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STATE OF MICHIGAN
IN THE SUPREME COURT

JANICE SHERMAN,

Plaintiff-Appellant,

v.

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

Docket No. 167826

Court of Appeals No. 364393

Lower Court No.22-000075-NI
Washtenaw County Circuit Court

BRIEF AMICUS CURIAE OF MICHIGAN ASSOCIATION FOR JUSTICE

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III. INTEREST OF AMICUS CURIAE[1]

The Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work, typically representing plaintiffs in civil lawsuits. MAJ recognizes an obligation to assist this Court on important issues that would substantially affect the orderly administration of justice in the courts of this state. This case presents such issues, particularly insofar as it involves application of the appellate standard of review in actions seeking rescission of contracts.

[1] No counsel associated with any party participated in authoring this brief in whole or in part. No party, or counsel for any party, made any monetary contribution intended to fund the preparation or submission of this brief, and all monetary contributions for preparation of this brief were made by the Michigan Association for Justice.

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IV. QUESTIONS PRESENTED

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.

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V. ARGUMENT OF AMICUS CURIAE

Amicus Curiae Michigan Association for Justice fully concurs in the analysis of equitable rescission and the standard of review set forth by Appellant Janice Sherman in this appeal. (Appellant's Brf, pp 4-9). We also seek to highlight three points that should be clarified by the Court in this case.

A. Appellate Review Under The Abuse Of Discretion Standard Still Requires Substantial Deference To The Trial Court's Decision

For many years, the abuse of discretion standard presented an almost insurmountable obstacle to appellate review of a trial court's discretionary decisions in Michigan:

> We have held repeatedly, and we again hold, that we will not interfere with the discretion of the trial chancellor in these cases unless a clear abuse thereof is manifest in the result reached below. The kind of determination before us requires a weighing of human and economic factors of the utmost complexity, a weighing that can best be accomplished at the local level, not in these chambers. In view of the frequency with which cases are reaching this Court assailing the exercise of a trial court's discretion as an abuse thereof, we deem it pertinent to make certain observations with respect thereto in the interests of saving expense to the litigants and avoiding delay in reaching final adjudication on the merits. Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result

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> must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. So tested, we perceive no error in the proceedings below nor in the determination made.
>
> *Spalding v Spalding*, 355 Mich 382, 384-85; 94 NW2d 810 (1959).

In a 2003 criminal sentencing case, the Court modified the *Spalding* standard based on statutory language controlling appellate review specific to sentencing issues. *People v Babcock*, 469 Mich 247, 264-70; 666 NW2d 231 (2003), citing MCL § 769.34(11) in its form at that time ("MCL 769.34(11) clearly states that if 'the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing . . . .'"). While this statute seemed to confer de novo review of sentencing decisions on appellate courts, the *Babcock* Court reiterated that "*some* degree of deference is nevertheless owed the trial court's finding" because "the trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case." *Babcock*, 469 Mich at 267 (emphasis in original).

The *Babcock* Court further observed: "Review de novo is a form of review primarily reserved for questions of law, the determination of which is not hindered by the appellate court's distance and separation

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from the testimony and evidence produced at trial." *Id* at 268. Balancing these interests, the *Babcock* Court concluded:

> Therefore, the appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding* abuse of discretion standard. At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. See *People v Talley*, 410 Mich. 378, 398; 301 N.W.2d 809 (1981)(LEVIN, J., concurring), quoting *Langnes v Green*, 282 U.S. 531, 541; 51 S. Ct. 243; 75 L. Ed. 520 (1931)("'The term "discretion" denotes the absence of a hard and fast rule.'"). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. See *Conoco, Inc, v JM Huber Corp*, 289 F.3d 819, 826 (CA Fed, 2002)("Under an abuse of discretion review, a range of reasonable determinations would survive review."); *United States v Penny*, 60 F.3d 1257, 1265 (CA 7, 1995)("a court does not abuse its discretion when its decision 'is within the range of options from which one would expect a reasonable trial judge to select'") (citation omitted).
>
> *Babcock*, 469 Mich at 269-70.

In 2006, the Court applied the *Babcock* standard to civil cases in Michigan, explaining: "While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard." *Maldonado v Ford Motor Co*, 476 Mich 372, 388;

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719 NW2d 809 (2006). Thus, the standard applicable to rescission cases such as this one has been stated as follows:

> The remedy of rescission is "granted only in the sound discretion of the court." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26; 331 NW2d 203 (1982); see also [*Bazzi v Sentinel Ins Co,* 502 Mich 390,409; 919 NW2d 20 (2018)]. An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes. *Berryman v Mackey*, 327 Mich App 711, 717; 935 NW2d 94 (2019). An abuse of discretion necessarily occurs when the trial court makes an error of law. *Id*. The trial court's factual findings are reviewed for clear error, and a finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 717-718.
>
> *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 405; 952 NW2d 586 (2020).

This is the standard that should control appellate review in this case. However, while acknowledging that "the ultimate question of the appropriate remedy is reviewed for an abuse of discretion," *Sherman v Progressive Mich Ins Co*, ____NW2d____; 2024 Mich. App. Lexis 6918, at *5 (Ct App, Sep. 5, 2024), the Court of Appeals proceeded without granting any deference to the trial court. In doing so, the Court of Appeals not only decided the operative facts for itself, but insisted that its selection of the appropriate remedy was the only reasonable outcome available to the trial court. After declaring that "[t]he trial court's balance of the equities should have revealed misconduct by Sherman, but none by Progressive," the Court of Appeals concluded that "the trial court abused its discretion when it ordered reformation, rather than rescission." *Id* at *9.

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Although the *Spalding* standard of review has been modified by *Babcock* and *Maldonado*, appellate courts must still give substantial deference to the discretionary decisions of the trial court. This was the point of *Babcock*, where a statute seemingly granted de novo review, but the Court balanced that against the discretion accorded to the trial court due to its familiarity with the facts and experience in fashioning appropriate remedies. *Babcock*, 469 Mich at 268-69.

In cases where a party seeks rescission of a contract, the trial court "is not confined to the polar opposite remedies urged by the opposing parties: full enforcement or total abrogation of the indemnity agreement. Other remedies, such as reformation, restitution, or partial enforcement of the contract, may be examined." *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 134; 313 NW2d 77 (1981). There are several remedial options available, and the equitable court awarding a remedy must look to the most just result. *Id.* This is a discretionary decision.

Here, even if the trial court abused its discretion under "the range of reasonable and principled outcomes" test, it follows that the case should be remanded to the trial court to make a new determination within the proper range. Although the *Spalding* standard has been modified somewhat, an abuse of discretion still "involves far more than a difference in judicial opinion between the trial and appellate courts," and deference to the trial courts is essential in these circumstances. *Spalding*, 355 Mich at 384-85.

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B. The *Bazzi* Decision Applies Broadly To Actions Seeking Rescission Of Contracts, Not Merely To No-Fault Actions Involving An Innocent Third Party

In its supplemental brief, Appellee Progressive Michigan Insurance Company argues that the framework for deciding equitable recission cases elaborated in *Bazzi v Sentinel Ins Co*, 502 Mich 390, 409; 919 NW2d 20 (2018), should be limited to instances "where rescission is sought against an innocent third party" in a no-fault case. (Appellee's Brf, p 19). There is nothing in *Bazzi* to support this limitation. To the contrary, *Bazzi* addressed rescission of contracts generally:

> Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made. *Wall v Zynda*, 283 Mich 260, 264-265, 278 N.W. 66 (1938). Because a claim to rescind a transaction is equitable in nature, it "is not strictly a matter of right" but is granted only in "the sound discretion of the court." *Amster v Stratton*, 259 Mich 683, 686, 244 N.W. 201 (1932). See *id.* (stating that "[e]quitable relief . . . is not strictly a matter of right, but rather a remedy, the granting of which rests in the sound discretion of the court"); *Windisch v Mortgage Security Corp of America*, 254 Mich 492, 495, 236 N.W. 880 (1931) (stating that one who seeks equity must "do equity") (quotation marks and citation omitted); *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31, 331 N.W.2d 203 (1982) (stating that rescission is "an equitable remedy which is granted only in the sound discretion of the court"), citing *Harris v Axline*, 323 Mich 585, 36 N.W.2d 154 (1949), and *Hathaway v Hudson*, 256 Mich 694, 239 N.W. 859 (1932). See also *Browne v Briggs Commercial & Dev Co*, 271 Mich 191, 194, 259 N.W. 886 (1935) (stating that "[t]he equitable remedy of rescission is one of grace"); 12A CJS, Cancellation of Instruments, § 11, p 507 (stating that "[t]he fact that the rescission of a contract is an available

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> remedy does not lead to the conclusion that it is required").
>
> *Bazzi v Sentinel Ins Co*, 502 Mich at409-10.

None of the authorities cited in this essential holding come from no-fault cases. Rather, the *Bazzi* analysis is drawn from the rich history of equitable jurisprudence in Michigan, and the *Bazzi* case likewise applies broadly to all actions seeking rescission of a contract. As this Court has reiterated:

> Most of this Court's recent decisions regarding rescission in the no-fault context involve the rescission of no-fault automobile insurance policies. See, e.g., *Bazzi*, 502 Mich at 396; [*Wilmore-Moody v Zakir,* 511 Mich 76, 79; 999 NW2d 1 (2023)]; *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 507 Mich 498, 503; 968 NW2d 482 (2021). However, these represent only one potential application of the broadly available remedy of rescission. See, e.g., *Lenawee Co Bd of Health v Messerly*, 417 Mich 17; 331 NW2d 203 (1982) (considering whether a party to a land contract was entitled to rescission).
>
> *C-Spine Orthopedics, PLLC v Progressive Mich Ins Co*, ____ Mich ____; ____NW3d____ n 24; 2025 Mich. Lexis 1246, at *38 (July 3, 2025).

C. <u>Contracting Parties Are Not Authorized To Make Unilateral Decrees That A Contract Has Been Rescinded Automatically</u>

The *Bazzi* decision could not be much clearer in declaring that rescission is an equitable remedy, not an absolute right. *Bazzi*, 502 Mich at 408-09. As *Bazzi* acknowledges, there are certainly circumstances where it is appropriate to rescind contracts. *Id* at 408-09. However, "[b]ecause a claim to rescind a transaction is equitable in nature, it 'is

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not strictly a matter of right' but is granted only in 'the sound discretion of the court.'" *Id* at409. Simply put, contracting parties are not authorized to make unilateral decrees that a contract has been rescinded automatically. A party seeking rescission of a contract must go to court to do so. As the Court has reaffirmed, even a claim of mutual rescission is not valid unless it is granted by the trial court:

> Unlike C-Spine, Wallace argues that she and her medical providers mutually rescinded the assignments, which rendered them void ab initio and retroactively made her the real party in interest at the time of filing. We disagree. As we have explained, rescission of a contract subject to litigation "does not function by automatic operation of the law." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 411; 919 NW2d 20 (2018). Rather, it is an equitable remedy that the trial court may grant, in its discretion, after balancing the equities. See *id*. at 409.
>
> *C-Spine Orthopedics*, 2025 Mich. Lexis 1246, at *38.

Certainly in cases such as this one, where the right to rescission has been disputed, it is improper for a contracting party to declare the contract rescinded without obtaining that remedy from a trial court. When this occurs, the rescinding party is usurping the equitable authority of the trial court and violating the maxim that "one who seeks equity must 'do equity.'" *Bazzi*, 502 Mich at 409, quoting *Windisch v Mtg Security Corp*, 254 Mich 492, 494-95; 236 NW 880 (1931).

Here, Progressive simply declared that it was rescinding the insurance policy and considered it done. (Appellee's Brf, p 6). This was aimed at depriving Ms. Sherman of her rights, and it also defied Progressive's obligation to seek court approval of its rescission claim.

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This constitutes wrongdoing by Progressive that weighs against any equitable rights Progressive may have. Therefore, if this case is remanded to the trial court, it would be appropriate for the Court to instruct that Progressive's actions in this regard may be factored into the trial court's balancing of the equities.

VI. CONCLUSION AND REQUEST FOR RELIEF

It is worth repeating that: "This Court has recognized that '[e]quity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life' and that '[e]quity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case.'" *Bazzi* 502 Mich 390, 411; 919 NW2d 20 (2018), quoting *Tkachik v Mandeville*, 487 Mich 38, 45-46, 790 N.W.2d 260 (2010). This necessarily entails appellate deference to the trial court's discretion in fashioning appropriate equitable remedies when a contracting party seeks rescission. Therefore, Amicus Curiae Michigan Association for Justice requests this Honorable Court to reverse the decision of the Court of Appeals below.

Respectfully submitted,

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VII. CERTIFICATE OF COMPLIANCE

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