to be her permanent address and domicile. Plaintiff-Appellant does not contest these facts. Rather, Plaintiff-Appellant contests the ultimate result – that Sherman was held accountable for her misrepresentations by the Court of Appeals.

After learning of these material misrepresentations, Progressive rescinded Sherman's policy and reimbursed the premiums that Sherman paid. Sherman accepted the premium refund and did not contest or return the money paid to her. But still, she ultimately filed suit. Progressive therefore filed a motion for summary disposition under MCR 2.116(C)(10), which the trial court denied. Instead, the trial court decided that the policy was subject to reformation, ordering the policy "reformed" to the Detroit address Sherman did not disclose and further ordering her to pay the higher premium owed to Progressive for coverage at that address.

Progressive then filed an application for leave to appeal, which the Court of Appeals granted. The parties submitted briefs on the issue and proceeded to oral argument before the Court. The panel agreed with Progressive and determined that the trial court had abused its discretion in denying

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rescission and erred by denying the summary disposition motion. The panel held that reformation is not the proper remedy in this situation – rescission is, by clear and convincing precedent.[1]

Plaintiff-Appellant now seeks to overturn that decision on the basis that reformation is "more equitable" and that the trial court had engaged in a more favorable balancing of equities on this question. But this ignores the fact that Sherman was the policyholder. No balancing of the equities is required when she is not an innocent third party. See *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018); *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 503 Mich 903, 906-907; 919 NW2d 394 (2018) (Markman, C.J., concurring). Instead, if the trial court was truly entitled to order reformation, it should have engaged in a review of the facts and equities on Progressive's side as well, yet it did not do so. Therefore, if reformation had somehow been the proper remedy, the trial court's reasoning still fails.

Regardless, Plaintiff-Appellant's argument ignores the clear precedent cited by the Court of Appeals in their opinion and the well-settled acceptance of rescission as the proper remedy for a misrepresentation, not reformation. The panel did not come to this conclusion "out of thin air." Rather, they confirmed that rescission is a proper remedy when a material misrepresentation is made by the policyholder. The trial court's so-called "creative" method – reforming the contract and ordering Plaintiff to pay a higher premium – was instead the unprecedented move. Leave to appeal is therefore not necessary and should not be granted.

[1] See Plaintiff-Appellant's Exhibit G – First Published Court of Appeals Opinion; see Plaintiff-Appellant's Exhibit A – Second Published Court of Appeals Opinion. The Court of Appeals issued two opinions, with the second opinion reflecting an updated standard of review. But their conclusion did not change.

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Counter-Statement of Facts

Janice Sherman claimed no fault benefits from Progressive following a July 14, 2021 motor vehicle accident. Sherman applied for a no-fault policy from Progressive on or about November 12, 2020.[2] Page 4 of the application contained the following acknowledgment that Sherman affirmed by her signature:

> I declare that the statements contained herein are true to the best of my knowledge and belief and do agree to pay any surcharges applicable under the Company rules which are necessitated by inaccurate statements. I declare that no persons other than those listed in this application regularly operate the vehicle(s) described in this application. . . I understand that this policy may be rescinded and declared void if this application contains any false information or if any information that would alter the Company's exposure is omitted or misrepresented.

Sherman listed 16845 Tremlett Dr., Clinton Township, MI as both the policy address and garage address for the two covered vehicles, a 2006 Cadillac DTS and a 1993 Chrysler New Yorker.[3] Plaintiff was instructed to identify "[t]he total number of resident relatives [14 years of age or older] and other drivers currently residing in your household;" however, she provided that she was the sole household member and driver of the covered vehicles.[4] Sherman made no changes to her address, garage address, household members or drivers upon renewal of the policy on or about April 15, 2021.[5] Plaintiff's representations were incorrect and false, and, as a result, Progressive charged a significantly lower premium for the policy.[6]

Sherman submitted a claim for benefits following the July 14, 2021 motor vehicle accident, which occurred while she was driving a covered vehicle. During Progressive's investigation of the claim, it determined that Sherman was domiciled at 12525 Gunston Street, in Detroit, MI, and not the

[2] **Exhibit C**, Janice Sherman Application for Insurance.
[3] *Id.* at 1-2.
[4] *Id.* at 1.
[5] **Exhibit D**, Renewal Declarations Page.
[6] **Exhibit E**, Copic Affidavit, paragraphs 5-10.

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Clinton Township address listed on the policy application. Progressive also determined that Plaintiff failed to identify household relatives and other drivers of the policy vehicles. The misrepresentations would have required a policy increase of over 80% if they were known at the inception of the policy.[7]

Progressive a letter to Sherman's current counsel on August 9, 2021, informing that Progressive was rescinding the policy because Sherman "made incorrect statements or representations with regard to [a] material fact or circumstance; concealed or misrepresented a material fact or circumstance or engaged in fraudulent conduct in connection with [the] application [for insurance]."[8] That letter informed Ms. Sherman that Progressive "would not have issued a policy at the current premium rate in this instance."[9] Progressive refunded the premium payment to the credit card on file the next day – August 10, 2021.[10]

Sherman filed suit on or about February 4, 2022. During her subsequent deposition, Sherman testified about her various misrepresentations:

- When she applied for insurance, Sherman was renting the house at the Detroit Address, which she considers to be her "permanent address" and "domicile."[11]

- Yet Sherman listed her adult daughter's home at the Clinton Township Address as her residential and garage address in the application. She testified that, at the time of the policy procurement, she was "temporarily" staying with her adult daughter off and on due to flooding in her basement at the Detroit Address.[12]

- During the time that Sherman stayed at her adult daughter's home she continued to pay rent for her house at the Detroit Address and kept clothing and all her furniture there.[13] She also did not update her address from the Detroit Address to the Clinton Township Address with the Social Security Administration or Medicaid because she "didn't intend to stay[ ] out there [at the Clinton Township Address] long."[14]

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[7] **Exhibit E**, Copic Affidavit, paragraphs 5-10.
[8] **Exhibit F**, Rescission Letter.
[9] *Id.*
[10] **Exhibit E**, Copic Affidavit, paragraph 11.
[11] **Exhibit G**, Janice Sherman Dep. Trsc., pp 7-8, 14, 22, 25.
[12] *Id.* at 14, 21, 24.
[13] *Id.* at 21
[14] *Id.* at 8-9, 12.

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- Sherman, however, did go to the Secretary of State to "temporarily" change her address on her driver's license to the Clinton Township Address because her daughter was "driving" a covered vehicle.[15] Tellingly, Sherman did not disclose that her daughter was either a household relative or a driver in the application for insurance.[16]

- At the time of the accident, Sherman testified that she was residing at the Detroit Address with her adult son and that he had been living with her for approximately three years.[17] But Sherman did not identify her son as a resident relative on the application for insurance either.

- Although Sherman is the title owner of the 2006 Cadillac DTS and included it on the policy, it was used and garaged by her brother at another address; she testified that she put the vehicle on her policy because her brother did not have insurance.[18]

Progressive filed a motion for summary disposition. After oral argument, the trial court held that Sherman was entitled to reformation of the policy to reflect her address in Detroit, and must pay Progressive the increased premium amount within 14 days of the order.[19] Progressive then filed a motion for reconsideration in the trial court, which was denied by an order on December 12, 2022.[20]

Consequently, Progressive sought leave to appeal the trial court's order. The Court of Appeals granted leave to appeal on June 27, 2023. Their opinion, as referenced above, soon followed, where they held that the trial court should not have reformed the policy or ordered Progressive "made whole" by Sherman paying a higher premium.[21] Rather, recission was the proper method to ameliorate the misrepresentation made by Sherman, as set forth in case law over the past few decades. Reformation, instead, is meant for situations involving mutual mistake of fact or "clean hands" by both parties; neither situation existed here. Therefore, the Court of Appeals rightfully overturned the trial court's

[15] *Id.* at 15-16, 22-23, 27-28; **Exhibit H**, Driver's License.
[16] **Exhibit G**, Janice Sherman Dep. Trsc., pp 19, 26, 28-29.
[17] *Id.* at 7.
[18] *Id.* at 8-9, 12.
[19] **Exhibit A**, Order Denying Summary Disposition.
[20] **Exhibit K**, Order Denying Reconsideration.
[21] See Plaintiff-Appellant's Exhibit G – First Published Court of Appeals Opinion; see Plaintiff-Appellant's Exhibit A – Second Published Court of Appeals Opinion.

decision. Whether the trial court's decision was "creative" in Plaintiff-Appellant's view matters not when it did not follow Michigan law.

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Standard of Review

Defendant-Appellee does not contest with the standard of review cited by Plaintiff-Appellant and as applied by the Court of Appeals in their Second Published Opinion.

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Argument

I. Leave to appeal is not warranted here as the Court of Appeals decision was not "clearly erroneous" and does not "cause material injustice."

An application for leave to appeal to the Michigan Supreme Court must show that, "in an appeal of a decision of the Court of Appeals, (a) the decision is clearly erroneous and will cause material injustice." MCR 7.305(B)(5). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473 (2006). Nothing in the panel's opinion, their comments at oral argument, or the record leads to a "definite and firm conviction that a mistake has been made." Rather, the Court of Appeals properly applied existing case law and a well-settled legal framework to overturn a "creative" holding from the trial court. When applying the correct law is the Court of Appeals' exact mandate, such a decision cannot be seen as "a mistake."

a. Reformation is not an appropriate remedy when Sherman, as the policyholder, misrepresented her address causing a different risk to be insured than Progressive anticipated.

"[I]t is well settled that an insurer is entitled to rescind a policy ab initio on the basis of a material misrepresentation made in an application for no-fault insurance." *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 445; 889 NW2d 759 (2016) (citation omitted). "Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 409; 919 NW2d 20 (2018).

Where a policy was procured on the basis of material misrepresentations on the part of the prospective insured, rescission is a remedy available to the insurer. *Id.* at 400-01. This prevents the party responsible for the misrepresentation from being "unjustly enriched if he were not held accountable for his misrepresentation." *Lash v Allstate Insurance Company*, 210 Mich App 98; 532 NW2d 869 (1995). The misrepresentation must be material and must be relied upon by the insurer in

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issuing the policy. *Lakes States Ins Co v Wilson*, 231 Mich App 327, 331-32; 586 NW2d 113 (1998). It does not matter if the misrepresentation was intentional or innocent, if it was relied upon by the insured. *Id.* A representation is material "where communication of it would have had the effect of 'substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium.'" *Oade v Jackson Nat Life Ins Co*, 465 Mich 244, 254; 632 NW2d 126 (2001), quoting *Keys v Pace*, 358 Mich 74, 82; 99 NW2d 547 (1959), and see *Auto-Owners Ins Co v Mich Comm'r of Ins*, 141 Mich App 776, 781; 369 NW2d 896 (1985).

Courts generally recognize three forms of misrepresentations which may entitle an insurer to rescind a policy: (1) actionable fraud[22] – where the insured made intentional misrepresentation in the hope that the insurer relies upon them; (2) silent fraud[23] – where the insured keeps silent about known material facts that would affect the insurer's decisions on issuing a policy; and (3) innocent misrepresentation – where the result of the innocent misrepresentation unjustly enriches the insured. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). The Court of Appeals' opinion classified Sherman's misrepresentation of her address as an innocent misrepresentation – but a misrepresentation, nonetheless. Despite Plaintiff-Appellant's arguments to the contrary, innocent misrepresentation is still grounds for rescission.

Innocent misrepresentation justifies rescission when a party relies on a misstatement and the result of that reliance unjustly enriches the party making the misstatement. *Lash v Allstate Ins Co*, 210

[22] For a representation to constitute actionable fraud, all of the following must be true: (1) That the party made a material representation; (2) that it was false; (3) that when they made it they knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that they made it with the intention that it should be acted upon by the insurer; (5) that the insurer acted in reliance upon it; and (6) that the insurer thereby suffered injury. *Titan*, 491 Mich at 555.

[23] Silent fraud arises where a person suppresses a material fact which they are in good faith duty-bound to disclose. *Maurer v Fremont Ins Co*, 325 Mich App 685, 695; 926 NW2d 848 (2018).

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Mich App 98, 103; 532 NW2d 869 (1995). Reliance is shown if "the misrepresentation relates to the insurer's guidelines for determining eligibility for coverage." *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 446; 889 NW2d 759 (2016).

In the hearings on Defendant's motion for summary disposition and subsequent order denying reconsideration, the trial court did not address whether *any* misrepresentation of any kind was made by Sherman when she applied for the policy.[24] The trial court simply announced that it was reforming the policy, stating that its rationale for doing so was "applying the Court's equitable power and the State's interest in ensuring that folks are insured," and making Progressive "whole based on the . . . insurance premium that it believes it would have been entitled to had the insured listed Detroit as the residence."[25] But the trial court implicitly understood that Sherman misrepresented her address and that misrepresentation was material when it ordered the policy reformed to reflect the Detroit address at a 75.5% premium increase.[26] The Court of Appeals agreed with this point – that reforming the contract acknowledges that a misrepresentation was made. The disagreement, then, was whether reformation or rescission was the proper remedy.

"[C]ourts are required to proceed with the utmost caution in exercising jurisdiction to reform written instruments." *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). "To reform a contract, 'the facts necessary for the allowance of the remedy shall be proved by clear and convincing evidence and not by a mere preponderance.'" *Johnson v USA Underwriters*, 328 Mich App 223, 234; 936 NW2d 834 (2019), quoting *Woolner v Layne*, 384 Mich 316, 319; 181 NW2d 907 (1970).

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[24] **Exhibit B**, November 2, 2022 Hearing Transcript pp 5-6.
[25] *Id.*
[26] Curiously, the trial court reformed the policy to reflect Sherman's Detroit address, not the Clinton Township address which she used to apply for the policy and which Progressive relied on in issuing the policy. By reforming the policy to reflect the Detroit address and a 75.5% premium increase, the court implicitly recognized that the Clinton Township address Sherman used was a misrepresentation.

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"Evidence is clear and convincing when it produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

Reformation is available where there is a mutual mistake of fact, or a mistake by one party and fraud committed by the other party. *Johnson*, 328 Mich App at 234. But reformation is not available where one party simply makes a mistake of law. *Id*. at 234-35. In other words, a party cannot have a contract reformed if they were merely mistaken as to the legal effect of the contract. *Id*. "[A] contract may be reformed when one party to a contract made a mistake and the other party knows about the mistake but remains silent about it, i.e., there was inequitable conduct." *Id*. at 236.

There was no evidence supplied by Sherman in the trial court that would permit an inference that a mistake in fact was made, and that Progressive knew of the mistake but kept silent. Progressive did not have any information concerning the garaging issues or Sherman's real address in Detroit until after the accident occurred and was investigated. Any suggestion by Sherman that Progressive was obligated to check the application information and thereby determine who was staying at the address, is an argument for the "easily ascertainable" rule, which was abrogated by this Court in *Titan*, 491 Mich 547, 569. The *Titan* court also explained that even if the easily ascertainable rule could be employed, it was only applicable where third parties were involved—not the actual parties to the contract. *Id*. at 568-569.

The *Titan* court also warned that the application of an equitable remedy on the basis of some "overarching public policy" of the no fault act, is not viable where actual provisions and details of the no fault act elucidate that policy. *Id*. at 565-66. This is precisely what the trial court did when it

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explained its rationale for reformation as "the State's interest in ensuring that folks are insured."[27] The Court of Appeals rightfully corrected that abuse of discretion.

Further, "it is impossible to hold an insurance company liable for a risk it did not assume." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). As recognized by the Court of Appeals, the trial court's rationale violated this basic tenant of insurance law. Progressive, and other insurers in similar circumstances, did not contract to cover Sherman with a PIP policy where her real address was different than what was stated in the application, the policy vehicles were not all garaged at the policy address, and the potential and actual drivers were not disclosed.

This is further supported by Sherman's unequivocal testimony. As stated previously, Sherman only listed the Clinton Township address because she was temporarily staying there due to a flooding issue at the Detroit address, but she considered the Detroit address to be her permanent address and domicile.[28] All of her clothing and furniture was kept at the Detroit address and she did not change her mailing address from Detroit because she "didn't intend to stay[ ] out there [at the Clinton Township Address] long."[29] Ms. Sherman also testified that she did not disclose that her adult daughter and son, and her brother were drivers of policy vehicles.[30] Even more egregious, Sherman testified that her brother was garaging and driving the 2006 Cadillac DTS from the policy at an address other than the Clinton Township or Detroit addresses.[31]

Although the question of whether a misrepresentation was made that would justify rescission is generally a question of fact, the issue may be decided as a matter of law where there is no issue of material fact left for a jury. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n2; 597 NW2d 28 (1999).

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[27] **Exhibit B**, November 2, 2022 Hearing Transcript, p 5.
[28] **Exhibit G**, Janice Sherman Dep. Trsc., pp 7-8, 14, 22, 21, 24, 25.
[29] *Id.* at 21-22.
[30] *Id.* at 15-16, 19, 22-23, 26-29
[31] *Id.* at 8-9, 12.

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For the trial court to reform the policy to the Detroit address with a 75.5% increased premium, required an understanding that the Detroit address was the true address, and the misrepresentation of the incorrect address was material. Materiality was further supported by the affidavit of Ms. Copic as well as the letter sent to Sherman's counsel which stated that the policy would not have been issued as it was had the misrepresentations been known at the application.[32] The trial court specifically stated that it was "reforming the contract so that Progressive is made whole based on the . . . insurance premium that it believes it would have been entitled to had the insured listed Detroit as the residence."[33] If the misrepresentation of the address did not occur and was not material, there would be no reason for reforming the policy.

b. The Court of Appeals properly affirmed a recission that was mutually assented to by both parties.

The trial court also ignored the undisputed evidence that Sherman accepted her premium refund, and thereby, assented to the rescission. While the Court of Appeals does not appear to have considered this issue determinative, it does lend credence to their ultimate decision that recission was proper. The letter sent to Ms. Sherman's counsel and the affidavit of Ms. Copic averring to the refund of the policy premium evidence that a mutual rescission occurred. "A mutual rescission may be inferred from the conduct of the parties clearly evidencing their intention to treat the contract as at an end." *Young v Rice*, 234 Mich 697, 701; 209 NW 43 (1926). "[T]he other party's acceptance of the return of the consideration it paid toward the contract creates a 'mutual agreement' or mutual 'assent' to rescind the contract and excuses all the duties and right flowing from that contract." *Carr v Auto Club Group*, unpublished opinion per curium of the Court of Appeals, issued April 29, 2021 (Docket

[32] **Exhibit E**, Copic Affidavit; **Exhibit F**, Rescission Letter.
[33] **Exhibit B**, November 2, 2022 Hearing Transcript, pp 5-6.

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No. 352662),[34] citing 13 Corbin, Contracts (rev ed), § 67.8, pp 47-49; 29 Williston, Contracts (4th ed), § 69:50, pp 119-121, § 73:15, pp 48-49. The tender of everything a party received under the contract creates mutual rescission, which is a legal remedy. *Meemic Ins Co v Fortson*, 506 Mich 287, 310 n 19; 954 NW2d 115 (2020). Once that tender is made and accepted, the parties have mutually rescinded the policy.

When the return of premiums is made through electronic transfer rather than a written check, mutual rescission is inferred where the party receiving the refund does not challenge the refund, set it aside, or return the refund. See *Carr v Auto Club Group*, unpublished opinion per curium of the Court of Appeals, issued April 29, 2021 (Docket No 352662) (holding that the testimony that the insured "set aside" the electronic refund and did not use it was sufficient to show that the rescission was not mutual). It was never disputed in the trial court that the refund was credited to Sherman's credit card. Therefore, the recission should have been ratified by the trial court, and the decision not to do so was properly overturned by the Court of Appeals.

c. The Court of Appeals did not err by looking at Progressive's conduct when the remedy of reformation requires such an analysis. Finding no evidence of bad conduct on the part of Progressive thereby affirms and validates their decision to overturn the trial court's application of reformation.

Plaintiff-Appellant suggests that the Court of Appeals engaged in the "wrong" type of equitable review by looking at Progressive's conduct rather than "balancing the equities." But by reforming the contract, the trial court placed Progressive's conduct at issue – as reformation is only proper if one party was "silent" as to a mistake made by the other party. Johnson, 328 Mich App at 236. Indeed, to even be entitled to reformation, Sherman must have had "clean hands" as well. *Harper v Gunn*, 297 Mich 396, 399; 297 NW 538 (1941); *Rose v Nat'l Auction Group*, 466 Mich 453, 463; 646 NW2d 455

[34] **Exhibit L**, *Carr v Auto Club Group*.

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(2002). Reformation of a contract is an equitable remedy. *Johnson v USA Underwriters*, 328 Mich App 223, 234; 936 NW2d 834 (2019).

So, the Court of Appeals looked as to whether Progressive had been silent as to a mistake made by Sherman. The Court of Appeals also looked as to whether Sherman had even engaged in a "mistake of fact" that would allow reformation to occur. Finding no such evidence in the record, they rightfully concluded that reformation was not the appropriate remedy. Rather, the facts supported recission as the proper remedy. Plaintiff-Appellant's cry foul over this review of the record ignores that their sought remedy of reformation requires it.

Plaintiff-Appellant implicitly argues that the Court of Appeals, if it was to look at the conduct of the parties, should have employed the "balancing of the equities" test found in *Bazzi* and further developed by Justice Markman's famed "factors." See Farm Bureau, 503 Mich at 906-907 (Markman, C.J., concurring.) These factors need not be repeated here though, as they have no bearing on the case. The factors and *Bazzi* holding ensure that an "innocent third party," i.e., an individual who was not listed on the policy nor involved in the application for insurance, was barred from PIP benefits by virtue of another person's misrepresentation. In essence, the insurer is not "automatically" entitled to rescission when the claimant is not a party to the insurance contract. Bazzi, 502 Mich at 396. The inverse thus could be assumed – if the policyholder, a party to the insurance contract, misrepresents an aspect of that contract, then rescission is proper. Here, Sherman is the policyholder. She is not an innocent third party and therefore, *Bazzi* and its progeny do not apply.

The sole equitable balancing required by Michigan law was therefore a review of the decision to reform the contract. That decision necessarily involves a review of Progressive's conduct to see if reformation would be viable. The Court of Appeals reviewed the record before it and found that it was not. None of that analysis was "clearly erroneous" or ungrounded in existing law.

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Instead, Plaintiff-Appellant would have a standard that allows trial courts to order premiums to be paid prospectively to insurers. That decision does not reimburse the insurer for lost premiums due to the misrepresentation. It does not account for an injured plaintiff who now is paying a different premium that may be higher. It does not set a schedule for those payments or elucidate how they will be made. Finally, and perhaps most importantly, it does not condemn bad conduct by a prospective insured. Instead, it offers an incentive to misrepresent your address, because, at the very least, you can get a better deal on insurance for a few months until you are caught.

Recission is therefore the sole logical remedy. It allows insurers to void a contract that was procured not by their own mistake or action, but by a prospective insured misrepresenting the risk they pose. It also does not create a perverse incentive to misrepresent for a lower premium or create a confusing system where the insured is now paying a higher premium but with no clarification as to what terms apply. The trial court's decision introduced this confusion into the existing, clear framework. The Court of Appeals' decision ameliorated that confusion by calling back to existing law. No intervention by this Court is therefore necessary.

d. The Court of Appeals applied sound reasoning under either standard of review supplied by Plaintiff-Appellant.

Plaintiff-Appellant concedes that the Court of Appeals ultimately applied the correct standard of review for recission – an abuse of discretion. But Plaintiff-Appellant does not acknowledge that applying that standard ultimately leads to the same conclusion. By "creatively" ordering reformation of the insurance contract rather than allowing rescission, the trial court abused its discretion.

An abuse of discretion occurs when trial court's decision is "outside the range of principled outcomes." *People v. Benton,* 294 Mich.App. 191, 195, 817 N.W.2d 599 (2011). An abuse of discretion may also result when the trial court operates within an incorrect legal framework. *People v Hine,* 467 Mich 242, 250-51; 650 NW2d 659 (2002).

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As argued *infra*, the trial court repeatedly adopted the wrong analysis and framework in deciding this case. The trial court explicitly stated it would not decide whether there was a misrepresentation, but then ordered reformation of the contract to a different premium, which implicitly recognized a misrepresentation had been made as the premium was changed. The Court of Appeals applied the correct remedy of recission by applying the correct legal framework. But it also reviewed the decision to reform the contract and found that approach would have been lacking too had the trial court engaged in a necessary review of the record. Whether a *de novo* standard was applied, as in the first published opinion, or both *de novo* and an abuse of discretion, as in the second published opinion, is ultimately immaterial as both standards reach the same conclusion. The trial court applied the wrong legal framework and thereby abused its discretion. Plaintiff-Appellant recognizes this by calling the trial court's decision "creative." It is creative because it is unprecedented and unsupported. The Court of Appeals did not overstep by overturning it.

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Conclusion and Relief Requested

Leave to appeal should not be granted by this Court. The Court of Appeals' opinion is not clearly erroneous when it is supported by the generally accepted legal framework concerning rescission. It also will not lead to grave injustice when, again, it is applying the same legal framework this Court has endorsed and used previously.

WHEREFORE Defendant-Appellee, PROGRESSIVE, respectfully requests this Honorable Court deny Plaintiff-Appellant's Application for Leave to Appeal and preserve the well-reasoned decision of the Court of Appeals.

Respectfully submitted,

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Certificate of Compliance

I certify that this appeal brief complies with the word-count limitation in MCR 7.212(B) and MCR 7.312. According to the word-processing system, this brief contains 5,492 countable words.

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Certificate of Service

The undersigned states that she is an employee of Novara Tesija Catenacci McDonald & Baas, PLLC, and states that she filed the foregoing document(s) with the Michigan Supreme Court using the Court's e-file and service option, which will send notification of such filing to the individuals listed on the Case Service List, on December 19, 2024.

/s/ Joanne M. Hickey

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