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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
CAMERON, P.J., and HOOD and YOUNG.

JANICE SHERMAN,

Plaintiff-Appellant,

Supreme Court Case No: 167826

Court of Appeals Case No: 364393
Lower Court Case No: 22-000075-NF
Washtenaw County Circuit Court

vs.

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee,

and

JOHN DOE,

Defendant.

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL PURSUANT TO THE MAY 22, 2025 ORDER OF THIS COURT

Respectfully Submitted,

THE SEVA LAW FIRM

/s/ Pratheep Sevanthinathan

PRATHEEP SEVANTHINATHAN (P70094)
Attorney for Plaintiff-Appellant
100 W. Big Beaver Road, Suite 500
Troy, MI 48084

Dated: August 7, 2025

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I. INTRODUCTION

On May 22, 2025, this Court granted oral argument on the application and directed supplemental briefing on three issues:[1]

> (1) whether the Court of Appeals applied the proper standard of review in its consideration of the trial court's factual findings made in connection with a decision to grant or deny equitable rescission; (2) if not, the standard of review that should have been applied; and (3) if the trial court erred in its determination, whether the Court of Appeals should have remanded to the trial court to allow it to rebalance the equities in the first instance.

This brief recaps the facts pertinent to these questions, then answers each question directly and explains why the trial court's equitable ruling—reformation with a premium true-up rather than rescission—fell well within the range of principled outcomes. In particular, the trial court decided an equitable remedy on a documentary record that resolved the material historical facts; its choice to treat any address inaccuracy as a rating issue, consistent with Progressive's own contract, was discretionary and is reviewable for abuse of discretion, not de novo. This Court's recent decision in *Wallace v SMART* confirms the point: "Rescission of a contract subject to litigation does not function by automatic operation of the law. Instead, rescission is an equitable remedy that the trial court may grant, in its discretion, after balancing the equities." *Wallace v Suburban Mobility Authority for Regional Transportation (SMART)*, ___ Mich ___; ___ NW2d ___ (2025) (Docket No. 165964), slip op at 2–3.

II. FACTS PERTINENT TO STANDARD OF REVIEW AND EQUITY

Janice Sherman testified that when she applied for Progressive coverage on November 12 2020 she was living at her daughter's home, 16845 Tremlett Drive, Clinton Township, because "I was staying with her for a little while and then I came and moved back to my house because I

[1] *Janice Sherman v Progressive Mich Ins Co*, Order of the Michigan Supreme Court, entered May 22, 2025 (Docket No. 167826).

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was having complications with my basement." (**Exhibit S**, p. 14). Asked how long she stayed there, she answered "For about a year and a half" and later clarified it was "on and off, but mostly on," adding that she was "sickly as well" and returned to Detroit only to check the house. (*Id.* at 14, 24). During that period she had her address changed to her daughter's on her driver's license. (*Id.* at 15). Yet, she continued to pay rent and keep her belongings at 12525 Gunston Street and regarded it as her permanent home: "Yes, I still had this house in Detroit"; "I didn't intend on staying out there long". (*Id.* at 21-22). She moved back to Gunston before the July 2021 accident, repeating that the Clinton Township stay had been "about a year and a half" and confirming the return was "before" the crash. (*Id.* at 25).

Ms. Sherman did not commit insurance fraud. Ms. Sherman completed the ninth grade and described her work history as "light factory work," and this was her "first time ever having insurance." (*Id.* at 29-30, 13). Progressive's principal "proof" of misrepresentation is her own deposition acknowledgment that she later relocated to Detroit before the accident.

In Progressive's Motion for Summary Disposition, it offered no admissible evidence contradicting Ms. Sherman's description of the Clinton Township interlude. Rather, Progressive's Motion was primarily centered on where Ms. Sherman was "domiciled" at the time she took out the policy. (**Exhibit B**). But notably, the policy application—a pre-filled form, apparently completed by the LA Insurance agent where Ms. Sherman purchased the policy—does not ask where the applicant is "domiciled." (**Def's Exhibit C**). It asked for a **"**Garaging ZIP Code**"** and "Rating City" and did not define either. (*Id.*) The application also provides the following notice:

> I understand that to calculate an accurate price for my insurance, the Company may obtain information from third parties, such as consumer reporting agencies that provide driving, claims and credit histories. The Company may use an insurance score based

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> on the information contained in the credit history. The Company or its affiliates may obtain new or updated information to calculate my renewal premium or service my insurance. [(*Id.* at 4).]

This notice also corresponds with Progressive's policy form, where under "Changes", the policy indicates that if the information provided on the application

> is determined by **us** to be incorrect, incomplete, or if it changes during the policy period, **you** agree that **we** may adjust **your** policy information and premium accordingly. Changes that may result in a premium adjustment are contained in **our** rates and rules. These include, but are not limited to... , changes in...
>
> 6. **your** mailing address and **your** residence address;
>
> 7. the principal garaging address of any **covered auto**...
>
> 9. rating territory or discount eligibility. [(**Exhibit B—Def's MSD**, at Ex. H, pp. 29-30) (bold in original, underlining added).]

Conversely, the "Fraud or Misrepresentation" section of the policy states:

> **FRAUD OR MISREPRESENTATION**
> This policy was issued in reliance upon the information provided on **your** insurance application. **We** may void this policy at any time, including after the occurrence of an accident or loss, if **you**:
>
> 1. made incorrect statements or representations to **us** with regard to any material fact or circumstance;
>
> 2. concealed or misrepresented any material fact or circumstance; or
>
> 3. engaged in fraudulent conduct;
>
> at the time of application. This means that **we** will not be liable for any claims or damages that would otherwise be covered. [(*Id.* at 31) (bold in original, underlining added).]

Thus, the policy agreement purports to prescribe a remedy in either circumstance: if there's an incorrect *material* fact or circumstance made "at the time of application," Progressive *may* seek

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to void the policy; while a mere change in information after the application is issued can only result in a change to the policy premium.

On this record, the trial court denied rescission and reformed the policy to reflect Detroit rating and ordered Ms. Sherman to pay the 75.5% premium differential so Progressive would be made whole—expressly stating, "I'm not making the finding that there was a misrepresentation, but I am reforming the contract." (**Exhibit D**—Hr'g Tr 11/2/24, pp. 5-6). The court also identified the 75.5% Detroit premium impact in fashioning relief. (*Id.* at 5).

III. PROCEDURAL POSTURE RELEVANT TO REVIEW

In its first opinion, the Court of Appeals reviewed the matter de novo and characterized Ms. Sherman's conduct as an innocent misrepresentation. (**Exhibit G**, slip op at 3-4). On reconsideration, the panel corrected its standard-of-review discussion but described Ms. Sherman's conduct inconsistently—stating in the standard-of-review section that "there was no genuine question of fact as to Sherman's fraud" (**Exhibit I**, slip op at 3), while elsewhere "reject[ing] … fraudulent misrepresentation" and finding only "innocent misrepresentation" (*Id.*, slip op at 4), and again concluding she obtained benefits "by way of fraud" (*Id.*, slip op at 5).

IV. STANDARDS OF REVIEW

A. Equitable Rescission—Abuse of Discretion

"Because a claim to rescind a transaction is equitable in nature, and equitable relief is not a matter of right, an insurer does not have an absolute right to rescission as a remedy for said fraud." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 410–11; 919 NW2d 20 (2018). The trial court balances the equities; rescission "should not be granted in cases where the result thus obtained would be unjust or inequitable." *Id.* at 410. See also *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26; 331 NW2d 203 (1982) ("[R]escission is not strictly a matter of right, but rather a

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remedy, the granting of which rests in the sound discretion of the court."). *Wallace* confirms rescission is not automatic but discretionary and equitable. ___ Mich at ___; slip op at 2–3.

B. Component Review

Factual findings underlying an equitable rescission ruling are reviewed for clear error, while the selection of an equitable remedy is reviewed for abuse of discretion. *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 405–06; 952 NW2d 586 (2020). Purely legal determinations—such as statutory or contractual interpretation—are reviewed de novo. See, e.g., *Wilmore-Moody v Zakir*, 511 Mich 76, 83; 999 NW2d 1 (2023) (noting de novo review for application of law), as harmonized by Wallace's reiteration that the act of granting rescission is itself a discretionary equitable decision requiring balancing. ___ Mich at ___; slip op at 2–3.

C. Record-Based Resolution; No Evidentiary Hearing Required

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion, with underlying legal questions de novo. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). A trial court "need not hold an evidentiary hearing when it can sufficiently decide an issue on the basis of the evidence already before it." *Vittiglio v Vittiglio*, 297 Mich App 391, 405–06; 824 NW2d 591 (2012). See also *Saffian v Simmons*, 477 Mich 8, 16; 727 NW2d 132 (2007) (upholding reinstatement of default; no evidentiary hearing required where the excuse was unsupported).

This framework controls the three questions this Court posed.

V. THE COURT OF APPEALS DID NOT APPLY THE PROPER STANDARD OF REVIEW

The first published opinion treated rescission as essentially a de novo question and labeled Ms. Sherman's conduct innocent misrepresentation. (**Exhibit G**, slip op at 3-4). Upon reconsideration the panel invoked "abuse of discretion" yet re-cast the conduct as fraud and

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again directed rescission, without remand. (**Exhibit I**, slip op at 3). That approach conflicts with this Court's equity jurisprudence.

As *Bazzi* explains, rescission is equitable and discretionary; it "does not 'function by automatic operation of the law.' " 502 Mich at 411. It requires balancing the equities and may be withheld "where the result thus obtained would be unjust or inequitable." *Id.* at 410. *Wallace* makes the point unmistakable: rescission is not automatic and is a matter the trial court grants "in its discretion, after balancing the equities." ___ Mich at ___; slip op at 2–3.

The Court of Appeals' de novo re-weighing of the record—and, on reconsideration, its relabelling of the facts from "innocent misrepresentation" to "fraud"—substituted its judgment for the trial court's on questions committed to equitable discretion and fact assessment. That is not the correct lens. See *Pioneer State*, 331 Mich App at 405–06 (factual findings—clear error; equitable remedy—abuse of discretion).

A. Issue (1): The Proper Standard Is (i) De Novo for Law, (ii) Clear Error for Historical Facts, and (iii) Abuse of Discretion for the Equitable Decision Whether (and How) to Rescind

First, legal predicates (e.g., that rescission is an available remedy under the No-Fault Act and Michigan common law) are reviewed de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012); *Wilmore-Moody*, 511 Mich at 83.

Second, once the legal framework is established, any historical facts found by the trial court—what the application asked for; what Ms. Sherman answered; whether any inaccuracy was innocent, clarified, or immaterial to the equitable remedy—are reviewed for clear error. *Pioneer State*, 331 Mich App at 405–06.

Third, the equitable choice—whether to rescind or to fashion lesser relief (reformation, restitution, partial enforcement)—is reviewed for abuse of discretion. *Bazzi*, 502 Mich at 410–

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11; *Lenawee*, 417 Mich at 26; *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 134–35; 313 NW2d 77 (1981) ("The equitable court awarding a remedy must look to the most just result… [Courts are] not confined to the polar opposite remedies… Other remedies, such as reformation, restitution, or partial enforcement… may be examined.").

This dual-track review remains true even on a (C)(10) paper record. The grant or denial of summary disposition is of course reviewed de novo; but the trial court's evidentiary gatekeeping (e.g., whether the deposition record sufficed) and its equitable choice of remedy are still discretionary calls reviewed deferentially. *Edry*, 486 Mich at 639; *Vittiglio*, 297 Mich App at 405–06; *Saffian*, 477 Mich at 16.

That is precisely what happened here. The material historical facts were functionally undisputed: the application asked for one "Garaging ZIP Code"; Ms. Sherman listed the Clinton Township address where she was living "on and off, but mostly on" during the basement-repair period; before the accident she moved back to Detroit; Progressive would have charged 75.5% more with Detroit rating. Equitably, the trial court determined that any misstatement was not fraudulent, the policy's own Changes clause identified a premium adjustment remedy, and Progressive could be made whole without forfeiture—so it ordered reformation.

Two additional principles confirm the trial court's leeway:

- **Single-deposition "inconsistency" is not an automatic fact question.** In *Bakeman v Citizens Ins Co of the Midwest*, the Court of Appeals refused a bright-line rule and stressed a case-by-case approach where any apparent inconsistency arises within a **single** deposition by a single deponent: "A single individual, testifying at a single deposition, is less likely to be trying to thwart a procedural rule, especially where that individual demonstrated a lack of guile." 344 Mich App 66, 77–78; 998 NW2d 743 (2022). Ms.

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Sherman's transcript fits that paradigm: one unsophisticated deponent, no guile, and clarifying context.

- **No evidentiary hearing was required.** Michigan courts have long held the circuit court may decide a motion "wholly or partly on … deposition," MCR 2.119(E)(2), and "need not hold an evidentiary hearing when it can sufficiently decide an issue on the basis of the evidence already before it." *Vittiglio*, 297 Mich App at 405–06; accord *Saffian*, 477 Mich at 16.

B. Issue (2) Under the Proper Standard, the Trial Court Acted Within the Range of Principled Outcomes

The contract Progressive drafted distinguishes sharply between (a) application-stage misrepresentation that is both false and material (potential rescission) and (b) rating information that proves incorrect, incomplete, or changes during the term (premium adjustment). Faced with an ambiguous, single-blank "Garaging ZIP Code" question and a lay applicant who answered in good faith while living at Tremlett, the trial court did what equity permits and the policy itself anticipates: it made Progressive whole through a premium true-up, avoided a harsh forfeiture, and left coverage intact.

This is classic *Black*: equity "is not confined to the polar opposite remedies urged by the opposing parties" and may choose "reformation [or] restitution" as justice requires. 412 Mich at 134–35. And it is entirely consistent with *Bazzi*: rescission is available but not mandatory; courts "balance the equities," withholding rescission where unjust. 502 Mich at 410–11.

It also avoids endorsing post-claim underwriting. As one court-cited account explains, "[a]n insurer engages in post-claim underwriting when it does not make a good-faith effort to assess the risk of loss at the time it issues policies but instead 'wait[s] until a claim has been filed to obtain information and make underwriting decisions.' " Brian Barnes, *Against Insurance*

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Rescission, 120 Yale L J 328, 339–40 (2010). Progressive's own form architecture (one "Garaging ZIP Code"), paired with a policy that lets it pull third-party data and adjust premiums at any time, shows Progressive controlled both the information and the pricing levers. On this record, the trial court reasonably declined to reward a wait-and-void posture when the contract's built-in remedy (premium adjustment) fully compensates the carrier.

If a touch of analogy helps: equity does not stop a bench trial to decide whether the hit-and-run car was black or dark gray when it is undisputed which car caused the crash. The trial judge can focus on what actually matters to a fair remedy. Here, what mattered was that Detroit rating was higher and the contract already told everyone how to handle later-discovered rating facts—charge the proper premium.

C. Issue (3): Even Assuming Error, the Court of Appeals Should Have Remanded for the Trial Court to Rebalance the Equities

This Court's decisions in *Bazzi* and *Wallace* supply the remedial template. In *Bazzi*, after confirming the legal availability of rescission, this Court remanded for the trial court "to determine whether, in its discretion, rescission … is available" between the parties. 502 Mich at 436. *Wallace* likewise underscores that rescission decisions require trial-level equitable balancing—not appellate re-balancing. ___ Mich at ___; slip op at 2–3.

The Court of Appeals here did the opposite. It first used a de novo standard while calling Ms. Sherman's conduct innocent misrepresentation, then—after switching to abuse of discretion—announced fraud and directed rescission without a remand. That is not how equity is supposed to work. See also *Pioneer State*, 331 Mich App at 405–06 (abuse of discretion review for rescission).

If this Court sees any legal misstep, the correct path is the *Bazzi/Wallace* path: remand so the trial court can exercise its discretion under the clarified framework.

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VI. APPLICATION TO THE RECORD

The panel's reconsideration opinion invokes "fraud" while conceding "innocent misrepresentation." That contradiction alone demonstrates why deferential review of trial-level fact and equity calls is vital. The circuit court had the entire deposition, found no need for live testimony, and chose a contract-conforming remedy that made Progressive whole. That was a principled exercise of discretion, particularly where (1) any inconsistency in Ms. Sherman's single deposition is the type *Bakeman* teaches courts to evaluate for confusion, not guile, 344 Mich App at 77–78; and (2) the policy expressly provides a non-forfeiture remedy for later-discovered address information.

Against that backdrop, the standard-of-review answers are straightforward:

- **Issue (1)**: No—the Court of Appeals did not apply the proper standard. It effectively reviewed the equitable rescission decision **de novo** and re-weighed facts.
- **Issue (2)**: The proper standard is **de novo** for law, **clear error** for historical facts, and **abuse of discretion** for the equitable decision whether (and how) to rescind. *Wallace*, slip op at 2–3; *Bazzi*, 502 Mich at 410–11; *Pioneer State*, 331 Mich App at 405–06.
- **Issue (3)**: If the trial court erred, the Court of Appeals should have **remanded** for the trial judge to rebalance the equities in the first instance. *Bazzi*, 502 Mich at 436.

VII. RELIEF REQUESTED

Plaintiff-Appellant respectfully asks this Court to (a) hold that the Court of Appeals applied the wrong standard of review to the trial court's factual assessments and equitable remedy; (b) clarify that the proper standard is clear error for historical facts and abuse of discretion for the decision to rescind or reform (with de novo review of pure legal questions);

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and (c) reverse the Court of Appeals and reinstate the trial court's reformation order—or, at minimum, remand for the trial court to rebalance the equities under the clarified framework.

Respectfully Submitted,

THE SEVA LAW FIRM

/s/ Pratheep Sevanthinathan

PRATHEEP SEVANTHINATHAN (P70094)
Attorney for Plaintiff-Appellant
100 W. Big Beaver Road, Suite 500
Troy, MI 48084

Dated: August 7, 2025

VIII. WORD COUNT CERTIFICATION

I hereby certify that this document contains 3,667 words, including any footnotes, but excluding the cover page, table of contents, index of authorities, judgment appealed from and relief sought, statement of jurisdiction, counter-statement of questions presented, and this word count certification. The body of the document is one-inch margins, 12-point Times New Roman font, and set to double space lining, except for quotations and footnotes.

Respectfully Submitted,

THE SEVA LAW FIRM

/s/ Pratheep Sevanthinathan

PRATHEEP SEVANTHINATHAN (P70094)
Attorney for Plaintiff-Appellant
100 W. Big Beaver Road, Suite 500
Troy, MI 48084

Dated: August 7, 2025