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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,

vs.

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee,

AND

JOHN DOE,

Defendant.

Supreme Court Case No.: 167826

Court of Appeals Case No: 364393

Washtenaw County Circuit Court
Lower Court Case No.: 22-000075-NI
Judge Carol Kuhnke

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DEFENDANT-APPELLEE PROGRESSIVE MICHIGAN INSURANCE COMPANY'S RESPONSE TO PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL PURSUANT TO THE MAY 22, 2025 ORDER OF THIS COURT

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Introduction

This case presents a clear instance of fraud in the procurement of an insurance policy that does not require further review by this Court. Plaintiff-Appellant, Janice Sherman ("Plaintiff"), provided sworn testimony that established she (whether innocently or not) misrepresented her residential and garaging address, household members, and drivers of the covered vehicles when obtaining the policy from Defendant-Appellee, Progressive Michigan Insurance Company ("Progressive"), and then failed to correct those misstatements upon renewal. The record is also undisputed that these facts were material to Progressive's premium calculation. Thus, on this record, rescission was the only proper remedy under Michigan law.

The trial court, however, ignored the legal consequences of Plaintiff's fraud and instead "creatively" reformed the policy to adjust the premium so that Plaintiff could still receive no-fault benefits**.** See **Progressive's Exhibit A**[1] - 11/10/22 Order. The Court of Appeals correctly held that the trial court abused its discretion by granting reformation—which is a limited equitable remedy that is not available under the facts here—and properly directed that Progressive was entitled to rescission on the record in accordance with well-settled law. *Sherman v Progressive Michigan Ins Co*, __ Mich App ___; __ NW3d __ (September 5, 2024) (Docket No. 364393), pp 3-5 (hereinafter, the "Opinion" or "*Sherman*, slip op"). Nevertheless, Plaintiff seeks to avoid that outcome by arguing the Court of Appeals misapplied the standards of review, claiming the Court improperly weighed evidence and substituted its judgment for the trial court's discretion; or, alternatively, Plaintiff argues that any error by the trial court required a remand for a balance the equities as to whether rescission was warranted. Those arguments fail.

[1] Progressive cites to its Appendix of Exhibits filed with its Response to Plaintiff-Appellant's Application for leave to Appeal, containing Exhibits A through M.

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The Court of Appeals applied the proper legal framework for reviewing the trial court's decision:

- It reviewed *de novo* the undisputed record to determine whether any genuine issue of material fact existed as to Plaintiff's fraud;
- It reviewed *de novo* the trial court's application of equitable doctrines (reformation and rescission); and
- It reviewed for abuse of discretion the trial court's ultimate decision to grant reformation.

Id. at 3.

Applying these standards, the Court of Appeals correctly found no genuine issue of material fact as to Plaintiff's fraud (as her sworn deposition testimony establishes that she made multiple, material misstatements at the time of procurement). *Id*. 3-4. The Court also recognized that rescission—and not reformation—is the applicable equitable doctrine applicable under Michigan law when an insured commits such an act. *Id*. While Plaintiff correctly notes that rescission is not automatic but subject to the trial court's equitable discretion, that discretion cannot extend to reformation here because, as explained by the Court of Appeals, the undisputed record shows reformation was legally unavailable. *Id*. at 4-5. Michigan courts have long limited reformation to situations involving a mutual mistake, where one party is mistaken and the other party commits fraud, or where a contract violates the law or public policy—none of which occurred here. *Id*. at 4 (see case law cited); see also *Johnson v USA Underwriters*, 328 Mich App 223, 234-235; 936 NW2d 834 (2019). By contrast, well-established precedent holds that rescission is appropriate where, as here, an insurance policy is procured through material misrepresentations, including those made innocently. *21st Century Premier Ins Co v Zufelt*, 315 Mich App 437, 445; 889 NW2d 759 (2016); *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998); *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995).

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Based on the applicable law and the undisputed record, the Court of Appeals correctly concluded that the trial court abused its discretion in granting reformation—finding the trial court improperly shifted the burden of Plaintiff's fraud onto Progressive, despite there being no evidence of any wrongdoing by Progressive. *Sherman*, slip op at 4-5. The Court therefore properly held that rescission, not reformation, was the appropriate remedy and remanded for further proceedings consistent with that conclusion. *Id*.

Nevertheless, even if this Court were to find any arguable error by the Court of Appeals in its application of the standard of review, the result would be the same. Given the undisputed record (Plaintiff misrepresented key facts at the time of procurement while Progressive engaged in no wrongdoing on its part), rescission was the only proper outcome. *See 21st Century Premier Ins Co*, 315 Mich App at 445-446; *Lake States Ins Co*, 231 Mich App at 331; *Lash*, 210 Mich App at 103. In contrast, the trial court's decision to reform the policy—forcing an insurer to bear the consequences of its insured's fraud—clearly fell outside the bounds of reasonable and principled outcomes and thus constituted an abuse of discretion.

Furthermore, contrary to Plaintiff's claim, a remand for a balancing of equities was not required. *Lakes State Ins Co*, 231 Mich App at 331 (noting the exception to the well-established rule that an insurer is entitled to rescission when an insured makes a material misrepresentation in the application for insurance is when an innocent third party is involved). There are no third-party interests to protect when Plaintiff is the named insured and party to the insurance contract (unlike in the case law relied on by Plaintiff, i.e., *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018); *Wallace v Suburban Mobility Authority for Regional Transportation*, __ Mich __; __ NW2d __ (2025) (Docket No. 165964), which both involved the issue of whether rescission should be allowed against an innocent third party). Justice Markman in *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 503 Mich 903, 903-907; 919 NW2d 394 (2018) (Markman, C.J., concurring),

explained how a balancing of equities inquiry is required in "innocent-third-party cases"—where rescission would affect someone who is not a party to the insurance policy and not complicit in the fraud—and set forth a nonexclusive list of factors to be considered in those cases. However, this is not an "innocent-third-party case" and so the balancing inquiry is not applicable. Plaintiff herself (the insured) committed the fraud, and Progressive acted properly. Indeed, a remand for equitable rebalancing would serve no practical purposes, as a wrongdoer should not retain the benefit of her fraud while an insurer that did nothing wrong bears the risk, and there is no countervailing equitable factor to justify allowing the fraud to stand. Recognizing this, the Court of Appeals correctly directed that reformation was improper and that the policy should instead be rescinded on remand. *Sherman*, slip op at 5.

Accordingly, this Court should deny Plaintiff's Application for Leave to Appeal and uphold the Opinion entered by Judges Cameron, Hood, and Young.

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Counter-Statement of Facts and Procedural History

I. Factual Background

On or about November 12, 2020, Plaintiff applied for a no-fault policy from Progressive. See **Progressive's Exhibit C** - Application. Plaintiff signed the Application for Insurance ("Application"), which provided:

> 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.

Id. at 4 (emphasis added). In the Application, Plaintiff listed 16845 Tremlett Dr., Clinton Township, MI 48035 (the "Clinton Township address") as both the policy address and garage address for the two covered vehicles, a 2006 Cadillac DTS and a 1993 Chrysler New Yorker. *Id*. at 1-2. Plaintiff was also 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 only listed herself as the sole household member and driver of the covered vehicles. *Id*. at 1.

On or about April 15, 2021, Plaintiff renewed the policy. See **Progressive's Exhibit D** – Renewal Declarations Page. At that time, it is undisputed that Plaintiff made no changes to her address, garage address, household members, or vehicle drivers upon renewal of the policy. *Id*.

On July 14, 2021, Plaintiff was allegedly involved in a motor vehicle accident while driving a covered vehicle. Thereafter, Plaintiff submitted a claim for no-fault benefits from Progressive under the policy. During its investigation of the claim, Progressive determined that Plaintiff's representations at the time of procurement as to her policy address, garage address, household members, and drivers of covered vehicles were incorrect and false. See **Progressive's Exhibit E** –

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Copic Affidavit, paras 5-10. Progressive discovered that Plaintiff was domiciled at 12525 Gunston Street in Detroit, Michigan 48205 (the "Detroit address") and not at the Clinton Township address disclosed in the Application. Progressive also determined that Plaintiff failed to identify household relatives and drivers of the policy vehicles. *Id*. Had Progressive been provided with accurate information regarding the policy address, the garage address, the household residents, and the drivers of covered vehicles, it would have charged a higher premium, resulting in an increase of over 80%. *Id*.

On August 9, 2021, Progressive provided written notice to Plaintiff, through her counsel, that it was rescinding the policy based on Plaintiff's "incorrect statements or representations with regard to [a] material fact or circumstance; concealed or misrepresented a material fact or circumstances or engaged in fraudulent conduct in connection with [the] application [for insurance]." See **Progressive's Exhibit F** - Rescission Letter. In the letter, Progressive further informed Plaintiff that it "would not have issued a policy at the current premium rate in this instance" had it been provided accurate information. *Id*. The next day, on August 10, 2021, Progressive indisputably refunded Plaintiff's premium payment to her credit card on file. See **Progressive's Exhibit E** – Copic Affidavit, para 11.

II. Procedural History

A. Lawsuit

On or about January 19, 2022, Plaintiff filed the instant lawsuit against Progressive for no-fault personal protection insurance ("PIP") benefits. See **Progressive's Exhibit I, Sub-Exhibit A** - Complaint.

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B. Plaintiff's deposition

On May 23, 2022, Plaintiff appeared for her deposition. See **Progressive's Exhibit G** – Plaintiff's Deposition Transcript. There, she provided testimony regarding her various misrepresentations:

- When she initially applied for insurance, Plaintiff was renting the house at the Detroit Address; however, Plaintiff listed her adult daughter's home at the Clinton Township address as her residential and garaging address in the Application, *id*. at 7-8, 14, 21-22 and 25;
- While Plaintiff testified that she was "temporarily" staying at her adult daughter's home at the time of the policy procurement due to flooding in the basement at her house, she unequivocally testified that the Detroit address is her "permanent address" and "domicile," *id*.;
- Plaintiff also testified that she continued to pay rent for her house at the Detroit address and kept clothing and all her furniture there, *id*. at 21; and
- Plaintiff further testified that she always kept her Detroit address on file with the Social Security Administration and Medicaid, stating she "didn't intend to stay[ ] out there [at the Clinton Township address] long," *id*. at 8-9 and 12;
- Plaintiff, however, testified that she 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 (although Plaintiff never disclosed to Progressive that her daughter was a household relative or a driver in the Application), *id*. at 15-16, 19, 22-23 and 26-29;
- At the time of the accident, Plaintiff 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

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(again, Plaintiff did not identify her son as a household relative on the Application), *id*. at 7; and

- Finally, Plaintiff testified that although she is the titled owner of the 2026 Cadillac DTS and listed it on her policy, the vehicle was in fact used and garaged by her brother at another address—and she admitted to adding it to her policy because her brother lacked insurance. *Id*. at 8-9 and 12.

Of note, Plaintiff never retracted her testimony by affidavit or otherwise.

C. Summary disposition motion

Following Plaintiff's deposition, Progressive filed a motion for summary disposition seeking dismissal of Plaintiff's claim based on rescission of the policy due to her fraudulent misrepresentation and/or omissions at procurement. See **Progressive's Exhibit I** – Progressive's Motion for Summary Disposition. The trial court denied the motion; however, it ordered that the policy be reformed as follows:

- "[T]he policy shall be reformed to reflect the proper policy address of 12525 Gunston Street, Detroit, MI 48205;" and
- "Plaintiff shall repay the previously refunded policy premium in the amount of $1,491.54 plus an additional 75.5% policy premium increase, $1,126.11, for the Detroit address. The 75.5% policy premium for the Detroit address equates to $2,617.65 in total.

See **Progressive's Exhibit A** – Copic Affidavit, paras 5-10. 11/10/22 Order. The trial court further ordered that Plaintiff's failure to pay said amount within 14 days of the Order would result in dismissal with prejudice. *Id*. Progressive filed a motion for reconsideration (see **Progressive's Exhibit M**); however, the trial court denied the motion. See **Progressive's Exhibit K** – 12/12/22 Order.

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D. Appellate Proceedings

On January 3, 2023, Progressive filed an application for leave to appeal with the Court of Appeals. On June 27, 2023, the Court of Appeals granted Progressive's application. On June 20, 2024, the Court of Appeals issued an opinion reversing the trial court's denial of summary disposition and finding Progressive was entitled to rescission; however, following a motion for reconsideration filed by Plaintiff, that opinion was vacated. See Court of Appeals' 9/5/24 Order.

On September 5, 2024, the Court of Appeals issued a new opinion (referred to as the Opinion herein), which is the subject of this appeal. *Sherman*, slip op. There, the Court of Appeals determined that the trial court had abused its discretion in ordering reformation rather than rescission and that Progressive was entitled to summary disposition. *Id*. at 4-5.

Thereafter, Plaintiff moved for reconsideration of the Opinion; however, the Court of Appeals denied the motion. See Court of Appeals' 10/15/24 Order. Plaintiff then filed an application for leave to appeal with this Court. On May 22, 2025, this Court ordered that oral argument be scheduled on Plaintiff's application and for the parties to submit supplemental briefs to address the following issues:

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.

See Michigan Supreme Court's 5/22/25 Order. It should bear noting that at no point during these proceedings has Plaintiff effectively challenged her testimony or that a misrepresentation existed;

rather, at the Court of Appeals, she argued in favor of the reformation ordered by the trial court as a properly equitable result.

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Counter-Statement to Plaintiff's Standard of Review

Plaintiff's statement does not address this Court's standard of review on an application for leave to appeal. Instead, Plaintiff states what standards she believes governed the Court of Appeals' review of the trial court's decision. While this Court is considering whether the Court of Appeals applied the correct standard of review in its review of the trial court's decision, it is important to recognize that this Court's determination of whether to grant leave is governed by MCR 7.305. Leave is not granted as a matter of right but only under limited and exceptional circumstances. MCR 7.303(B); MCR 7.305. The rule identifies when leave may be appropriate: (1) the case presents legal principles of major significance to the state's jurisprudence, MCR 7.305(B)(3); or (2) the Court of Appeals' decision is clearly erroneous and will cause material injustice, or conflicts with decisions of this Court or the Court of Appeals, 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; 726 NW2d 746 (2006).

Thus, even if a party alleges error below, that alone is insufficient to justify leave unless one of the narrow criteria under MCR 7.305(B) is satisfied. As argued in Progressive's Brief in Response to Plaintiff-Appellant's Application for Leave to Appeal, none of the criteria are met. The Court of Appeals' Opinion applies well-settled law to an undisputed record, produces no conflict with other appellate precedent, and raises no novel or unsettled legal issue of statewide significance. Accordingly, this case does not present the type of exceptional circumstance warranting further review.

As to applicable standard of review for the Court of Appeals' review of the trial court's denial of summary disposition, Progressive incorporates by reference the Court of Appeals' standard of review in its Opinion and further addresses this issue in the Argument section herein, given this Court's instructions in its Order for supplemental briefing.

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Argument

I. The Court of Appeals applied the proper standard of review in its Opinion

Plaintiff's pending Application for Leave to Appeal arises from the Court of Appeals' Opinion issued September 5, 2024, which superseded the Court's initial opinion that was vacated on reconsideration. Despite this, Plaintiff repeatedly dwells on the Court's initial opinion as support for its argument that the Court misapplied the applicable standards of review—however, as that opinion was vacated, it has no continuing legal effect. Rather, the Court's Opinion of September 5, 2024 controls. And, that Opinion is properly decided.

The parties are largely in agreement that the Court of Appeals correctly articulated the proper standards of review in its Opinion. The disagreement lies in Plaintiff's assertion that the Court *misapplied* the standards by reweighing evidence and substituting its judgment for the trial court's discretion. That contention is without support, as the Court of Appeals' review of the trial court's decision was entirely consistent with the established law and properly distinguished between the legal, factual, and equitable components at play:

1. *De novo* review of legal and evidentiary issues – The Court of Appeals properly applied *de novo* review to determine whether a genuine issue of material fact regarding Plaintiff's misstatements in procuring the policy prevented summary disposition. Plaintiff seemingly challenges this, arguing that the Court improperly reweighed evidence instead of reviewing factual findings for clear error. But that argument is a red herring, as Plaintiff concedes that the relevant historical facts here were undisputed. Plaintiff's sworn testimony and signed Application clearly establish that she misstated her residential and garaging addresses, household members, and drivers of covered vehicles at the time of procurement (**Progressive's Exhibit G** – Plaintiff's Dep. Tr., pp 7-9, 12, 14-16, 19, 21-23, 25-29, and **Exhibit C** – Application), and it is undisputed that she never corrected those misstatements at renewal or any other time.

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Importantly, the trial court never made an explicit finding as to whether Plaintiff made a misrepresentation. At most, the trial court commented during oral argument on Progressive's motion for summary disposition that it was not finding a "misrepresentation;" *however, the trial court subsequently entered an Order reforming the policy to reflect the "proper" address (the Detroit address) and then adjusted the premium based on that address*. See **Progressive's Exhibit A** – 11/10/22 Order. That Order implicitly recognized that Plaintiff in fact made a misrepresentation as to her address at procurement. *Id*. It is possible that the trial court's comment during oral argument (before it officially ruled and issued its Order) referred only to intent, rather than disputing that Plaintiff misstated her address. However, as the Court of Appeals correctly explained, intent is not required for fraud in the procurement for purposes of rescission:

> [R]escission "is justified without regard to the intentional nature of the misrepresentation, as long as it is relied upon the by the insurer." *21st Century Premier Ins Co*, 315 Mich App at 446. "Rescission is justified in cases of innocent misrepresentation if a party relies upon the misstatement, because otherwise the party responsible for the misstatement would be unjustly enriched if he were not held accountable for his misrepresentation." *Lash* . . ., 210 Mich App [at] 103 . . .; see also *M & D, Inc v W B McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). "[T]he party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false." *M&D, Inc*, 231 Mich App at 28.

Sherman, slip op at 4. And, here, Progressive's reliance on Plaintiff's misstatements was undisputed (as the evidence plainly established that it would have charged a higher premium had it been provided accurate information regarding Plaintiff's residential and garaging address, household members, and drivers of covered vehicles, see **Progressive's Exhibit E** - Copic Affidavit, paras 5-10). *Sherman*, slip op at 4.

In any event, because the material facts were undisputed, the Court of Appeals' review was both appropriate and consistent with Michigan law—and it properly held that Plaintiff's innocent

misrepresentation at procurement presented no genuine issue of material fact and thus warranted rescission as a matter of law. *Id*. at 3-4.

2. *De novo* review of application of equitable remedy – The Court of Appeals correctly applied a *de novo* review to the trial court's application of equitable doctrines—i.e., as to whether reformation (or rescission) was legally permissible based on the record. *Sherman*, Slip op at 3-4. Questions concerning the scope and availability of equitable remedies present legal issues reviewed *de novo*. *21st Century Premier Ins Co*, 315 Mich App at 443; *Wilmore-Moody v Zakir*, 511 Mich 76, 83; 999 NW2d 1 (2023). **This threshold inquiry is necessary before a reviewing court considers whether the trial court properly exercised its discretion in selecting a particular remedy**. The Court of Appeals therefore properly analyzed the limited circumstances where reformation is available to determine if it was even legally permissible based on the record here, before turning to whether the trial court had abused its discretion:

> [W]e have deemed reformation "the appropriate remedy when an insurance contract violates the law or public policy." *Progressive Marathon Ins Co v Pena*, 345 Mich App 270, 276; 5 NW3d 367 (2023). Similarly, reformation is possible if a party can "prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). This Court has also held that reformation is available for contracts if the writing "fails to express the intentions of the parties . . . as the result of accident, inadvertence, mistake, fraud, or inequitable conduct, or both fraud and mistake, fraud or inequitable conduct being on one side and mistake on the other." *Najor v Wayne Nat'l Life Ins Co*, 23 Mich App 260, 272; 178 NW2d 504 (1970), quoting 45 Am Jur, Reformation of Instruments, § 45, p 609.

Sherman, slip op at 4. As the facts here did not fall in any of these scenarios, reformation was not an option on the record. Tellingly, Plaintiff does not cite to *any* case law applying reformation under facts similar to this case (i.e., where there was no mutual mistake of fact, no mistake on one side and fraud on the other side, no claim that the policy failed to express the intentions of the party due to accident, inadvertence, mistake, fraud or inequitable conduct, etc.). Rather, the Court of Appeals

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properly found that rescission was the only available equitable remedy based on the record and applicable law.[2] *E.g.*, *21st Century Premier Ins Co*, 315 Mich App at 445-446.

3. Review of the trial court's ultimate decision to reform the policy for abuse of discretion

The Court of Appeals correctly reviewed the trial court's ultimate decision to reform the policy for an abuse of discretion. There is no dispute that a court abuses its discretion when it rules "outside th[e] principled range of principled outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001) (A trial court abuses its discretion when "an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made.").

That is certainly what happened here. The trial court's decision to reform the policy—by recalculating the premiums as if Plaintiff had accurately disclosed her address when, in fact, she had not—effectively legitimized a fraudulently procured policy. It allowed Plaintiff, the wrongdoer, to retain the benefits of her misstatements while forcing Progressive to bear the very risk that Michigan law says should rest with the party who committed the fraud. *United Sec Ins Co v Comm'r of Ins*, 133 Mich App 38, 43; 348 NW2d 34 (1984) ("[W]e see no reason in law or policy for the burden of such a risk to be placed on the insurer in preference to the insured who made the intentional material misrepresentations.").

Plaintiff's contention that the Court of Appeals impermissibly substituted its judgment for that of the trial court misstates the role of appellate review. The Court of Appeals did not intrude on the trial court's discretion; it applied the established law that reserves reformation to limited situations

[2] Relying on *Wallace*, Plaintiff urges that rescission is not automatic but subject to judicial discretion. Progressive does not dispute that; however, *Wallace* does not authorize a trial court to disregard well-settled precedent holding that rescission is the proper remedy when an insured procures a policy through fraud. Moreover, *Wallace* does not support the creation of remedies beyond those recognized in law, such as reformation to accommodate misrepresentations made at procurement.

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that were not applicable here and recognized that no principled range of outcomes could include rewriting a policy to accommodate fraud especially where rescission was clearly compelled by law. By choosing reformation, the trial court exceeded the limits of its equitable discretion. Simply put, a trial court cannot have exercised sound discretion when it selects a remedy that is not legally available to it. Accordingly, because the Court of Appeals applied the correct legal framework in its Opinion, no further review is warranted, and this Court should deny Plaintiff's Application for Leave to Appeal.

II. Any error by the Court of Appeals in its application of the standard of review is inconsequential to the holding that Progressive was entitled to rescission based on Plaintiff's fraudulent misrepresentations at procurement.

Even assuming *arguendo* that the Court of Appeals somehow erred in its application of the standard of review, its conclusion—***that rescission is the proper remedy***—was correct. By reforming the policy to charge a higher premium, the trial court necessarily acknowledged that Plaintiff made at least an innocent misrepresentation regarding her address at procurement. The Court of Appeals properly recognized that such a misstatement when procuring insurance—even if innocently made—constitutes fraud in the procurement and thus warranted rescission. *Sherman*, slip op at 4. See also *Lash*, 210 Mich App at 103.

Instead of confronting the substance of her misrepresentations, Plaintiff attempts to shift ground by improperly advancing new arguments for the first time in this litigation. Plaintiff now suggests that her misrepresentations occurred post-application and thus fall under the policy's "changes" provision for which reformation is the purported remedy; she also newly claims that her single deposition testimony cannot establish fraud. Yet, *Plaintiff never advanced these theories in the trial court—or before the Court of Appeals or even in her Application for Leave to Appeal to this Court*. Those arguments are therefore waived and should not be considered by this Court on review. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (an issue not raised before and addressed by the trial court is not preserved for appellate review); *Booth Newspapers, Inc v Univ of*

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Mich Bd of Regents, 444 Mich 211, 234; 507 NW2d 422 (1993) ("[T]he issue was neither presented to nor evaluated either by the trial court or the Court of Appeals. Issues raised for the first time on appeal are not ordinarily subject to review."). Nevertheless, even if considered, neither argument is availing.

First, Plaintiff's reliance on the "changes" provision is misplaced. That provision plainly governs adjustments to the premium when information previously provided by the insured changes during the policy term, not when the original information was false. Simply stated, it does not prevent rescission where the policy itself was obtained through a misrepresentation, nor does it authorize a court to retroactively rewrite a policy to accommodate fraud in the procurement. The application itself expressly warned that the policy would be "**rescinded and declared void**" if any false statements were made. See **Progressive's Exhibit C** – Application, p 4 (emphasis added). Even if Plaintiff subjectively believed her answers were correct, her statements regarding residence, garaging, household relatives, and vehicle drivers were objectively false ***at the time of the application*** and thus constituted innocent misrepresentations. Plaintiff then compounded those misstatements by failing to correct those misstatements through renewal. As such, the "changes" provision offers no support for Plaintiff's argument, and rescission remains the proper remedy under Michigan law.

Second, Plaintiff cannot escape the consequences of her own sworn admissions. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) ("[W]hen a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence."). Plaintiff's deposition testimony was not ambiguous or equivocal—it was a direct acknowledgment that she misrepresented material facts at the time of application. Plaintiff never retracted, clarified, or contradicted that testimony by affidavit or any other evidence, and she cannot now disavow her own words. A party's sworn testimony is binding evidence, and here

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it squarely establishes fraud that warrants rescission. *Casey*, 373 Mich App at 396 ("[A] witness is bound by his or her deposition testimony[.]").

Plaintiff cites to *Bakeman v Citizens Ins Co of the Midwest*, 344 Mich App 66; 998 NW2d 743 (2022), as support for her attempt to nullify her sworn testimony. However, *Bakeman* does not save Plaintiff from her own words. When deposition testimony appears inconsistent, the Court of Appeals noted that a court may consider whether the inconsistency reflects confusion instead of guile; however, nothing in *Bakeman* permits a party to avoid clear, direct and unredacted admissions. *Id*. at 77-78. Here, Plaintiff's testimony was neither confusing nor ambiguous; it was straightforward and never retracted by affidavit or otherwise. Accordingly, *Bakeman* underscores—rather than undermines—that her testimony is binding and establishes fraud warranting rescission.[3]

Thus, based on the record, the trial court's "creative" approach—refusing to find fraud yet reconfiguring the premium—is unprecedented and inconsistent with Michigan law. The Court of Appeals correctly identified that rescission, rather than reformation, is the proper remedy when a policy is procured through misrepresentation, and it properly applied established standards and precedent to reach that result. In short, Plaintiff's arguments do not disturb the Court of Appeals' sound conclusion that rescission and rescission alone governs here.

III. Remand for a balancing of equities was unnecessary because Plaintiff is the insured who fraudulently procured the policy, and the record is devoid of any wrongdoing on the part of Progressive.

Although the trial court erred by granting reformation instead of rescission, and the Court of Appeals properly corrected that error, Plaintiff now seeks to avoid that result by urging remand for a "balancing of equities." However, such balancing is not required where Plaintiff—the insured—made

[3] In *Bakeman*, the Court of Appeals further held that the insured's subjective intent is immaterial when a false statement is made in an application for insurance—emphasizing it is the falsity and materiality of the statement that controls. 344 Mich App at 74-75. And, here, Plaintiff's sworn testimony establishes she made multiple, material, false statements in the Application.

the misrepresentations and Progressive did nothing wrong. To find otherwise would distort equity by suggesting both sides bore fault and corrupt the balancing framework first outlined by Justice Markman. See *Farm Bureau Gen Ins Co of Mich*, 503 Mich at 903-907 (Markman, C.J., concurring). Those factors were meant to be applied when the party suing was not a party to the contract and, therefore, considered "innocent" to the fraud. That is not the case here where Plaintiff is the named insured. Nonetheless, there are even more issues with Plaintiff's suggestion.

First, Plaintiff's reliance on *Bazzi* and *Wallace* are misplaced; rather, this Court's holdings in those cases necessitate a balancing of equities in the instance where rescission is sought against an innocent third party. In *Bazzi*, the plaintiff was injured while driving a vehicle owned by his mother and sought PIP benefits under his parents' policy. 502 Mich at 396. The insurer discovered that the policy had been procured through fraud by the insureds (the plaintiff's parents) and sought to rescind the policy. *Id*. at 397. The insurer sought summary disposition; however, the trial court denied the motion, reasoning that rescission was unavailable when an innocent third party is involved. *Id*. On appeal, the Court of Appeals reversed, holding the insurer was automatically permitted to rescind even if an innocent third party would be affected. *Id*. at 397-398. On further appeal, this Court reversed and remanded, holding that the trial court must balance the equities between the insurance company and the innocent third party before granting rescission. *Id*. at 398 and 408-412.

Critically, *Bazzi* involved unresolved factual and equitable issues *affecting an innocent third party* and thus justified remand to determine whether rescission should be permitted against the third party. By contrast, the record here is complete and largely undisputed—there is no innocent third party involved; rather, Plaintiff is the named insured who misrepresented material information at procurement, and it is undisputed that Progressive did not do anything wrong. As such, no further fact-finding or equity-balancing is required and so the Court of Appeals correctly recognized that rescission was warranted on the record before it.

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Plaintiff's reliance on *Wallace* is likewise inapplicable. *Wallace* addressed the distinct scenario of a mutual rescission of an insured's assignment of rights to a medical provider. Slip op at 10-13. In line with *Bazzi*, this Court held that the trial court must balance the equities between the parties before extending the effect of the rescission to third parties, such as an insurer. *Id*. at 34-35. Again, this Court's analysis in *Wallace* (like in *Bazzi*) was limited to the application of rescission against an innocent third party—which requires a balancing of equities—but in no way suggested that the same analysis was required where no third party was involved in the attempted rescission and only one party bore fault.

Second, the record clearly and conclusively establishes the facts necessary to decide this case. Plaintiff's own sworn testimony established that she listed the wrong residential and garaging address and failed to disclose household residents and vehicle drivers on the Application. See **Progressive's Exhibit G** – Plaintiff's Dep. Tr., pp 7-9, 12, 14-16, 19, 21-23, 25-29, and **Exhibit C** – Application. Indeed, the trial court's ruling was based on Plaintiff having provided the wrong address when she obtained the policy. See **Progressive's Exhibit A** – 11/10/22 Order. The trial court also confirmed that Plaintiff's representation of the wrong address was material, as the trial court's basis for reformation was that Plaintiff should have been charged a significantly higher premium based on the correct address. *Id*. Thus, even though the trial court declined to call it a "misrepresentation" during oral argument, its holding implicitly recognized Plaintiff's fraud constituted at least an innocent misrepresentation—and so no further testimony, credibility determination or evidentiary proceedings are required. Rather, the Court of Appeals, having appropriately determined that rescission and not reformation was the proper remedy based on the record, properly concluded that the trial court abused its discretion, reversed the trial court's decision and remanded for entry of summary disposition in favor of Progressive based on rescission of the policy. *Sherman*, slip op at 3-5.

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Third, remand for a balancing of equities would be unnecessary and inappropriate. As discussed above, Plaintiff is the party who committed the fraud, there are no third-party interests at stake, and, as properly recognized by the Court of Appeals, it is undisputed that Progressive acted entirely properly. *Id*. at 4. The equities are therefore one-sided—and requiring a remand to "rebalance" them would be both unnecessary under Michigan law and a waste of judicial resources. *United Sec Ins Co*, 133 Mich App at 43. Simply stated, the wrongdoer (Plaintiff) should not retain the benefits of her fraud, and Progressive should not be penalized. Because the record is complete and the equities overwhelmingly favor rescission, the Court of Appeals correctly found that the policy should be rescinded and so there is no practical or legal reason to remand the case.

IV. Plaintiff's application should be denied.

Plaintiff's application fails to satisfy the limited and exceptional circumstances required for this Court to grant leave under MCR 7.305. The Court of Appeals properly applied the relevant standards in reviewing the trial court's decision and correctly concluded that the trial court abused its discretion in granting reformation rather than rescission. Even assuming arguendo that the Court of Appeals made any error in applying those standards, leave is still not warranted because the result was correct—that the undisputed record plainly showed that reformation was legally unavailable and that rescission was the appropriate equitable remedy under well-established precedent. Moreover, contrary to Plaintiff's urgence, there is no need for further equitable proceedings, as the record shows no competing interests. There are no third-party interests at issue, and Progressive should not be forced to absorb the consequences of Plaintiff's misrepresentations (even if innocently made) where it indisputably did nothing wrong.

Plaintiff's application meets none of criteria for leave to appeal: There is no unresolved legal question of statewide significance, no conflict with prior appellate decisions, and no material injustice that would warrant this Court's intervention. Pursuing further review would serve no practical

purpose, and it would risk undermining the settled principle that an insurer should not bear the consequences of its insured's fraud. Accordingly, the application should be denied, and the Court of Appeals' Opinion should be upheld.

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Conclusion and Relief Requested

Defendant-Appellee, Progressive Michigan Insurance Company, respectfully requests that this Court deny Plaintiff-Appellant's Application for Leave to Appeal and preserve the Court of Appeals' well-reasoned Opinion entered by Judges Cameron, Hood, and Young.

Respectfully submitted,

MCDONALD BAAS & LIVINGSTON PLLC

/s/ Kaitlyn A. Cramer

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Dated: September 25, 2025

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Certificate of Compliance with MCR 7.212(B)

In accordance with MCR 7.212(B), I, Kaitlyn A. Cramer, hereby certify that there are 6,347 words in Defendant-Appellee Progressive Michigan Insurance Company's Response to Plaintiff-Appellant's Supplemental Brief on Appeal Pursuant to the May 22, 2025 Order of this Court, including headings, footnotes, citations and quotations contained in the Introduction, Counter-Statement of Facts, Counter-Standard of Review, Argument and Conclusion sections of its Brief.

/s/ Kaitlyn A. Cramer
Kaitlyn A. Cramer

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Certificate of Service

The undersigned states that she is an employee of McDonald Baas & Livingston 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 September 25, 2025.

/s/ Joanne M. Hickey
JOANNE M. HICKEY